

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

1. IMMIGRATION

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

- (a) Base Offense Level:
 - (1) **23**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or
 - (2) **12**, otherwise.

- (b) Specific Offense Characteristics
 - (1) If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant’s spouse or child (or both the defendant’s spouse and child), and (B) the base offense level is determined under subsection (a)(2), decrease by **3** levels.
 - (2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

	<u>Number of Unlawful Aliens Smuggled, Transported, or Harbored</u>	<u>Increase in Level</u>
(A)	6-24	add 3
(B)	25-99	add 6
(C)	100 or more	add 9 .

- (3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.
- (4) (Apply the Greatest):
 - (A) If a firearm was discharged, increase by **6** levels, but if the resulting offense level is less than level **22**, increase to level **22**.

- (B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by **4** levels, but if the resulting offense level is less than level **20**, increase to level **20**.
- (C) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.
- (5) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.
- (6) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

<u>Death or Degree of Injury</u>	<u>Increase in Level</u>
(1) Bodily Injury	add 2 levels
(2) Serious Bodily Injury	add 4 levels
(3) Permanent or Life-Threatening Bodily Injury	add 6 levels
(4) Death	add 8 levels.

(c) Cross Reference

If any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the special maritime and territorial jurisdiction of the United States, apply the appropriate murder guideline from Chapter Two, Part A, Subpart 1.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1324(a), 1327. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—

"The offense was committed other than for profit" means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

"Number of unlawful aliens smuggled, transported, or harbored" does not include the defendant.

"Aggravated felony" is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States).

"Child" has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

"Spouse" has the meaning set forth in 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

"Immigration and naturalization offense" means any offense covered by Chapter Two, Part L.

2. *For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others.*
3. *Where the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior, an upward departure may be warranted.*
4. *If the offense involved substantially more than 100 aliens, an upward departure may be warranted.*
5. *Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*
6. *Reckless conduct to which the adjustment from subsection (b)(5) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition). If subsection (b)(5) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)(5) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(4).*

***Background:** This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986. In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 (Aggravating Role) typically will apply to the most culpable defendants.*

***Historical Note:** Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendments 35, 36, and 37); November 1, 1989 (see Appendix C, amendment 192); November 1, 1990 (see Appendix C, amendment 335); November 1, 1991 (see Appendix C, amendment 375); November 1, 1992 (see Appendix C, amendment 450); May 1, 1997 (see Appendix C, amendment 543); November 1, 1997 (see Appendix C, amendment 561).*

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic
 - (1) If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, use the greater):
 - (A) If the conviction was for an aggravated felony, increase by **16** levels.
 - (B) If the conviction was for (i) any other felony, or (ii) three or more misdemeanor crimes of violence or misdemeanor controlled substance offenses, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—

"Deported after a conviction," means that the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction. An alien has previously been "deported" if he or she has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

"Remained in the United States following a removal order issued after a conviction," means that the removal order was subsequent to the conviction, whether or not the removal order was in response to such conviction.

"Aggravated felony," is defined at 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony.

"Crime of violence" and "controlled substance offense" are defined in §4B1.2. For purposes of subsection (b)(1)(B), "crime of violence" includes offenses punishable by imprisonment for a term of one year or less.

"Firearms offense" means any offense covered by Chapter Two, Part K, Subpart 2, or any similar offense under state or local law.

"Felony offense" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

2. *This guideline applies only to felonies. A first offense under 8 U.S.C. § 1325(a) is a Class B misdemeanor for which no guideline has been promulgated. A prior sentence for such offense, however, is to be considered under the provisions of Chapter Four, Part A (Criminal History).*
3. *In the case of a defendant with repeated prior instances of deportation, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).*
4. *An adjustment under subsection (b) for a prior felony conviction applies in addition to any criminal history points added for such conviction in Chapter Four, Part A (Criminal History).*
5. *Aggravated felonies that trigger the adjustment from subsection (b)(1)(A) vary widely. If subsection (b)(1)(A) applies, and (A) the defendant has previously been convicted of only one felony offense; (B) such offense was not a crime of violence or firearms offense; and (C) the term of imprisonment imposed for such offense did not exceed one year, a downward departure may be warranted based on the seriousness of the aggravated felony.*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 38); November 1, 1989 (see Appendix C, amendment 193); November 1, 1991 (see Appendix C, amendment 375); November 1, 1995 (see Appendix C, amendment 523); May 1, 1997 (see Appendix C, amendment 544); November 1, 1997 (see Appendix C, amendment 562).

§2L1.3. [Deleted]

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

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2. NATURALIZATION AND PASSPORTS

§2L2.1. Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law

- (a) Base Offense Level: **11**
- (b) Specific Offense Characteristics
 - (1) If the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), decrease by **3** levels.

- (2) If the offense involved six or more documents or passports, increase as follows:

	<u>Number of Documents/Passports</u>	<u>Increase in Level</u>
(A)	6-24	add 3
(B)	25-99	add 6
(C)	100 or more	add 9 .

- (3) If the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws, increase by **4** levels.
- (4) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (4), 1325(b), (c); 18 U.S.C. §§ 1015, 1028, 1425-1427, 1542, 1544, 1546. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—

"The offense was committed other than for profit" means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

"Immigration and naturalization offense" means any offense covered by Chapter Two, Part L.

"Child" has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

"Spouse" has the meaning set forth in section 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

2. Where it is established that multiple documents are part of a set of documents intended for use by a single person, treat the set as one document.

3. *Subsection (b)(3) provides an enhancement if the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. If the defendant knew, believed, or had reason to believe that the felony offense to be committed was of an especially serious type, an upward departure may be warranted.*
4. *Prior felony conviction(s) resulting in an adjustment under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*
5. *If the offense involved substantially more than 100 documents, an upward departure may be warranted.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 195); November 1, 1992 (see Appendix C, amendment 450); November 1, 1993 (see Appendix C, amendment 481); November 1, 1995 (see Appendix C, amendment 524); May 1, 1997 (see Appendix C, amendment 544); November 1, 1997 (see Appendix C, amendment 563).

§2L2.2. Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
 - (1) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by **2** levels.
 - (2) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.
- (c) Cross Reference
 - (1) If the defendant used a passport or visa in the commission or attempted commission of a felony offense, other than an offense involving violation of the immigration laws, apply --
 - (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony 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: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (5), 1325(b), (c); 18 U.S.C. §§ 911, 1015, 1028, 1423-1426, 1542-1544, 1546.

Application Notes:

1. For purposes of this guideline—

"Immigration and naturalization offense" means any offense covered by Chapter Two, Part L.

2. *For the purposes of Chapter Three, Part D (Multiple Counts), a conviction for unlawfully entering or remaining in the United States (§2L1.2) arising from the same course of conduct is treated as a closely related count, and is therefore grouped with an offense covered by this guideline.*
3. *Prior felony conviction(s) resulting in an adjustment under subsection (b)(2) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 39); November 1, 1989 (see Appendix C, amendment 196); November 1, 1992 (see Appendix C, amendment 450); November 1, 1993 (see Appendix C, amendment 481); November 1, 1995 (see Appendix C, amendment 524); May 1, 1997 (see Appendix C, amendment 544); November 1, 1997 (see Appendix C, amendment 563).

§2L2.3. [Deleted]

Historical Note: Section 2L2.3 (Trafficking in a United States Passport), effective November 1, 1987, amended effective November 1, 1989 (see Appendix C, amendment 197) and November 1, 1992 (see Appendix C, amendment 450), was deleted by consolidation with §2L2.1 effective November 1, 1993 (see Appendix C, amendment 481).

§2L2.4. [Deleted]

Historical Note: Section 2L2.4 (Fraudulently Acquiring or Improperly Using a United States Passport), effective November 1, 1987, amended effective January 15, 1988 (see Appendix C, amendment 40) and November 1, 1989 (see Appendix C, amendment 198), was deleted by consolidation with §2L2.2 effective November 1, 1993 (see Appendix C, amendment 481).

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

- (a) Base Offense Level: **6**

Commentary

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

Historical Note: Effective November 1, 1987.

PART M - OFFENSES INVOLVING NATIONAL DEFENSE**1. TREASON****§2M1.1. Treason**

(a) Base Offense Level:

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

Commentary

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

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

Historical Note: Effective November 1, 1987.

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2. SABOTAGE**§2M2.1. Destruction of, or Production of Defective, War Material, Premises, or Utilities**

(a) Base Offense Level: **32**

Commentary

Statutory Provisions: 18 U.S.C. § 2153, 2154; 42 U.S.C. § 2284.

Application Note:

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1993 (see Appendix C, amendment 481).

§2M2.2. [Deleted]

Historical Note: Section 2M2.2 (Production of Defective War Material, Premises, or Utilities), effective November 1, 1987, was deleted by consolidation with §2M2.1 effective November 1, 1993 (see Appendix C, amendment 481).

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

- (a) Base Offense Level: **26**

Commentary

Statutory Provisions: 18 U.S.C. § 2155, 2156; 42 U.S.C. § 2284.

Application Note:

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1993 (see Appendix C, amendment 481).

§2M2.4. [Deleted]

Historical Note: Section 2M2.4 (Production of Defective National Defense Material, Premises, or Utilities), effective November 1, 1987, was deleted by consolidation with §2M2.3 effective November 1, 1993 (see Appendix C, amendment 481).

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3. ESPIONAGE AND RELATED OFFENSES**§2M3.1. Gathering or Transmitting National Defense Information to Aid a Foreign Government**

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

Commentary

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

Application Notes:

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

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

Historical Note: Effective November 1, 1987.

§2M3.2. Gathering National Defense Information

- (a) Base Offense Level:
- (1) **35**, if top secret information was gathered; or
 - (2) **30**, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. § 793(a), (b), (c), (d), (e), (g). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

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

Historical Note: Effective November 1, 1987.

§2M3.3. Transmitting National Defense Information; Disclosure of Classified Cryptographic Information; Unauthorized Disclosure to a Foreign Government or a Communist Organization of Classified Information by Government Employee; Unauthorized Receipt of Classified Information

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 793(d), (e), (g), 798; 50 U.S.C. § 783(b), (c).

Application Notes:

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

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

This section also covers statutes that proscribe the disclosure of classified information concerning cryptographic or communication intelligence to the detriment of the United States or for the benefit of a foreign government, the unauthorized disclosure to a foreign government or a communist organization of classified information by a government employee, and the unauthorized receipt of classified information.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1993 (see Appendix C, amendment 481).

§2M3.4. Losing National Defense Information

- (a) Base Offense Level:
- (1) **18**, if top secret information was lost; or
 - (2) **13**, otherwise.

Commentary

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

Application Note:

1. See Commentary to §2M3.1.

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

Historical Note: Effective November 1, 1987.

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

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

Commentary

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

Application Note:

1. See Commentary to §2M3.1.

Historical Note: Effective November 1, 1987.

§2M3.6. [Deleted]

Historical Note: Section 2M3.6 (Disclosure of Classified Cryptographic Information), effective November 1, 1987, was deleted by consolidation with §2M3.3 effective November 1, 1993 (see Appendix C, amendment 481).

§2M3.7. [Deleted]

Historical Note: Section 2M3.7 (Unauthorized Disclosure to Foreign Government or a Communist Organization of Classified Information by Government Employee), effective November 1, 1987, was deleted by consolidation with §2M3.3 effective November 1, 1993 (see Appendix C, amendment 481).

§2M3.8. [Deleted]

Historical Note: Section 2M3.8 (Receipt of Classified Information), effective November 1, 1987, was deleted by consolidation with §2M3.3 effective November 1, 1993 (see Appendix C, amendment 481).

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

(a) Base Offense Level:

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

Commentary

Statutory Provision: 50 U.S.C. § 421.

Application Notes:

1. See Commentary to §2M3.1.
2. *This guideline applies only to violations of 50 U.S.C. § 421 by persons who have or previously had authorized access to classified information. This guideline does not apply to violations of 50 U.S.C. § 421 by defendants, including journalists, who disclosed such information without having or having had authorized access to classified information. Violations of 50 U.S.C. § 421 not covered by this guideline may vary in the degree of harm they inflict, and the court should impose a sentence that reflects such harm. See §2X5.1 (Other Offenses).*

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

Historical Note: Effective November 1, 1987.

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4. EVASION OF MILITARY SERVICE**§2M4.1. Failure to Register and Evasion of Military Service**

(a) Base Offense Level: **6**

- (b) Specific Offense Characteristic
- (1) If the offense occurred at a time when persons were being inducted for compulsory military service, increase by **6** levels.

Commentary

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

Application Note:

1. Subsection (b)(1) does not distinguish between whether the offense was committed in peacetime or during time of war or armed conflict. If the offense was committed when persons were being inducted for compulsory military service during time of war or armed conflict, an upward departure may be warranted.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 336).

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5. PROHIBITED FINANCIAL TRANSACTIONS AND EXPORTS

§2M5.1. Evasion of Export Controls

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

Commentary

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

Application Notes:

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

3. *In addition to the provisions for imprisonment, 50 U.S.C. App. § 2410 contains provisions for criminal fines and forfeiture as well as civil penalties. The maximum fine for individual defendants is \$250,000. In the case of corporations, the maximum fine is five times the value of the exports involved or \$1 million, whichever is greater. When national security controls are violated, in addition to any other sanction, the defendant is subject to forfeiture of any interest in, security of, or claim against: any goods or tangible items that were the subject of the violation; property used to export or attempt to export that was the subject of the violation; and any proceeds obtained directly or indirectly as a result of the violation.*

Historical Note: Effective November 1, 1987.

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

- (a) Base Offense Level:
 - (1) **22**, except as provided in subdivision (2) below;
 - (2) **14**, if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten.

Commentary

Statutory Provisions: 22 U.S.C. §§ 2778, 2780.

Application Notes:

1. *Under 22 U.S.C. § 2778, the President is authorized, through a licensing system administered by the Department of State, to control exports of defense articles and defense services that he deems critical to a security or foreign policy interest of the United States. The items subject to control constitute the United States Munitions List, which is set out in 22 C.F.R. Part 121.1. Included in this list are such things as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, vessels of war, explosives, military and space electronics, and certain firearms.*

The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted. In the case of a violation during time of war or armed conflict, an upward departure may be warranted. See Chapter Five, Part K (Departures).

2. *In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 337).

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6. ATOMIC ENERGY

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

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

Commentary

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

Historical Note: Effective November 1, 1987.

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

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

Commentary

Statutory Provision: 42 U.S.C. § 2273.

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 359).

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

1. TAMPERING WITH CONSUMER PRODUCTS

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

- (a) Base Offense Level: **25**
- (b) Specific Offense Characteristic
 - (1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) if any victim sustained serious bodily injury, increase by **2** levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.
- (c) Cross References
 - (1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) in any other case.
 - (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder) if the resulting offense level is greater than that determined above.
 - (3) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.
- (d) Special Instruction
 - (1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim.

Commentary

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

Application Notes:

1. *The base offense level reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury. Where the offense posed a substantial risk of death or serious bodily injury to numerous victims, or caused extreme psychological injury or substantial property damage or monetary loss, an upward departure may be warranted. In the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.*
2. *The special instruction in subsection (d)(1) applies whether the offense level is determined under subsection (b)(1) or by use of a cross reference in subsection (c).*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 338); November 1, 1991 (see Appendix C, amendment 376).

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

- (a) Base Offense Level: **16**
- (b) Cross Reference
 - (1) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

Commentary

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

Application Note:

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 339).

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

- (a) Base Offense Level: **12**

Commentary

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

Application Note:

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

Historical Note: Effective November 1, 1987.

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2. FOOD, DRUGS, AND AGRICULTURAL PRODUCTS

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

- (a) Base Offense Level: **6**
- (b) Cross References
 - (1) If the offense involved fraud, apply §2F1.1 (Fraud and Deceit).
 - (2) If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 7 U.S.C. §§ 150bb, 150gg; 21 U.S.C. §§ 115, 117, 122, 134-134e, 151-158, 331, 333(a)(1), (a)(2), (b), 458-461, 463, 466, 610, 611, 614, 617, 619, 620, 642-644, 676; 42 U.S.C. § 262. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *This guideline assumes a regulatory offense that involved knowing or reckless conduct. Where only negligence was involved, a downward departure may be warranted. See Chapter Five, Part K (Departures).*
2. *The cross reference at subsection (b)(1) addresses cases in which the offense involved fraud. The cross reference at subsection (b)(2) addresses cases in which the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline (e.g., theft, bribery, revealing trade secrets, or destruction of property).*
3. *If death or bodily injury, extreme psychological injury, property damage or monetary loss resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

4. *The Commission has not promulgated a guideline for violations of 21 U.S.C. § 333(e) (offenses involving human growth hormones). Offenses involving anabolic steroids are covered by Chapter Two, Part D (Offenses Involving Drugs). In the case of an offense involving a substance purported to be an anabolic steroid, but not containing any active ingredient, apply §2F1.1 (Fraud and Deceit) with "loss" measured by the amount paid, or to be paid, by the victim for such substance.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 340); November 1, 1991 (see Appendix C, amendment 432); November 1, 1992 (see Appendix C, amendment 451).

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3. ODOMETER LAWS AND REGULATIONS

§2N3.1. Odometer Laws and Regulations

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

Commentary

Statutory Provisions: 49 U.S.C. §§ 32703-32705, 32709(b).

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 199); November 1, 1997 (see Appendix C, amendment 553).

PART P - OFFENSES INVOLVING PRISONS AND CORRECTIONAL FACILITIES**§2P1.1. Escape, Instigating or Assisting Escape**

- (a) Base Offense Level:
- (1) **13**, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense;
 - (2) **8**, otherwise.
- (b) Specific Offense Characteristics
- (1) If the use or the threat of force against any person was involved, increase by **5** levels.
 - (2) If the defendant escaped from non-secure custody and returned voluntarily within ninety-six hours, decrease the offense level under §2P1.1(a)(1) by **7** levels or the offense level under §2P1.1(a)(2) by **4** levels. *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.
 - (3) If the defendant escaped from the non-secure custody of a community corrections center, community treatment center, "halfway house," or similar facility, and subsection (b)(2) is not applicable, decrease the offense level under subsection (a)(1) by **4** levels or the offense level under subsection (a)(2) 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.
 - (4) If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 751, 752, 755; 28 U.S.C. § 1826. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. "Non-secure custody" means custody with no significant physical restraint (*e.g.*, where a defendant walked away from a work detail outside the security perimeter of an institution;

where a defendant failed to return to any institution from a pass or unescorted furlough; or where a defendant escaped from an institution with no physical perimeter barrier).

2. *"Returned voluntarily" includes voluntarily returning to the institution or turning one's self in to a law enforcement authority as an escapee (not in connection with an arrest or other charges).*
3. *If the adjustment in subsection (b)(4) applies, no adjustment is to be made under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*
4. *If death or bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).*
5. *Criminal history points under Chapter Four, Part A (Criminal History) are to be determined independently of the application of this guideline. For example, in the case of a defendant serving a one-year sentence of imprisonment at the time of the escape, criminal history points from §4A1.1(b) (for the sentence being served at the time of the escape), §4A1.1(d) (custody status), and §4A1.1(e) (recency) would be applicable.*
6. *If the adjustment in subsection (b)(1) applies as a result of conduct that involves an official victim, do not apply §3A1.2 (Official Victim).*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 200 and 201); November 1, 1990 (see Appendix C, amendment 341); November 1, 1991 (see Appendix C, amendment 406).

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

- (a) Base Offense Level:
 - (1) **23**, if the object was a firearm or destructive device.
 - (2) **13**, if the object was a weapon (other than a firearm or a destructive device), any object that might be used as a weapon or as a means of facilitating escape, ammunition, LSD, PCP, methamphetamine, or a narcotic drug.
 - (3) **6**, if the object was an alcoholic beverage, United States or foreign currency, or a controlled substance (other than LSD, PCP, methamphetamine, or a narcotic drug).
 - (4) **4**, if the object was any other object that threatened the order, discipline, or security of the institution or the life, health, or safety of an individual.
- (b) Specific Offense Characteristic
 - (1) If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by **2** levels.

(c) Cross Reference

- (1) If the object of the offense was the distribution of a controlled substance, apply the offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy). *Provided*, that if the defendant is convicted under 18 U.S.C. § 1791(a)(1) and is punishable under 18 U.S.C. § 1791(b)(1), and the resulting offense level is less than level **26**, increase to level **26**.

Commentary

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

Application Notes:

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 202 and 203); November 1, 1995 (see Appendix C, amendment 525).

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

(a) Base Offense Level:

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

Commentary

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

Application Note:

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

Historical Note: Effective November 1, 1987.

§2P1.4. [Deleted]

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

PART Q - OFFENSES INVOLVING THE ENVIRONMENT**1. ENVIRONMENT****§2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants**

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

Commentary

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

Application Note:

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

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

Historical Note: Effective November 1, 1987.

§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
- (1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by **6** levels; or
- (B) if the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by **4** levels.
- (2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by **9** levels.

- (3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by **4** levels.
- (4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by **4** levels.
- (5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.
- (6) If the offense involved a simple recordkeeping or reporting violation only, decrease by **2** levels.

Commentary

Statutory Provisions: 7 U.S.C. §§ 136j-136l; 15 U.S.C. §§ 2614 and 2615; 33 U.S.C. §§ 1319(c)(1), (2), 1321(b)(5), 1517(b); 42 U.S.C. §§ 300h-2, 6928(d), 7413, 9603(b), (c), (d); 43 U.S.C. §§ 1350, 1816(a), 1822(b); 49 U.S.C. § 60123(d). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. "Recordkeeping offense" includes both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.
2. "Simple recordkeeping or reporting violation" means a recordkeeping or reporting offense in a situation where the defendant neither knew nor had reason to believe that the recordkeeping offense would significantly increase the likelihood of any substantive environmental harm.
3. This section applies to offenses involving pesticides or substances designated toxic or hazardous at the time of the offense by statute or regulation. A listing of hazardous and toxic substances in the guidelines would be impractical. Several federal statutes (or regulations promulgated thereunder) list toxics, hazardous wastes and substances, and pesticides. These lists, such as those of toxic pollutants for which effluent standards are published under the Federal Water Pollution Control Act (e.g., 33 U.S.C. § 1317) as well as the designation of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (e.g., 42 U.S.C. § 9601(14)), are revised from time to time. "Toxic" and "hazardous" are defined differently in various statutes, but the common dictionary meanings of the words are not significantly different.
4. Except when the adjustment in subsection (b)(6) for simple recordkeeping offenses applies, this section assumes knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.
5. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual

environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these specific offense characteristics may be appropriate.

6. *Subsection (b)(2) applies to offenses where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Part K (Departures).*
7. *Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted.*
8. *Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels either upward or downward may be warranted.*
9. *Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).*

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1993 (see Appendix C, amendment 481); November 1, 1997 (see Appendix C, amendment 553).

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

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristics
 - (1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment, increase by **6** levels; or

- (B) if the offense otherwise involved a discharge, release, or emission of a pollutant, increase by **4** levels.
- (2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by **11** levels.
- (3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by **4** levels.
- (4) If the offense involved a discharge without a permit or in violation of a permit, increase by **4** levels.
- (5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

Commentary

Statutory Provisions: 33 U.S.C. §§ 403, 406, 407, 411, 1319(c)(1), (c)(2), 1415(b), 1907, 1908; 42 U.S.C. § 7413. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

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

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

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

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

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

Commentary

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

Application Note:

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

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

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

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

Commentary

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

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

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

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

Commentary

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

Background: The statute covered by this guideline proscribes a wide variety of conduct, ranging from placing nails in trees to interfere with harvesting equipment to placing anti-personnel devices capable of causing death or serious bodily injury to protect the unlawful production of a controlled

substance. Subsections (a)(1)-(a)(3) cover the more serious forms of this offense. Subsection (a)(4) provides a minimum offense level of 6 where the intent was to obstruct the harvesting of timber and little or no property damage resulted.

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 208). Amended effective November 1, 1990 (see Appendix C, amendment 313).

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2. CONSERVATION AND WILDLIFE

§2Q2.1. Offenses Involving Fish, Wildlife, and Plants

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristics
 - (1) If the offense (A) was committed for pecuniary gain or otherwise involved a commercial purpose; or (B) involved a pattern of similar violations, increase by **2** levels.
 - (2) If the offense (A) involved fish, wildlife, or plants that were not quarantined as required by law; or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants, increase by **2** levels.
 - (3) (If more than one applies, use the greater):
 - (A) If the market value of the fish, wildlife, or plants exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or
 - (B) If the offense involved (i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 C.F.R. § 216.15); (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 C.F.R. Part 17); or (iii) fish, wildlife, or plants that are listed in Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 C.F.R. Part 23), increase by **4** levels.

Commentary

Statutory Provisions: 16 U.S.C. §§ 668(a), 707(b), 1174(a), 1338(a), 1375(b), 1540(b), 3373(d); 18 U.S.C. § 545. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"For pecuniary gain" means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Thus, offenses committed for pecuniary gain include both monetary and barter transactions. Similarly, activities designed to increase gross revenue are considered to be committed for pecuniary gain.*
2. *The acquisition of fish, wildlife, or plants for display to the public, whether for a fee or donation and whether by an individual or an organization, including a governmental entity, a private non-profit organization, or a private for-profit organization, shall be considered to involve a "commercial purpose."*
3. *For purposes of subsection (b)(2), the quarantine requirements include those set forth in 9 C.F.R. Part 92, and 7 C.F.R. Chapter III. State quarantine laws are included as well.*
4. *When information is reasonably available, "market value" under subsection (b)(3)(A) shall be based on the fair-market retail price. Where the fair-market retail price is difficult to ascertain, the court may make a reasonable estimate using any reliable information, such as the reasonable replacement or restitution cost or the acquisition and preservation (e.g., taxidermy) cost. Market value, however, shall not be based on measurement of aesthetic loss (so called "contingent valuation" methods).*
5. *If the offense involved the destruction of a substantial quantity of fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value, an upward departure may be warranted.*

Background: *This section applies to violations of the Endangered Species Act, the Bald Eagle Protection Act, the Migratory Bird Treaty, the Marine Mammal Protection Act, the Wild Free-Roaming Horses and Burros Act, the Fur Seal Act, the Lacey Act, and to violations of 18 U.S.C. § 545 where the smuggling activity involved fish, wildlife, or plants.*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 41); November 1, 1989 (see Appendix C, amendments 209 and 210); November 1, 1991 (see Appendix C, amendment 407); November 1, 1992 (see Appendix C, amendment 452); November 1, 1995 (see Appendix C, amendment 534).

§2Q2.2. [Deleted]

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

PART R - ANTITRUST OFFENSES

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

- (a) Base Offense Level: **10**
- (b) Specific Offense Characteristics
- (1) If the conduct involved participation in an agreement to submit non-competitive bids, increase by **1** level.
 - (2) If the volume of commerce attributable to the defendant was more than \$400,000, adjust the offense level as follows:

<u>Volume of Commerce</u> (Apply the Greatest)	<u>Adjustment to Offense Level</u>
(A) More than \$400,000	add 1
(B) More than \$1,000,000	add 2
(C) More than \$2,500,000	add 3
(D) More than \$6,250,000	add 4
(E) More than \$15,000,000	add 5
(F) More than \$37,500,000	add 6
(G) More than \$100,000,000	add 7 .

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

- (c) Special Instruction for Fines
- (1) For an individual, the guideline fine range shall be from one to five percent of the volume of commerce, but not less than \$20,000.
- (d) Special Instructions for Fines - Organizations
- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce.
 - (2) When applying §8C2.6 (Minimum and Maximum Multipliers), neither the minimum nor maximum multiplier shall be less than 0.75.
 - (3) In a bid-rigging case in which the organization submitted one or more complementary bids, use as the organization's volume of commerce the

greater of (A) the volume of commerce done by the organization in the goods or services that were affected by the violation, or (B) the largest contract on which the organization submitted a complementary bid in connection with the bid-rigging conspiracy.

Commentary

Statutory Provision: 15 U.S.C. § 1. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *The provisions of §3B1.1 (Aggravating Role) and §3B1.2 (Mitigating Role) should be applied to an individual defendant as appropriate to reflect the individual's role in committing the offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, a 4-level increase is called for under §3B1.1. An individual defendant should be considered for a downward adjustment under §3B1.2 for a mitigating role in the offense only if he was responsible in some minor way for his firm's participation in the conspiracy.*
2. *In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, his role, and the degree to which he personally profited from the offense (including salary, bonuses, and career enhancement). If the court concludes that the defendant lacks the ability to pay the guideline fine, it should impose community service in lieu of a portion of the fine. The community service should be equally as burdensome as a fine.*
3. *The fine for an organization is determined by applying Chapter Eight (Sentencing of Organizations). In selecting a fine for an organization within the guideline fine range, the court should consider both the gain to the organization from the offense and the loss caused by the organization. It is estimated that the average gain from price-fixing is 10 percent of the selling price. The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under §8C2.4(a)(3). The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss. In cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range.*
4. *Another consideration in setting the fine is that the average level of mark-up due to price-fixing may tend to decline with the volume of commerce involved.*
5. *It is the intent of the Commission that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.*

6. *Understatement of seriousness is especially likely in cases involving complementary bids. If, for example, the defendant participated in an agreement not to submit a bid, or to submit an unreasonably high bid, on one occasion, in exchange for his being allowed to win a subsequent bid that he did not in fact win, his volume of commerce would be zero, although he would have contributed to harm that possibly was quite substantial. The court should consider sentences near the top of the guideline range in such cases.*
7. *In the case of a defendant with previous antitrust convictions, a sentence at, or even above, the maximum of the applicable guideline range may be warranted. See §4A1.3 (Adequacy of Criminal History Category).*

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

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

Under the guidelines, prison terms for these offenders should be much more common, and usually somewhat longer, than typical under pre-guidelines practice. Absent adjustments, the guidelines require confinement of six months or longer in the great majority of cases that are prosecuted, including all bid-rigging cases. The court will have the discretion to impose considerably longer sentences within the guideline ranges. Adjustments from Chapter Three, Part E (Acceptance of Responsibility) and, in rare instances, Chapter Three, Part B (Role in the Offense), may decrease these minimum sentences; nonetheless, in very few cases will the guidelines not require that some confinement be imposed. Adjustments will not affect the level of fines.

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

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

Substantial fines are an essential part of the sentence. For an individual, the guideline fine range is from one to five percent of the volume of commerce, but not less than \$20,000. For an organization, the guideline fine range is determined under Chapter Eight (Sentencing of Organizations), but pursuant to subsection (d)(2), the minimum multiplier is at least 0.75. This multiplier, which requires a minimum fine of 15 percent of the volume of commerce for the least serious case, was selected to provide an effective deterrent to antitrust offenses. At the same time, this minimum multiplier maintains incentives for desired organizational behavior. Because the Department of Justice has a well-established amnesty program for organizations that self-report antitrust offenses, no lower minimum multiplier is needed as an incentive for self-reporting. A minimum multiplier of at least 0.75 ensures that fines imposed in antitrust cases will exceed the average monopoly overcharge.

The Commission believes that most antitrust defendants have the resources and earning capacity to pay the fines called for by this guideline, at least over time on an installment basis. The statutory maximum fine is \$350,000 for individuals and \$10,000,000 for organizations, but is increased when there are convictions on multiple counts.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 211 and 303); November 1, 1991 (see Appendix C, amendments 377 and 422).

PART S - MONEY LAUNDERING AND MONETARY TRANSACTION REPORTING

Historical Note: Introductory Commentary to this Part, effective November 1, 1987, was deleted effective November 1, 1990 (see Appendix C, amendment 342).

§2S1.1. Laundrying of Monetary Instruments

(a) Base Offense Level:

- (1) **23**, if convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A);
- (2) **20**, otherwise.

(b) Specific Offense Characteristics

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

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

(c) Special Instruction for Fines - Organizations

- (1) In lieu of the applicable amount from the table in subsection (d) of §8C2.4 (Base Fine), use:
 - (A) the greater of \$250,000 or 100 percent of the value of the funds if subsections (a)(1) and (b)(1) are used to determine the offense level; or

- (B) the greater of \$200,000 or 70 percent of the value of the funds if subsections (a)(2) and (b)(1) are used to determine the offense level; or
- (C) the greater of \$200,000 or 70 percent of the value of the funds if subsection (a)(1) but not (b)(1) is used to determine the offense level; or
- (D) the greater of \$150,000 or 50 percent of the value of the funds if subsection (a)(2) but not (b)(1) is used to determine the offense level.

Commentary

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

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

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

A higher base offense level is specified if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A) because those subsections apply to defendants who encouraged or facilitated the commission of further crimes. Effective November 18, 1988, 18 U.S.C. § 1956(a)(1)(A) contains two subdivisions. The base offense level of 23 applies to § 1956(a)(1)(A)(i) and (ii).

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 212-214); November 1, 1991 (see Appendix C, amendments 378 and 422).

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

- (a) Base Offense Level: **17**
- (b) Specific Offense Characteristics

- (1) If the defendant knew that the funds were the proceeds of:
 - (A) an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by **5** levels; or
 - (B) any other specified unlawful activity (see 18 U.S.C. § 1956(c)(7)), increase by **2** levels.
 - (2) If the value of the funds exceeded \$100,000, increase the offense level as specified in §2S1.1(b)(2).
- (c) Special Instruction for Fines - Organizations
- (1) In lieu of the applicable amount from the table in subsection (d) of §8C2.4 (Base Fine), use:
 - (A) the greater of \$175,000 or 60 percent of the value of the funds if subsection (b)(1)(A) is used to determine the offense level; or
 - (B) the greater of \$150,000 or 50 percent of the value of the funds if subsection (b)(1)(B) is used to determine the offense level.

Commentary

Statutory Provisions: 18 U.S.C. § 1957. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

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

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

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

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 215); November 1, 1991 (see Appendix C, amendment 422).

§2S1.3. Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports

- (a) Base Offense Level: **6** plus the number of offense levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the funds.
- (b) Specific Offense Characteristics:
 - (1) If the defendant knew or believed that the funds were proceeds of unlawful activity, or were intended to promote unlawful activity, increase by **2** levels.
 - (2) If (A) subsection (b)(1) does not apply; (B) the defendant did not act with reckless disregard of the source of the funds; (C) the funds were the proceeds of lawful activity; and (D) the funds were to be used for a lawful purpose, decrease the offense level to level **6**.
- (c) Cross Reference
 - (1) If the offense was committed for the purposes of violating the Internal Revenue laws, apply the most appropriate guideline from Chapter Two, Part T (Offenses Involving Taxation) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 26 U.S.C. § 7203 (if a violation based upon 26 U.S.C. § 6050I), § 7206 (if a violation based upon 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5316, 5324. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. For purposes of this guideline, "value of the funds" means the amount of the funds involved in the structuring or reporting conduct. The relevant statutes require monetary reporting without regard to whether the funds were lawfully or unlawfully obtained.

Background: The offenses covered by this guideline relate to records and reports of certain transactions involving currency and monetary instruments. These reports include Currency Transaction Reports, Currency and Monetary Instrument Reports, Reports of Foreign Bank and Financial Accounts, and Reports of Cash Payments Over \$10,000 Received in a Trade or Business.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 216-218); November 1, 1991 (see Appendix C, amendments 379 and 422); November 1, 1993 (see Appendix C, amendment 490).

§2S1.4. [Deleted]

Historical Note: Section 2S1.4 (Failure to File Currency and Monetary Instrument Report), effective November 1, 1991 (see Appendix C, amendments 379 and 422), was deleted by consolidation with §2S1.3 effective November 1, 1993 (see Appendix C, amendment 490).

PART T - OFFENSES INVOLVING TAXATION**1. INCOME TAXES, EMPLOYMENT TAXES, ESTATE TAXES, GIFT TAXES, AND EXCISE TAXES (OTHER THAN ALCOHOL, TOBACCO, AND CUSTOMS TAXES)**

Historical Note: Effective November 1, 1987. Amended effective November 1, 1993 (see Appendix C, amendment 491).

Introductory Commentary

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

Historical Note: Effective November 1, 1987.

§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

- (a) Base Offense Level:
 - (1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; or
 - (2) **6**, if there is no tax loss.
- (b) Specific Offense Characteristics
 - (1) If the defendant failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
 - (2) If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by **2** levels.
- (c) Special Instructions

For the purposes of this guideline --

 - (1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).

Notes:

(A) If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved improperly claiming a deduction or an exemption, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction or exemption (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(C) If the offense involved improperly claiming a deduction to provide a basis for tax evasion in the future, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

- (2) If the offense involved failure to file a tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay.

Note: If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made.

- (3) If the offense involved willful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.
- (4) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss is the amount of the claimed refund to which the claimant was not entitled.
- (5) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense.

Commentary

Statutory Provisions: 26 U.S.C. §§ 7201, 7203 (other than a violation based upon 26 U.S.C. § 6050I), 7206 (other than a violation based upon 26 U.S.C. § 6050I or § 7206(2)), and 7207. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. "Tax loss" is defined in subsection (c). The tax loss does not include interest or penalties. Although the definition of tax loss corresponds to what is commonly called the "criminal figures," its amount is to be determined by the same rules applicable in determining any other sentencing factor. In some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.

Notes under subsections (c)(1) and (c)(2) address certain situations in income tax cases in which the tax loss may not be reasonably ascertainable. In these situations, the "presumptions" set forth are to be used unless the government or defense provides sufficient information for a more accurate assessment of the tax loss. In cases involving other types of taxes, the presumptions in the notes under subsections (c)(1) and (c)(2) do not apply.

Example 1: A defendant files a tax return reporting income of \$40,000 when his income was actually \$90,000. Under Note (A) to subsection (c)(1), the tax loss is treated as \$14,000 (\$90,000 of actual gross income minus \$40,000 of reported gross income = \$50,000 x 28%) unless sufficient information is available to make a more accurate assessment of the tax loss.

Example 2: A defendant files a tax return reporting income of \$60,000 when his income was actually \$130,000. In addition, the defendant claims \$10,000 in false tax credits. Under Note (A) to subsection (c)(1), the tax loss is treated as \$29,600 (\$130,000 of actual gross income minus \$60,000 of reported gross income = \$70,000 x 28% = \$19,600, plus \$10,000 of false tax credits) unless sufficient information is available to make a more accurate assessment of the tax loss.

Example 3: A defendant fails to file a tax return for a year in which his salary was \$24,000, and \$2,600 in income tax was withheld by his employer. Under the note to subsection (c)(2), the tax loss is treated as \$2,200 (\$24,000 of gross income x 20% = \$4,800, minus \$2,600 of tax withheld) unless sufficient information is available to make a more accurate assessment of the tax loss.

In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed.

2. In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. The following examples are illustrative of conduct that is part of the same course of conduct or common scheme or plan: (a) there is a continuing pattern of violations of the tax laws by the defendant; (b) the defendant uses a consistent method to evade or camouflage income, e.g., backdating documents or using off-shore accounts; (c) the violations involve the same or a related series of transactions; (d) the violation in each instance involves a false or inflated

claim of a similar deduction or credit; and (e) the violation in each instance involves a failure to report or an understatement of a specific source of income, e.g., interest from savings accounts or income from a particular business activity. These examples are not intended to be exhaustive.

3. *"Criminal activity" means any conduct constituting a criminal offense under federal, state, local, or foreign law.*
4. *"Sophisticated means," as used in subsection (b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.*
5. *A "credit claimed against tax" is an item that reduces the amount of tax directly. In contrast, a "deduction" is an item that reduces the amount of taxable income.*
6. *"Gross income," for the purposes of this section, has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § 1.61.*
7. *If the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.*

Background: This guideline relies most heavily on the amount of loss that was the object of the offense. Tax offenses, in and of themselves, are serious offenses; however, a greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from the offense increases, the sanction necessary to deter also increases.

Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax offenses and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax offenses are inconsequential in relation to the potential increase in revenue. According to estimates current at the time this guideline was originally developed (1987), income taxes are underpaid by approximately \$90 billion annually. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than \$100,000 in tax loss. The increase is expected to be somewhat larger for cases involving more taxes.

Failure to report criminally derived income is included as a factor for deterrence purposes. Criminally derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated. An enhancement for offenders who violate the tax laws as part of a pattern of criminal activity from which they derive a substantial portion of their income also serves to implement the mandate of 28 U.S.C. § 994(i)(2).

Although tax offenses always involve some planning, unusually sophisticated efforts to conceal the offense decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes.

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 219-223); November 1, 1990 (see Appendix C, amendment 343); November 1, 1992 (see Appendix C, amendment 468); November 1, 1993 (see Appendix C, amendment 491).

§2T1.2. [Deleted]

Historical Note: Section 2T1.2 (Willful Failure To File Return, Supply Information, or Pay Tax), effective November 1, 1987, amended effective November 1, 1989 (see Appendix C, amendments 224-227), November 1, 1990 (see Appendix C, amendment 343), and November 1, 1991 (see Appendix C, amendment 408), was deleted by consolidation with §2T1.1 effective November 1, 1993 (see Appendix C, amendment 491).

§2T1.3. [Deleted]

Historical Note: Section 2T1.3 (Fraud and False Statements Under Penalty of Perjury), effective November 1, 1987, amended effective November 1, 1989 (see Appendix C, amendments 228-230), November 1, 1990 (see Appendix C, amendment 343), and November 1, 1991 (see Appendix C, amendment 426), was deleted by consolidation with §2T1.1 effective November 1, 1993 (see Appendix C, amendment 491).

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

(a) Base Offense Level:

- (1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; or
- (2) **6**, if there is no tax loss.

For purposes of this guideline, the "tax loss" is the tax loss, as defined in §2T1.1, resulting from the defendant's aid, assistance, procurement or advice.

(b) Specific Offense Characteristics

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

Commentary

Statutory Provision: 26 U.S.C. § 7206(2) (other than a violation based upon 26 U.S.C. § 6050I).

Application Notes:

1. For the general principles underlying the determination of tax loss, see §2T1.1(c) and Application Note 1 of the Commentary to §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents). In certain instances, such as promotion of a tax shelter scheme, the defendant may advise other persons to violate their tax obligations through filing returns that find no support in the tax laws. If this type of conduct can be shown to have resulted in the filing of false returns (regardless of whether the principals were aware of their falsity), the misstatements in all such returns will contribute to one aggregate "tax loss."
2. Subsection (b)(1) has two prongs. The first prong applies to persons who derive a substantial portion of their income through the promotion of tax schemes, e.g., through promoting fraudulent tax shelters. The second prong applies to persons who regularly prepare or assist in the preparation of tax returns for profit. If an enhancement from this subsection applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
3. "Sophisticated means," as used in §2T1.4(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts or transactions through corporate shells or fictitious entities.

Background: An increased offense level is specified for those in the business of preparing or assisting in the preparation of tax returns and those who make a business of promoting tax fraud because their misconduct poses a greater risk of revenue loss and is more clearly willful. Other considerations are similar to those in §2T1.1.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 231 and 303); November 1, 1990 (see Appendix C, amendment 343); November 1, 1993 (see Appendix C, amendment 491).

§2T1.5. [Deleted]

Historical Note: Section 2T1.5 (Fraudulent Returns, Statements, or Other Documents), effective November 1, 1987, was deleted by consolidation with §2T1.1 effective November 1, 1993 (see Appendix C, amendment 491).

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

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

(b) Cross Reference

- (1) Where the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it, apply §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) if the resulting offense level is greater than that determined above.

Commentary

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

Application Note:

1. *In the event that the employer not only failed to account to the Internal Revenue Service and pay over the tax, but also collected the tax from employees and did not account to them for it, it is both tax evasion and a form of embezzlement. Subsection (b)(1) addresses such cases.*

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 232); November 1, 1991 (see Appendix C, amendment 409).

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

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

- (1) **4**; or
- (2) **5** less than the level from §2T4.1 (Tax Table) corresponding to the amount not deposited.

Commentary

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

Application Notes:

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

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

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

Historical Note: Effective November 1, 1987.

§2T1.8. Offenses Relating to Withholding Statements

- (a) Base Offense Level: **4**

Commentary

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

Application Note:

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

Background: *The offenses are misdemeanors. Under pre-guidelines practice, imprisonment was unusual.*

Historical Note: Effective November 1, 1987.

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

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

- (1) Offense level determined from §2T1.1 or §2T1.4, as appropriate; or
- (2) **10.**

- (b) Specific Offense Characteristics

If more than one applies, use the greater:

- (1) If the offense involved the planned or threatened use of violence to impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue, increase by **4** levels.
- (2) If the conduct was intended to encourage persons other than or in addition to co-conspirators to violate the internal revenue laws or impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue, increase by **2** levels. Do not, however, apply this adjustment if an adjustment from §2T1.4(b)(1) is applied.

Commentary

Statutory Provision: 18 U.S.C. § 371.

Application Notes:

1. *This section applies to conspiracies to "defraud the United States by impeding, impairing, obstructing and defeating . . . the collection of revenue." United States v. Carruth, 699 F.2d 1017, 1021 (9th Cir. 1983), cert. denied, 464 U.S. 1038 (1984). See also United States v. Browning, 723 F.2d 1544 (11th Cir. 1984); United States v. Klein, 247 F.2d 908, 915 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958). It does not apply to taxpayers, such as a husband and wife, who merely evade taxes jointly or file a fraudulent return.*
2. *The base offense level is the offense level (base offense level plus any applicable specific offense characteristics) from §2T1.1 or §2T1.4 (whichever guideline most closely addresses the harm that would have resulted had the conspirators succeeded in impeding, impairing, obstructing, or defeating the Internal Revenue Service) if that offense level is greater than 10. Otherwise, the base offense level is 10.*
3. *Specific offense characteristics from §2T1.9(b) are to be applied to the base offense level determined under §2T1.9(a)(1) or (2).*
4. *Subsection (b)(2) provides an enhancement where the conduct was intended to encourage persons, other than the participants directly involved in the offense, to violate the tax laws (e.g., an offense involving a "tax protest" group that encourages persons to violate the tax laws, or an offense involving the marketing of fraudulent tax shelters or schemes).*

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 233 and 234); November 1, 1993 (see Appendix C, amendment 491).

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2. ALCOHOL AND TOBACCO TAXES

Introductory Commentary

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

conduct is dealt with by dividing offenses into two broad categories: tax evasion offenses and regulatory offenses.

Historical Note: Effective November 1, 1987.

§2T2.1. Non-Payment of Taxes

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

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

Commentary

Statutory Provisions: 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, 5762, provided the conduct constitutes non-payment, evasion or attempted evasion of taxes. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

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

Historical Note: Effective November 1, 1987.

§2T2.2. Regulatory Offenses

- (a) Base Offense Level: 4

Commentary

Statutory Provisions: 26 U.S.C. §§ 5601, 5603-5605, 5661, 5671, 5762, provided the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes. For additional statutory provision(s), see Appendix A (Statutory Index).

Background: Prosecutions of this type are infrequent.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 359).

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3. CUSTOMS TAXES

Introductory Commentary

This Subpart deals with violations of 18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915 and 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b), and is designed to address violations involving revenue collection or trade regulation. It is not intended to deal with the importation of contraband, such as drugs, or other items such as obscene material, firearms or pelts of endangered species, the importation of which is prohibited or restricted for non-economic reasons. Other, more specific criminal statutes apply to most of these offenses. Importation of contraband or stolen goods would be a reason for referring to another, more specific guideline, if applicable, or for imposing a sentence above that specified in the guideline in this Subpart.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1992 (see Appendix C, amendment 453).

§2T3.1. Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property

(a) Base Offense Level:

- (1) The level from §2T4.1 (Tax Table) corresponding to the tax loss, if the tax loss exceeded \$1,000; or
- (2) **5**, if the tax loss exceeded \$100 but did not exceed \$1,000; or
- (3) **4**, if the tax loss did not exceed \$100.

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

(b) Specific Offense Characteristic

- (1) If sophisticated means were used to impede discovery of the nature or existence of the offense, increase by **2** levels.

(c) Cross Reference

- (1) If the offense involves a contraband item covered by another offense guideline, apply that offense guideline if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915; 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 235); November 1, 1991 (see Appendix C, amendment 410); November 1, 1992 (see Appendix C, amendment 453).

§2T3.2. [Deleted]

Historical Note: Section 2T3.2 (Receiving or Trafficking in Smuggled Property), effective November 1, 1987, amended effective November 1, 1989 (see Appendix C, amendment 236) and November 1, 1991 (see Appendix C, amendment 410), was deleted by consolidation with §2T3.1 effective November 1, 1992 (see Appendix C, amendment 453).

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4. TAX TABLE

§2T4.1. Tax Table

	<u>Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
(A)	\$1,700 or less	6
(B)	More than \$1,700	7
(C)	More than \$3,000	8
(D)	More than \$5,000	9
(E)	More than \$8,000	10
(F)	More than \$13,500	11
(G)	More than \$23,500	12
(H)	More than \$40,000	13

(I)	More than \$70,000	14
(J)	More than \$120,000	15
(K)	More than \$200,000	16
(L)	More than \$325,000	17
(M)	More than \$550,000	18
(N)	More than \$950,000	19
(O)	More than \$1,500,000	20
(P)	More than \$2,500,000	21
(Q)	More than \$5,000,000	22
(R)	More than \$10,000,000	23
(S)	More than \$20,000,000	24
(T)	More than \$40,000,000	25
(U)	More than \$80,000,000	26.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 237); November 1, 1993 (see Appendix C, amendment 491).

PART X - OTHER OFFENSES**1. CONSPIRACIES, ATTEMPTS, SOLICITATIONS****§2X1.1. Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)**

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 371, 372, 2271. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

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

Offense guidelines that expressly cover attempts include:

§§2A2.1, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.2, 2A5.1;
§§2C1.1, 2C1.2;
§§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13,
2D2.1, 2D2.2, 2D3.1, 2D3.2;
§2E5.1;
§2N1.1;
§2Q1.4.

Offense guidelines that expressly cover conspiracies include:

§2A1.5;
§§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13,
2D2.1, 2D2.2, 2D3.1, 2D3.2;
§2H1.1;
§2T1.9.

Offense guidelines that expressly cover solicitations include:

§2A1.5;
§§2C1.1, 2C1.2;
§2E5.1.

2. *"Substantive offense," as used in this guideline, means the offense that the defendant was convicted of soliciting, attempting, or conspiring to commit. Under §2X1.1(a), the base offense level will be the same as that for the substantive offense. But the only specific offense characteristics from the guideline for the substantive offense that apply are those that are determined to have been specifically intended or actually occurred. Speculative specific offense characteristics will not be applied. For example, if two defendants are arrested during the conspiratorial stage of planning an armed bank robbery, the offense level ordinarily would not include aggravating factors regarding possible injury to others, hostage taking, discharge of a weapon, or obtaining a large sum of money, because such factors would be speculative. The offense level would simply reflect the level applicable to robbery of a financial institution, with the enhancement for possession of a weapon. If it was established that the defendants actually intended to physically restrain the teller, the specific offense characteristic for physical restraint would be added. In an attempted theft, the value of the items that the defendant attempted to steal would be considered.*

3. *If the substantive offense is not covered by a specific guideline, see §2X5.1 (Other Offenses).*
4. *In certain cases, the participants may have completed (or have been about to complete but for apprehension or interruption) all of the acts necessary for the successful completion of part, but not all, of the intended offense. In such cases, the offense level for the count (or group of closely related multiple counts) is whichever of the following is greater: the offense level for the intended offense minus 3 levels (under §2X1.1(b)(1), (b)(2), or (b)(3)(A)), or the offense level for the part of the offense for which the necessary acts were completed (or about to be completed but for apprehension or interruption). For example, where the intended offense was the theft of \$800,000 but the participants completed (or were about to complete) only the acts necessary to steal \$30,000, the offense level is the offense level for the theft of \$800,000 minus 3 levels, or the offense level for the theft of \$30,000, whichever is greater.*

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

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

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 42); November 1, 1989 (see Appendix C, amendments 238-242); November 1, 1990 (see Appendix C, amendments 311 and 327); November 1, 1991 (see Appendix C, amendment 411); November 1, 1992 (see Appendix C, amendments 444 and 447); November 1, 1993 (see Appendix C, amendment 496).

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2. AIDING AND ABETTING

§2X2.1. Aiding and Abetting

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

Commentary

Statutory Provision: 18 U.S.C. § 2.

Application Note:

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

Background: A defendant convicted of aiding and abetting is punishable as a principal. 18 U.S.C. § 2. This section provides that aiding and abetting the commission of an offense has the same

offense level as the underlying offense. An adjustment for a mitigating role (§3B1.2) may be applicable.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 359).

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3. ACCESSORY AFTER THE FACT

§2X3.1. Accessory After the Fact

- (a) Base Offense Level: **6** levels lower than the offense level for the underlying offense, but in no event less than **4**, or more than **30**. *Provided*, that where the conduct is limited to harboring a fugitive, the offense level shall not be more than level **20**.

Commentary

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

Application Notes:

1. *"Underlying offense" means the offense as to which the defendant is convicted of being an accessory. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note 10 of the Commentary to §1B1.3 (Relevant Conduct).*
2. *The adjustment from §3B1.2 (Mitigating Role) normally would not apply because an adjustment for reduced culpability is incorporated in the base offense level.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 243); November 1, 1991 (see Appendix C, amendment 380); November 1, 1993 (see Appendix C, amendment 496).

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4. MISPRISION OF FELONY

§2X4.1. Misprision of Felony

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

Commentary

Statutory Provision: 18 U.S.C. § 4.

Application Notes:

1. "Underlying offense" means the offense as to which the defendant is convicted of committing the misprision. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note 10 of the Commentary to §1B1.3 (Relevant Conduct).
2. The adjustment from §3B1.2 (Mitigating Role) normally would not apply because an adjustment for reduced culpability is incorporated in the base offense level.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 244); November 1, 1993 (see Appendix C, amendment 496).

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5. ALL OTHER OFFENSES

§2X5.1. Other Offenses

If the offense is a felony or Class A misdemeanor for which no guideline expressly has been promulgated, apply the most analogous offense guideline. If there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) shall control, except that any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable.

Commentary

Application Note:

1. Guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline include: §5B1.3 (Conditions of Probation); §5D1.1 (Imposition of a Term of Supervised Release); §5D1.2 (Term of Supervised Release); §5D1.3 (Conditions of Supervised Release); §5E1.1 (Restitution); §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); Chapter Five, Part F (Sentencing Options); §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment); Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Departures); Chapter Six, Part A (Sentencing Procedures); Chapter Six, Part B (Plea Agreements).

Background: Many offenses, especially assimilative crimes, are not listed in the Statutory Index or in any of the lists of Statutory Provisions that follow each offense guideline. Nonetheless, the

specific guidelines that have been promulgated cover the type of criminal behavior that most such offenses proscribe. The court is required to determine if there is a sufficiently analogous offense guideline, and, if so, to apply the guideline that is most analogous. Where there is no sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) control. That statute provides in relevant part as follows: "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in [18 U.S.C. § 3553] subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."

The sentencing guidelines apply to convictions under 18 U.S.C. § 13 (Assimilative Crimes Act) and 18 U.S.C. § 1153 (Indian Major Crimes Act); see 18 U.S.C. § 3551(a), as amended by section 1602 of Public Law 101-647.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 43); November 1, 1991 (see Appendix C, amendment 412); November 1, 1997 (see Appendix C, amendment 569).