

PART D - OFFENSES INVOLVING DRUGS**1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE****§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

- (a) Base Offense Level (Apply the greatest):
- (1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
 - (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
 - (3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.
- (b) Specific Offense Characteristics
- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
 - (2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.
 - (3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.
 - (4) If (A) the offense involved the importation of methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.

- (5) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
- (6) If the defendant meets the criteria set forth in subdivisions (1)-(5) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level **26** or greater, decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).
- (2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(c) DRUG QUANTITY TABLE**Controlled Substances and Quantity*****Base Offense Level**

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|--|-----------------|
| <p>(1) M 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates);
 M 150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
 M 1.5 KG or more of Cocaine Base;
 M 30 KG or more of PCP, or 3 KG or more of PCP (actual);
 M 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice";
 M 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
 M 12 KG or more of Fentanyl;
 M 3 KG or more of a Fentanyl Analogue;
 M 30,000 KG or more of Marihuana;
 M 6,000 KG or more of Hashish;
 M 600 KG or more of Hashish Oil.</p> | Level 38 |
| <p>(2) M At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);
 M At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
 M At least 500 G but less than 1.5 KG of Cocaine Base;
 M At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
 M At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice";
 M At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
 M At least 4 KG but less than 12 KG of Fentanyl;
 M At least 1 KG but less than 3 KG of a Fentanyl Analogue;
 M At least 10,000 KG but less than 30,000 KG of Marihuana;
 M At least 2,000 KG but less than 6,000 KG of Hashish;
 M At least 200 KG but less than 600 KG of Hashish Oil.</p> | Level 36 |
| <p>(3) M At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);
 M At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
 M At least 150 G but less than 500 G of Cocaine Base;
 M At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
 M At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";
 M At least 30 G but less than 100 G of LSD (or the equivalent amount of other</p> | Level 34 |

- Schedule I or II Hallucinogens);
M At least 1.2 KG but less than 4 KG of Fentanyl;
M At least 300 G but less than 1 KG of a Fentanyl Analogue;
M At least 3,000 KG but less than 10,000 KG of Marihuana;
M At least 600 KG but less than 2,000 KG of Hashish;
M At least 60 KG but less than 200 KG of Hashish Oil.
- (4) M At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 32**
M At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
M At least 50 G but less than 150 G of Cocaine Base;
M At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
M At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
M At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
M At least 400 G but less than 1.2 KG of Fentanyl;
M At least 100 G but less than 300 G of a Fentanyl Analogue;
M At least 1,000 KG but less than 3,000 KG of Marihuana;
M At least 200 KG but less than 600 KG of Hashish;
M At least 20 KG but less than 60 KG of Hashish Oil.
- (5) M At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 30**
M At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
M At least 35 G but less than 50 G of Cocaine Base;
M At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
M At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
M At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
M At least 280 G but less than 400 G of Fentanyl;
M At least 70 G but less than 100 G of a Fentanyl Analogue;
M At least 700 KG but less than 1,000 KG of Marihuana;
M At least 140 KG but less than 200 KG of Hashish;
M At least 14 KG but less than 20 KG of Hashish Oil.
- (6) M At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 28**
M At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
M At least 20 G but less than 35 G of Cocaine Base;
M At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);

- M At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";
- M At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- M At least 160 G but less than 280 G of Fentanyl;
- M At least 40 G but less than 70 G of a Fentanyl Analogue;
- M At least 400 KG but less than 700 KG of Marihuana;
- M At least 80 KG but less than 140 KG of Hashish;
- M At least 8 KG but less than 14 KG of Hashish Oil.
- (7) M At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 26**
- M At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- M At least 5 G but less than 20 G of Cocaine Base;
- M At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
- M At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
- M At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- M At least 40 G but less than 160 G of Fentanyl;
- M At least 10 G but less than 40 G of a Fentanyl Analogue;
- M At least 100 KG but less than 400 KG of Marihuana;
- M At least 20 KG but less than 80 KG of Hashish;
- M At least 2 KG but less than 8 KG of Hashish Oil.
- (8) M At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 24**
- M At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- M At least 4 G but less than 5 G of Cocaine Base;
- M At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
- M At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
- M At least 800 MG but less than 1 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- M At least 32 G but less than 40 G of Fentanyl;
- M At least 8 G but less than 10 G of a Fentanyl Analogue;
- M At least 80 KG but less than 100 KG of Marihuana;
- M At least 16 KG but less than 20 KG of Hashish;
- M At least 1.6 KG but less than 2 KG of Hashish Oil.
- (9) M At least 60 G but less than 80 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 22**
- M At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other

- Schedule I or II Stimulants);
M At least 3 G but less than 4 G of Cocaine Base;
M At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
M At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";
M At least 600 MG but less than 800 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
M At least 24 G but less than 32 G of Fentanyl;
M At least 6 G but less than 8 G of a Fentanyl Analogue;
M At least 60 KG but less than 80 KG of Marihuana;
M At least 12 KG but less than 16 KG of Hashish;
M At least 1.2 KG but less than 1.6 KG of Hashish Oil.
- (10) M At least 40 G but less than 60 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 20**
M At least 200 G but less than 300 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
M At least 2 G but less than 3 G of Cocaine Base;
M At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
M At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
M At least 400 MG but less than 600 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
M At least 16 G but less than 24 G of Fentanyl;
M At least 4 G but less than 6 G of a Fentanyl Analogue;
M At least 40 KG but less than 60 KG of Marihuana;
M At least 8 KG but less than 12 KG of Hashish;
M At least 800 G but less than 1.2 KG of Hashish Oil;
M 40,000 or more units of Schedule I or II Depressants or Schedule III substances;
M 2,500 or more units of Flunitrazepam.
- (11) M At least 20 G but less than 40 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 18**
M At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
M At least 1 G but less than 2 G of Cocaine Base;
M At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
M At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
M At least 200 MG but less than 400 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
M At least 8 G but less than 16 G of Fentanyl;
M At least 2 G but less than 4 G of a Fentanyl Analogue;
M At least 20 KG but less than 40 KG of Marihuana;
M At least 5 KG but less than 8 KG of Hashish;

- M At least 500 G but less than 800 G of Hashish Oil;
- M At least 20,000 but less than 40,000 units of Schedule I or II Depressants or Schedule III substances;
- M At least 1,250 but less than 2,500 units of Flunitrazepam.

- (12) M At least 10 G but less than 20 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- M At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
 - M At least 500 MG but less than 1 G of Cocaine Base;
 - M At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
 - M At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";
 - M At least 100 MG but less than 200 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
 - M At least 4 G but less than 8 G of Fentanyl;
 - M At least 1 G but less than 2 G of a Fentanyl Analogue;
 - M At least 10 KG but less than 20 KG of Marihuana;
 - M At least 2 KG but less than 5 KG of Hashish;
 - M At least 200 G but less than 500 G of Hashish Oil;
 - M At least 10,000 but less than 20,000 units of Schedule I or II Depressants or Schedule III substances;
 - M At least 625 but less than 1,250 units of Flunitrazepam.

Level 16

- (13) M At least 5 G but less than 10 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- M At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
 - M At least 250 MG but less than 500 MG of Cocaine Base;
 - M At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
 - M At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
 - M At least 50 MG but less than 100 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
 - M At least 2 G but less than 4 G of Fentanyl;
 - M At least 500 MG but less than 1 G of a Fentanyl Analogue;
 - M At least 5 KG but less than 10 KG of Marihuana;
 - M At least 1 KG but less than 2 KG of Hashish;
 - M At least 100 G but less than 200 G of Hashish Oil;
 - M At least 5,000 but less than 10,000 units of Schedule I or II Depressants or Schedule III substances;
 - M At least 312 but less than 625 units of Flunitrazepam.

Level 14

- (14) **M** Less than 5 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 12**
M Less than 25 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
M Less than 250 MG of Cocaine Base;
M Less than 5 G of PCP, or less than 500 MG of PCP (actual);
M Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
M Less than 50 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
M Less than 2 G of Fentanyl;
M Less than 500 MG of a Fentanyl Analogue;
M At least 2.5 KG but less than 5 KG of Marihuana;
M At least 500 G but less than 1 KG of Hashish;
M At least 50 G but less than 100 G of Hashish Oil;
M At least 2,500 but less than 5,000 units of Schedule I or II Depressants or Schedule III substances;
M At least 156 but less than 312 units of Flunitrazepam;
M 40,000 or more units of Schedule IV substances (except Flunitrazepam).
- (15) **M** At least 1 KG but less than 2.5 KG of Marihuana; **Level 10**
M At least 200 G but less than 500 G of Hashish;
M At least 20 G but less than 50 G of Hashish Oil;
M At least 1,000 but less than 2,500 units of Schedule I or II Depressants or Schedule III substances;
M At least 62 but less than 156 units of Flunitrazepam;
M At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).
- (16) **M** At least 250 G but less than 1 KG of Marihuana; **Level 8**
M At least 50 G but less than 200 G of Hashish;
M At least 5 G but less than 20 G of Hashish Oil;
M At least 250 but less than 1,000 units of Schedule I or II Depressants or Schedule III substances;
M Less than 62 units of Flunitrazepam;
M At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
M 40,000 or more units of Schedule V substances.
- (17) **M** Less than 250 G of Marihuana; **Level 6**
M Less than 50 G of Hashish;
M Less than 5 G of Hashish Oil;
M Less than 250 units of Schedule I or II Depressants or Schedule III substances;
M Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
M Less than 40,000 units of Schedule V substances.
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*Notes to Drug Quantity Table:

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.
- (B) The terms "PCP (actual)" and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual) or methamphetamine (actual), whichever is greater.
- (C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.
- (D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.
- (F) In the case of Schedule I or II Depressants, Schedule III substances (except anabolic steroids), Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance is in liquid form, one "unit" means 0.5 gms.
- (G) In the case of anabolic steroids, one "unit" means a 10 cc vial of an injectable steroid or fifty tablets. All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g., one 50 cc vial is to be counted as five 10 cc vials).
- (H) In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.
- (I) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabiniol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

- (J) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)-(3), (7), 960(a), (b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.*

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

2. *The statute and guideline also apply to "counterfeit" substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.*

3. *Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1; see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(c)(1), and 2D2.1(b)(1).*
4. *Distribution of "a small amount of marihuana for no remuneration", 21 U.S.C. § 841(b)(4), is treated as simple possession, to which §2D2.1 applies.*
5. *Any reference to a particular controlled substance in these guidelines includes all salts, isomers, and all salts of isomers. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed.*
6. *Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.*
7. *Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." See §5K1.1 (Substantial Assistance to Authorities). In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).*
8. *A defendant who used special skills in the commission of the offense may be subject to an enhancement under §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense.*

Note, however, that if an adjustment from subsection (b)(2)(B) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

9. *Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP or methamphetamine for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.*

10. *The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. The Drug Equivalency Tables set forth below provide conversion factors for other substances, which the Drug Quantity Table refers to as "equivalents" of these drugs. For example, one gram of a substance containing oxymorphone, a Schedule I opiate, is to be treated as the equivalent of five kilograms of marihuana in applying the Drug Quantity Table.*

The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its marihuana equivalent, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level.

For certain types of controlled substances, the marihuana equivalencies in the Drug Equivalency Tables are "capped" at specified amounts (e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 999 grams of marihuana). Where there are controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies to determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts).

Note: Because of the statutory equivalences, the ratios in the Drug Equivalency Tables do not necessarily reflect dosages based on pharmacological equivalents.

Examples:

- a. *The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 24.*
- b. *The defendant is convicted of selling 500 grams of marihuana (Level 8) and five kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 10 in the Drug Quantity Table.*
- c. *The defendant is convicted of selling 80 grams of cocaine (Level 16) and five kilograms of marihuana (Level 14). The cocaine is equivalent to 16 kilograms of marihuana. The total is therefore equivalent to 21 kilograms of marihuana, which has an offense level of 18 in the Drug Quantity Table.*
- d. *The defendant is convicted of selling 56,000 units of a Schedule III substance, 100,000 units of a Schedule IV substance, and 200,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 56 kilograms of marihuana (below the cap of 59.99 kilograms of marihuana set forth as the maximum equivalent weight for*

Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 4.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 6.25 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 999 grams of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 1.25 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 59.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 61.99 (56 + 4.99 + .999) kilograms.

DRUG EQUIVALENCY TABLES

Schedule I or II Opiates*

1 gm of Heroin =	1 kg of marihuana
1 gm of Alpha-Methylfentanyl =	10 kg of marihuana
1 gm of Dextromoramide =	670 gm of marihuana
1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/ PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4- piperidiny] Propanamide) =	2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone =	500 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone =	500 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM)=	3 kg of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylamine =	40 gm of marihuana
1 gm of Amphetamine =	200 gm of marihuana
1 gm of Dextroamphetamine =	200 gm of marihuana
1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	20 kg of marihuana
1 gm of "Ice" =	20 kg of marihuana
1 gm of Khat =	.01 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria")=	100 gm of marihuana
1 gm of Methylphenidate (Ritalin)=	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P ₂ P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P ₂ P (in any other case) =	75 gm of marihuana
1 gm of Cocaine Base ("Crack") =	20 kg of marihuana
1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*

1 gm of Bufotenine =	70 gm of marihuana
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg of marihuana
1 gm of Diethyltryptamine/DET =	80 gm of marihuana
1 gm of Dimethyltryptamine/DMT =	100 gm of marihuana
1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana
1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana

1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	50 gm of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDMA	35 gm of marihuana
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA=	30 gm of marihuana
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm of marihuana
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

Schedule I Marihuana

1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm of marihuana
1 gm of Hashish Oil =	50 gm of marihuana
1 gm of Cannabis Resin or Hashish =	5 gm of marihuana
1 gm of Tetrahydrocannabinol, Organic =	167 gm of marihuana
1 gm of Tetrahydrocannabinol, Synthetic =	167 gm of marihuana

Flunitrazepam **

1 unit of Flunitrazepam =	16 gm of marihuana
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** *Provided*, that the combined equivalent weight of flunitrazepam, all Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances shall not exceed 99.99 kilograms of marihuana.

The minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

Schedule I or II Depressants***

1 unit of a Schedule I or II Depressant =	1 gm of marihuana
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****Provided*, that the combined equivalent weight of all Schedule I or II depressants, Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Schedule III Substances****

1 unit of a Schedule III Substance =	1 gm of marihuana
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*****Provided*, that the combined equivalent weight of all Schedule III substances, Schedule I or II depressants, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Schedule IV Substances (except flunitrazepam)*****

1 unit of a Schedule IV Substance
(except Flunitrazepam)= 0.0625 gm of marihuana

******Provided*, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 4.99 kilograms of marihuana.

Schedule V Substances*****

1 unit of a Schedule V Substance = 0.00625 gm of marihuana

******Provided*, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.

To facilitate conversions to drug equivalencies, the following table is provided:

MEASUREMENT CONVERSION TABLE

*1 oz = 28.35 gm
1 lb = 453.6 gm
1 lb = 0.4536 kg
1 gal = 3.785 liters
1 qt = 0.946 liters
1 gm = 1 ml (liquid)
1 liter = 1,000 ml
1 kg = 1,000 gm
1 gm = 1,000 mg
1 grain = 64.8 mg.*

11. *If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (e.g., 100 doses of Mescaline at 500 mg per dose = 50 gms of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.*

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLEHallucinogens

<i>MDA*</i>	100 mg
<i>Mescaline</i>	500 mg
<i>PCP*</i>	5 mg
<i>Peyote (dry)</i>	12 gm
<i>Peyote (wet)</i>	120 gm
<i>Psilocin*</i>	10 mg
<i>Psilocybe mushrooms (dry)</i>	5 gm
<i>Psilocybe mushrooms (wet)</i>	50 gm
<i>Psilocybin*</i>	10 mg
<i>2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*</i>	3 mg

Marihuana

<i>1 marihuana cigarette</i>	0.5 gm
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Stimulants

<i>Amphetamine*</i>	10 mg
<i>Methamphetamine*</i>	5 mg
<i>Phenmetrazine (Preludin)*</i>	75 mg

**For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.*

12. *Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.*

If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the

offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance - actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing.

13. *Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13-15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13-15 is the appropriate classification.*
14. *Where (A) the amount of the controlled substance for which the defendant is accountable under §1B1.3 (Relevant Conduct) results in a base offense level greater than 36, (B) the court finds that this offense level overrepresents the defendant's culpability in the criminal activity, and (C) the defendant qualifies for a mitigating role adjustment under §3B1.2 (Mitigating Role), a downward departure may be warranted. The court may depart to a sentence no lower than the guideline range that would have resulted if the defendant's Chapter Two offense level had been offense level 36. Provided, that a defendant is not eligible for a downward departure under this provision if the defendant:*
 - (a) *has one or more prior felony convictions for a crime of violence or a controlled substance offense as defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1);*
 - (b) *qualifies for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill);*
 - (c) *possessed or induced another participant to use or possess a firearm in the offense;*
 - (d) *had decision-making authority;*
 - (e) *owned the controlled substance or financed any part of the offense; or*
 - (f) *sold the controlled substance or played a substantial part in negotiating the terms of the sale.*

Example: A defendant, who the court finds meets the criteria for a downward departure under this provision, has a Chapter Two offense level of 38, a 2-level reduction for a minor role from §3B1.2, and a 3-level reduction for acceptance of responsibility from §3E1.1. His final offense level is 33. If the defendant's Chapter Two offense level had been 36, the 2-level reduction for a minor role and 3-level reduction for acceptance of responsibility would have

resulted in a final offense level of 31. Therefore, under this provision, a downward departure not to exceed 2 levels (from level 33 to level 31) would be authorized.

15. *If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.*
16. *LSD on a blotter paper carrier medium typically is marked so that the number of doses ("hits") per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.*

In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.
17. *In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38 (e.g., the maximum offense level in the Drug Quantity Table for flunitrazepam is level 20), an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.*
18. *For purposes of the guidelines, a "plant" is an organism having leaves and a readily observable root formation (e.g., a marijuana cutting having roots, a rootball, or root hairs is a marijuana plant).*
19. *If the offense involved importation of methamphetamine, and an adjustment from subsection (b)(2) applies, do not apply subsection (b)(4).*
20. *Subsection (b)(5) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(5) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).*

Background: Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense.

The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 32 and 26 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.

The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; *e.g.*, level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.

For marijuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marijuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marijuana plant equals 100 grams of marijuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt. Consequently, the Commission adopted the policy that each plant is to be treated as the equivalent of an attempt to produce 100 grams of marijuana, except where the actual weight of the usable marijuana is greater.

Specific Offense Characteristic (b)(2) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (*i.e.*, the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman

v. United States, 111 S.Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence (see Chapman; §5G1.1(b)).

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendments 19, 20, and 21); November 1, 1989 (see Appendix C, amendments 123-134, 302, and 303); November 1, 1990 (see Appendix C, amendment 318); November 1, 1991 (see Appendix C, amendments 369-371 and 394-396); November 1, 1992 (see Appendix C, amendments 446 and 447); November 1, 1993 (see Appendix C, amendments 479, 484-488, and 499); September 23, 1994 (see Appendix C, amendment 509); November 1, 1994 (see Appendix C, amendment 505); November 1, 1995 (see Appendix C, amendments 514-518); November 1, 1997 (see Appendix C, amendments 555 and 556); November 1, 2000 (see Appendix C, amendments 594 and 605).

§2D1.2. Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

- (a) Base Offense Level (Apply the greatest):
- (1) **2** plus the offense level from §2D1.1 applicable to the quantity of controlled substances directly involving a protected location or an underage or pregnant individual; or
 - (2) **1** plus the offense level from §2D1.1 applicable to the total quantity of controlled substances involved in the offense; or
 - (3) **26**, if the offense involved a person less than eighteen years of age; or
 - (4) **13**, otherwise.

Commentary

Statutory Provisions: 21 U.S.C. §§ 859 (formerly 21 U.S.C. § 845), 860 (formerly 21 U.S.C. § 845a), 861 (formerly 21 U.S.C. § 845b).

Application Note:

1. This guideline applies only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual (including an attempt or conspiracy to commit such a violation) or in a case in which the defendant stipulated to such a statutory violation. See §1B1.2(a). In a case involving such

a conviction but in which only part of the relevant offense conduct directly involved a protected location or an underage or pregnant individual, subsections (a)(1) and (a)(2) may result in different offense levels. For example, if the defendant, as part of the same course of conduct or common scheme or plan, sold 5 grams of heroin near a protected location and 10 grams of heroin elsewhere, the offense level from subsection (a)(1) would be level 16 (2 plus the offense level for the sale of 5 grams of heroin, the amount sold near the protected location); the offense level from subsection (a)(2) would be level 17 (1 plus the offense level for the sale of 15 grams of heroin, the total amount of heroin involved in the offense).

Background: This section implements the direction to the Commission in Section 6454 of the Anti-Drug Abuse Act of 1988.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 22); November 1, 1989 (see Appendix C, amendment 135); November 1, 1990 (see Appendix C, amendment 319); November 1, 1991 (see Appendix C, amendment 421); November 1, 1992 (see Appendix C, amendment 447); November 1, 2000 (see Appendix C, amendment 591).

§2D1.3. [Deleted]

Historical Note: Section 2D1.3 (Distributing Controlled Substances to Individuals Younger than Twenty-One Years, to Pregnant Women, or Within 1000 Feet of a School or College), effective November 1, 1987, amended effective January 15, 1988 (see Appendix C, amendment 23), was deleted by consolidation with §2D1.2 effective November 1, 1989 (see Appendix C, amendment 135).

§2D1.4. [Deleted]

Historical Note: Section 2D1.4 (Attempts and Conspiracies), effective November 1, 1987, amended effective November 1, 1989 (see Appendix C, amendments 136-138), was deleted by consolidation with the guidelines applicable to the underlying substantive offenses effective November 1, 1992 (see Appendix C, amendment 447).

§2D1.5. **Continuing Criminal Enterprise; Attempt or Conspiracy**

- (a) Base Offense Level (Apply the greater):
- (1) **4** plus the offense level from §2D1.1 applicable to the underlying offense; or
 - (2) **38**.

Commentary

Statutory Provision: 21 U.S.C. § 848.

Application Notes:

1. Do not apply any adjustment from Chapter Three, Part B (Role in the Offense).
2. If as part of the enterprise the defendant sanctioned the use of violence, or if the number of persons managed by the defendant was extremely large, an upward departure may be warranted.

3. *Under 21 U.S.C. § 848, certain conduct for which the defendant has previously been sentenced may be charged as part of the instant offense to establish a "continuing series of violations." A sentence resulting from a conviction sustained prior to the last overt act of the instant offense is to be considered a prior sentence under §4A1.2(a)(1) and not part of the instant offense.*
4. *Violations of 21 U.S.C. § 848 will be grouped with other drug offenses for the purpose of applying Chapter Three, Part D (Multiple Counts).*

Background: *Because a conviction under 21 U.S.C. § 848 establishes that a defendant controlled and exercised authority over one of the most serious types of ongoing criminal activity, this guideline provides a minimum base offense level of 38. An adjustment from Chapter Three, Part B is not authorized because the offense level of this guideline already reflects an adjustment for role in the offense.*

Title 21 U.S.C. § 848 provides a 20-year minimum mandatory penalty for the first conviction, a 30-year minimum mandatory penalty for a second conviction, and a mandatory life sentence for principal administrators of extremely large enterprises. If the application of the guidelines results in a sentence below the minimum sentence required by statute, the statutory minimum shall be the guideline sentence. See §5G1.1(b).

Historical Note: Effective November 1, 1987. Amended effective October 15, 1988 (see Appendix C, amendment 66); November 1, 1989 (see Appendix C, amendment 139); November 1, 1992 (see Appendix C, amendment 447).

§2D1.6. Use of Communication Facility in Committing Drug Offense; Attempt or Conspiracy

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

Commentary

Statutory Provision: 21 U.S.C. § 843(b).

Application Note:

1. *Where the offense level for the underlying offense is to be determined by reference to §2D1.1, see Application Note 12 of the Commentary to §2D1.1 for guidance in determining the scale of the offense. Note that the Drug Quantity Table in §2D1.1 provides a minimum offense level of 12 where the offense involves heroin (or other Schedule I or II opiates), cocaine (or other Schedule I or II stimulants), cocaine base, PCP, methamphetamine, LSD (or other Schedule I or II hallucinogens), fentanyl, or fentanyl analogue (§2D1.1(c)(14)); and a minimum offense level of 6 otherwise (§2D1.1(c)(17)).*

Background: *This section covers the use of a communication facility in committing a drug offense. A communication facility includes any public or private instrument used in the transmission of writing, signs, signals, pictures, and sound; e.g., telephone, wire, radio.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 320); November 1, 1992 (see Appendix C, amendment 447); November 1, 1994 (see Appendix C, amendment 505).

§2D1.7. Unlawful Sale or Transportation of Drug Paraphernalia; Attempt or Conspiracy

- (a) Base Offense Level: **12**
- (b) Cross Reference
 - (1) If the offense involved a controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) or §2D2.1 (Unlawful Possession), as appropriate, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 21 U.S.C. § 863 (formerly 21 U.S.C. § 857).

Application Note:

1. *The typical case addressed by this guideline involves small-scale trafficking in drug paraphernalia (generally from a retail establishment that also sells items that are not unlawful). In a case involving a large-scale dealer, distributor, or manufacturer, an upward departure may be warranted. Conversely, where the offense was not committed for pecuniary gain (e.g., transportation for the defendant's personal use), a downward departure may be warranted.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 397); November 1, 1992 (see Appendix C, amendment 447).

§2D1.8. Renting or Managing a Drug Establishment; Attempt or Conspiracy

- (a) Base Offense Level:
 - (1) The offense level from §2D1.1 applicable to the underlying controlled substance offense, except as provided below.
 - (2) If the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises, the offense level shall be **4** levels less than the offense level from §2D1.1 applicable to the underlying controlled substance offense, but not greater than level **16**.
- (b) Special Instruction
 - (1) If the offense level is determined under subsection (a)(2), do not apply an adjustment under §3B1.2 (Mitigating Role).

Commentary

Statutory Provision: 21 U.S.C. § 856.

Application Note:

1. Subsection (a)(2) does not apply unless the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises. For example, subsection (a)(2) would not apply to a defendant who possessed a dangerous weapon in connection with the offense, a defendant who guarded the cache of controlled substances, a defendant who arranged for the use of the premises for the purpose of facilitating a drug transaction, a defendant who allowed the use of more than one premises, a defendant who made telephone calls to facilitate the underlying controlled substance offense, or a defendant who otherwise assisted in the commission of the underlying controlled substance offense. Furthermore, subsection (a)(2) does not apply unless the defendant initially leased, rented, purchased, or otherwise acquired a possessory interest in the premises for a legitimate purpose. Finally, subsection (a)(2) does not apply if the defendant had previously allowed any premises to be used as a drug establishment without regard to whether such prior misconduct resulted in a conviction.

Background: This section covers the offense of knowingly opening, maintaining, managing, or controlling any building, room, or enclosure for the purpose of manufacturing, distributing, storing, or using a controlled substance contrary to law (*e.g.*, a "crack house").

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (*see* Appendix C, amendment 394); November 1, 1992 (*see* Appendix C, amendments 447 and 448).

§2D1.9. Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy

(a) Base Offense Level: **23**

Commentary

Statutory Provision: 21 U.S.C. § 841(e)(1).

Background: This section covers the offense of assembling, placing, or causing to be placed, or maintaining a "booby-trap" on federal property where a controlled substance is being manufactured or distributed.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1992 (*see* Appendix C, amendment 447).

§2D1.10. Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy

- (a) Base Offense Level (Apply the greater):
- (1) **3** plus the offense level from the Drug Quantity Table in §2D1.1; or
 - (2) **20**.

Commentary

Statutory Provision: 21 U.S.C. § 858.

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 140). Amended effective November 1, 1992 (see Appendix C, amendment 447).

§2D1.11. Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy

- (a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) below.
- (b) Specific Offense Characteristics
- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
 - (2) If the defendant is convicted of violating 21 U.S.C. §§ 841(d)(2), (g)(1), or 960(d)(2), decrease by **3** levels, unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully.
 - (3) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
- (c) Cross Reference
- (1) If the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance unlawfully, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, Trafficking) if the resulting offense level is greater than that determined above.

(d) CHEMICAL QUANTITY TABLE*

Listed Chemicals and Quantity	Base Offense Level
(1) <u>List I Chemicals</u>	Level 30
17.8 KG or more of Benzaldehyde;	
20 KG or more of Benzyl Cyanide;	
20 KG or more of Ephedrine;	
200 G or more of Ergonovine;	
400 G or more of Ergotamine;	
20 KG or more of Ethylamine;	
44 KG or more of Hydriodic Acid;	
320 KG or more of Isosafrole;	
4 KG or more of Methylamine;	
500 KG or more of N-Methylephedrine;	
500 KG or more of N-Methylpseudoephedrine;	
12.6 KG or more of Nitroethane;	
200 KG or more of Norpseudoephedrine;	
20 KG or more of Phenylacetic Acid;	
200 KG or more of Phenylpropanolamine;	
10 KG or more of Piperidine;	
320 KG or more of Piperonal;	
1.6 KG or more of Propionic Anhydride;	
20 KG or more of Pseudoephedrine;	
320 KG or more of Safrole;	
400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;	
(2) <u>List I Chemicals</u>	Level 28
At least 5.3 KG but less than 17.8 KG of Benzaldehyde;	
At least 6 KG but less than 20 KG of Benzyl Cyanide;	
At least 6 KG but less than 20 KG of Ephedrine;	
At least 60 G but less than 200 G of Ergonovine;	
At least 120 G but less than 400 G of Ergotamine;	
At least 6 KG but less than 20 KG of Ethylamine;	
At least 13.2 KG but less than 44 KG of Hydriodic Acid;	
At least 96 KG but less than 320 KG of Isosafrole;	
At least 1.2 KG but less than 4 KG of Methylamine;	
At least 150 KG but less than 500 KG of N-Methylephedrine;	
At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;	
At least 3.8 KG but less than 12.6 KG of Nitroethane;	
At least 60 KG but less than 200 KG of Norpseudoephedrine;	
At least 6 KG but less than 20 KG of Phenylacetic Acid;	
At least 60 KG but less than 200 KG of Phenylpropanolamine;	
At least 3 KG but less than 10 KG of Piperidine;	
At least 96 KG but less than 320 KG of Piperonal;	
At least 480 G but less than 1.6 KG of Propionic Anhydride;	

At least 6 KG but less than 20 KG of Pseudoephedrine;
At least 96 KG but less than 320 KG of Safrole;
At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

11 KG or more of Acetic Anhydride;
1175 KG or more of Acetone;
20 KG or more of Benzyl Chloride;
1075 KG or more of Ethyl Ether;
1200 KG or more of Methyl Ethyl Ketone;
10 KG or more of Potassium Permanganate;
1300 KG or more of Toluene.

(3)List I Chemicals

Level 26

At least 1.8 KG but less than 5.3 KG of Benzaldehyde;
At least 2 KG but less than 6 KG of Benzyl Cyanide;
At least 2 KG but less than 6 KG of Ephedrine;
At least 20 G but less than 60 G of Ergonovine;
At least 40 G but less than 120 G of Ergotamine;
At least 2 KG but less than 6 KG of Ethylamine;
At least 4.4 KG but less than 13.2 KG of Hydriodic Acid;
At least 32 KG but less than 96 KG of Isosafrole;
At least 400 G but less than 1.2 KG of Methylamine;
At least 50 KG but less than 150 KG of N-Methylephedrine;
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;
At least 1.3 KG but less than 3.8 KG of Nitroethane;
At least 20 KG but less than 60 KG of Norpseudoephedrine;
At least 2 KG but less than 6 KG of Phenylacetic Acid;
At least 20 KG but less than 60 KG of Phenylpropanolamine;
At least 1 KG but less than 3 KG of Piperidine;
At least 32 KG but less than 96 KG of Piperonal;
At least 160 G but less than 480 G of Propionic Anhydride;
At least 2 KG but less than 6 KG of Pseudoephedrine;
At least 32 KG but less than 96 KG of Safrole;
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

At least 3.3 KG but less than 11 KG of Acetic Anhydride;
At least 352.5 KG but less than 1175 KG of Acetone;
At least 6 KG but less than 20 KG of Benzyl Chloride;
At least 322.5 KG but less than 1075 KG of Ethyl Ether;
At least 360 KG but less than 1200 KG of Methyl Ethyl Ketone;
At least 3 KG but less than 10 KG of Potassium Permanganate;
At least 390 KG but less than 1300 KG of Toluene.

(4) List I Chemicals

Level 24

At least 1.2 KG but less than 1.8 KG of Benzaldehyde;
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;
At least 1.4 KG but less than 2 KG of Ephedrine;
At least 14 G but less than 20 G of Ergonovine;
At least 28 G but less than 40 G of Ergotamine;
At least 1.4 KG but less than 2 KG of Ethylamine;
At least 3.08 KG but less than 4.4 KG of Hydriodic Acid;
At least 22.4 KG but less than 32 KG of Isosafrole;
At least 280 G but less than 400 G of Methylamine;
At least 35 KG but less than 50 KG of N-Methylephedrine;
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;
At least 879 G but less than 1.3 KG of Nitroethane;
At least 14 KG but less than 20 KG of Norpseudoephedrine;
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;
At least 14 KG but less than 20 KG of Phenylpropanolamine;
At least 700 G but less than 1 KG of Piperidine;
At least 22.4 KG but less than 32 KG of Piperonal;
At least 112 G but less than 160 G of Propionic Anhydride;
At least 1.4 KG but less than 2 KG of Pseudoephedrine;
At least 22.4 KG but less than 32 KG of Safrole;
At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

At least 1.1 KG but less than 3.3 KG of Acetic Anhydride;
At least 117.5 KG but less than 352.5 KG of Acetone;
At least 2 KG but less than 6 KG of Benzyl Chloride;
At least 107.5 KG but less than 322.5 KG of Ethyl Ether;
At least 120 KG but less than 360 KG of Methyl Ethyl Ketone;
At least 1 KG but less than 3 KG of Potassium Permanganate;
At least 130 KG but less than 390 KG of Toluene.

(5) List I Chemicals

Level 22

At least 712 G but less than 1.2 KG of Benzaldehyde;
At least 800 G but less than 1.4 KG of Benzyl Cyanide;
At least 800 G but less than 1.4 KG of Ephedrine;
At least 8 G but less than 14 G of Ergonovine;
At least 16 G but less than 28 G of Ergotamine;
At least 800 G but less than 1.4 KG of Ethylamine;
At least 1.76 KG but less than 3.08 KG of Hydriodic Acid;
At least 12.8 KG but less than 22.4 KG of Isosafrole;
At least 160 G but less than 280 G of Methylamine;
At least 20 KG but less than 35 KG of N-Methylephedrine;
At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;
At least 503 G but less than 879 G of Nitroethane;
At least 8 KG but less than 14 KG of Norpseudoephedrine;
At least 800 G but less than 1.4 KG of Phenylacetic Acid;
At least 8 KG but less than 14 KG of Phenylpropanolamine;

At least 400 G but less than 700 G of Piperidine;
At least 12.8 KG but less than 22.4 KG of Piperonal;
At least 64 G but less than 112 G of Propionic Anhydride;
At least 800 G but less than 1.4 KG of Pseudoephedrine;
At least 12.8 KG but less than 22.4 KG of Safrole;
At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

At least 726 G but less than 1.1 KG of Acetic Anhydride;
At least 82.25 KG but less than 117.5 KG of Acetone;
At least 1.4 KG but less than 2 KG of Benzyl Chloride;
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;
At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;
At least 700 G but less than 1 KG of Potassium Permanganate;
At least 91 KG but less than 130 KG of Toluene.

(6) List I Chemicals

Level 20

At least 178 G but less than 712 G of Benzaldehyde;
At least 200 G but less than 800 G of Benzyl Cyanide;
At least 200 G but less than 800 G of Ephedrine;
At least 2 G but less than 8 G of Ergonovine;
At least 4 G but less than 16 G of Ergotamine;
At least 200 G but less than 800 G of Ethylamine;
At least 440 G but less than 1.76 KG of Hydriodic Acid;
At least 3.2 KG but less than 12.8 KG of Isosafrole;
At least 40 G but less than 160 G of Methylamine;
At least 5 KG but less than 20 KG of N-Methylephedrine;
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;
At least 126 G but less than 503 G of Nitroethane;
At least 2 KG but less than 8 KG of Norpseudoephedrine;
At least 200 G but less than 800 G of Phenylacetic Acid;
At least 2 KG but less than 8 KG of Phenylpropanolamine;
At least 100 G but less than 400 G of Piperidine;
At least 3.2 KG but less than 12.8 KG of Piperonal;
At least 16 G but less than 64 G of Propionic Anhydride;
At least 200 G but less than 800 G of Pseudoephedrine;
At least 3.2 KG but less than 12.8 KG of Safrole;
At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

At least 440 G but less than 726 G of Acetic Anhydride;
At least 47 KG but less than 82.25 KG of Acetone;
At least 800 G but less than 1.4 KG of Benzyl Chloride;
At least 43 KG but less than 75.25 KG of Ethyl Ether;
At least 48 KG but less than 84 KG of Methyl Ethyl Ketone;
At least 400 G but less than 700 G of Potassium Permanganate;
At least 52 KG but less than 91 KG of Toluene.

(7) List I Chemicals

Level 18

At least 142 G but less than 178 G of Benzaldehyde;
At least 160 G but less than 200 G of Benzyl Cyanide;
At least 160 G but less than 200 G of Ephedrine;
At least 1.6 G but less than 2 G of Ergonovine;
At least 3.2 G but less than 4 G of Ergotamine;
At least 160 G but less than 200 G of Ethylamine;
At least 352 G but less than 440 G of Hydriodic Acid;
At least 2.56 KG but less than 3.2 KG of Isosafrole;
At least 32 G but less than 40 G of Methylamine;
At least 4 KG but less than 5 KG of N-Methylephedrine;
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;
At least 100 G but less than 126 G of Nitroethane;
At least 1.6 KG but less than 2 KG of Norpseudoephedrine;
At least 160 G but less than 200 G of Phenylacetic Acid;
At least 1.6 KG but less than 2 KG of Phenylpropanolamine;
At least 80 G but less than 100 G of Piperidine;
At least 2.56 KG but less than 3.2 KG of Piperonal;
At least 12.8 G but less than 16 G of Propionic Anhydride;
At least 160 G but less than 200 G of Pseudoephedrine;
At least 2.56 KG but less than 3.2 KG of Safrole;
At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

At least 110 G but less than 440 G of Acetic Anhydride;
At least 11.75 KG but less than 47 KG of Acetone;
At least 200 G but less than 800 G of Benzyl Chloride;
At least 10.75 KG but less than 43 KG of Ethyl Ether;
At least 12 KG but less than 48 KG of Methyl Ethyl Ketone;
At least 100 G but less than 400 G of Potassium Permanganate;
At least 13 KG but less than 52 KG of Toluene.

(8) List I Chemicals

Level 16

3.6 KG or more of Anthranilic Acid;
At least 107 G but less than 142 G of Benzaldehyde;
At least 120 G but less than 160 G of Benzyl Cyanide;
At least 120 G but less than 160 G of Ephedrine;
At least 1.2 G but less than 1.6 G of Ergonovine;
At least 2.4 G but less than 3.2 G of Ergotamine;
At least 120 G but less than 160 G of Ethylamine;
At least 264 G but less than 352 G of Hydriodic Acid;
At least 1.92 KG but less than 2.56 KG of Isosafrole;
At least 24 G but less than 32 G of Methylamine;
4.8 KG or more of N-Acetylanthranilic Acid;
At least 3 KG but less than 4 KG of N-Methylephedrine;
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;
At least 75 G but less than 100 G of Nitroethane;
At least 1.2 KG but less than 1.6 KG of Norpseudoephedrine;

At least 120 G but less than 160 G of Phenylacetic Acid;
At least 1.2 KG but less than 1.6 KG of Phenylpropanolamine;
At least 60 G but less than 80 G of Piperidine;
At least 1.92 KG but less than 2.56 KG of Piperonal;
At least 9.6 G but less than 12.8 G of Propionic Anhydride;
At least 120 G but less than 160 G of Pseudoephedrine;
At least 1.92 KG but less than 2.56 KG of Safrole;
At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

At least 88 G but less than 110 G of Acetic Anhydride;
At least 9.4 KG but less than 11.75 KG of Acetone;
At least 160 G but less than 200 G of Benzyl Chloride;
At least 8.6 KG but less than 10.75 KG of Ethyl Ether;
At least 9.6 KG but less than 12 KG of Methyl Ethyl Ketone;
At least 80 G but less than 100 G of Potassium Permanganate;
At least 10.4 KG but less than 13 KG of Toluene.

(9) List I Chemicals

Level 14

At least 2.7 KG but less than 3.6 KG of Anthranilic Acid;
At least 71.2 G but less than 107 G of Benzaldehyde;
At least 80 G but less than 120 G of Benzyl Cyanide;
At least 80 G but less than 120 G of Ephedrine;
At least 800 MG but less than 1.2 G of Ergonovine;
At least 1.6 G but less than 2.4 G of Ergotamine;
At least 80 G but less than 120 G of Ethylamine;
At least 176 G but less than 264 G of Hydriodic Acid;
At least 1.44 KG but less than 1.92 KG of Isosafrole;
At least 16 G but less than 24 G of Methylamine;
At least 3.6 KG but less than 4.8 KG of N-Acetylanthranilic Acid;
At least 2.25 KG but less than 3 KG of N-Methylephedrine;
At least 2.25 KG but less than 3 KG of N-Methylpseudoephedrine;
At least 56.25 G but less than 75 G of Nitroethane;
At least 800 G but less than 1.2 KG of Norpseudoephedrine;
At least 80 G but less than 120 G of Phenylacetic Acid;
At least 800 G but less than 1.2 KG of Phenylpropanolamine;
At least 40 G but less than 60 G of Piperidine;
At least 1.44 KG but less than 1.92 KG of Piperonal;
At least 7.2 G but less than 9.6 G of Propionic Anhydride;
At least 80 G but less than 120 G of Pseudoephedrine;
At least 1.44 KG but less than 1.92 KG of Safrole;
At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

At least 66 G but less than 88 G of Acetic Anhydride;
At least 7.05 KG but less than 9.4 KG of Acetone;
At least 120 G but less than 160 G of Benzyl Chloride;
At least 6.45 KG but less than 8.6 KG of Ethyl Ether;

At least 7.2 KG but less than 9.6 KG of Methyl Ethyl Ketone;
At least 60 G but less than 80 G of Potassium Permanganate;
At least 7.8 KG but less than 10.4 KG of Toluene.

(10) List I Chemicals

Level 12

Less than 2.7 KG of Anthranilic Acid;
Less than 71.2 G of Benzaldehyde;
Less than 80 G of Benzyl Cyanide;
Less than 80 G of Ephedrine;
Less than 800 MG of Ergonovine;
Less than 1.6 G of Ergotamine;
Less than 80 G of Ethylamine;
Less than 176 G of Hydriodic Acid;
Less than 1.44 KG of Isosafrole;
Less than 16 G of Methylamine;
Less than 3.6 KG of N-Acetylanthranilic Acid;
Less than 2.25 KG of N-Methylephedrine;
Less than 2.25 KG of N-Methylpseudoephedrine;
Less than 56.25 G of Nitroethane;
Less than 800 G of Norpseudoephedrine;
Less than 80 G of Phenylacetic Acid;
Less than 800 G of Phenylpropanolamine;
Less than 40 G of Piperidine;
Less than 1.44 KG of Piperonal;
Less than 7.2 G of Propionic Anhydride;
Less than 80 G of Pseudoephedrine;
Less than 1.44 KG of Safrole;
Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

Less than 66 G of Acetic Anhydride;
Less than 7.05 KG of Acetone;
Less than 120 G of Benzyl Chloride;
Less than 6.45 KG of Ethyl Ether;
Less than 7.2 KG of Methyl Ethyl Ketone;
Less than 60 G of Potassium Permanganate;
Less than 7.8 KG of Toluene.

*Notes:

- (A) The List I Chemical Equivalency Table provides a method for combining different precursor chemicals to obtain a single offense level. In a case involving two or more list I chemicals used to manufacture different controlled substances or to manufacture one controlled substance by different manufacturing processes, convert each to its ephedrine equivalency from the table below, add the quantities, and use the Chemical Quantity Table to determine the base offense level. In a case involving two or more list I chemicals used together to manufacture a controlled substance in the same manufacturing process, use the quantity of the single list I chemical that results in the greatest base offense level.

- (B) If more than one list II chemical is involved, use the single list II chemical resulting in the greatest offense level.
- (C) If both list I and list II chemicals are involved, use the offense level determined under (A) or (B) above, whichever is greater.
- (D) In a case involving ephedrine tablets, use the weight of the ephedrine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

(E) LIST I CHEMICAL EQUIVALENCY TABLE

1 gm of Anthranilic Acid* =	0.033 gm of Ephedrine
1 gm of Benzaldehyde** =	1.124 gm of Ephedrine
1 gm of Benzyl Cyanide =	1 gm of Ephedrine
1 gm of Ergonovine =	100 gm of Ephedrine
1 gm of Ergotamine =	50 gm of Ephedrine
1 gm of Ethylamine** =	1 gm of Ephedrine
1 gm of Hydriodic Acid** =	0.4545 gm of Ephedrine
1 gm of Isosafrole =	0.0625 gm of Ephedrine
1 gm of Methylamine =	5 gm of Ephedrine
1 gm of N-Acetylanthranilic Acid* =	0.025 gm of Ephedrine
1 gm of N-Methylephedrine** =	0.04 gm of Ephedrine
1 gm of N-Methylpseudoephedrine** =	0.04 gm of Ephedrine
1 gm of Nitroethane** =	1.592 gm of Ephedrine
1 gm of Norpseudoephedrine** =	0.1 gm of Ephedrine
1 gm of Phenylacetic Acid =	1 gm of Ephedrine
1 gm of Phenylpropanolamine** =	0.1 gm of Ephedrine
1 gm of Piperidine =	2 gm of Ephedrine
1 gm of Piperonal =	0.0625 gm of Ephedrine
1 gm of Propionic Anhydride =	12.5 gm of Ephedrine
1 gm of Pseudoephedrine** =	1 gm of Ephedrine
1 gm of Safrole =	0.0625 gm of Ephedrine
1 gm of 3,4-Methylenedioxyphenyl-2-propanone** =	0.05 gm of Ephedrine

* The ephedrine equivalency for anthranilic acid or N-acetylanthranilic acid, or both, shall not exceed 159.99 grams of ephedrine.

**In cases involving (A) hydriodic acid and one of the following: ephedrine, N-methylephedrine, N-methylpseudoephedrine, norpseudoephedrine, phenylpropanolamine, or pseudoephedrine; or (B) ethylamine and 3,4-methylenedioxyphenyl-2-propanone; or (C) benzaldehyde and nitroethane, calculate the offense level for each separately and use the quantity that results in the greater offense level.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(d)(1), (2), (g)(1), 960(d)(1), (2).

Application Notes:

1. "Firearm" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions). The adjustment in subsection (b)(1) should be applied if the weapon was present, unless it is improbable that the weapon was connected with the offense.
2. "Offense involved unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully," as used in subsection (c)(1), means that the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), completed the actions sufficient to constitute the offense of unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully.
3. In certain cases, the defendant will be convicted of an offense involving a listed chemical covered under this guideline, and a related offense involving an immediate precursor or other controlled substance covered under §2D1.1 (Unlawfully Manufacturing, Importing, Exporting, or Trafficking). For example, P2P (an immediate precursor) and methylamine (a listed chemical) are used together to produce methamphetamine. Determine the offense level under each guideline separately. The offense level for methylamine is determined by using §2D1.11. The offense level for P2P is determined by using §2D1.1 (P2P is listed in the Drug Equivalency Table under Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)). Under the grouping rules of §3D1.2(b), the counts will be grouped together. Note that in determining the scale of the offense under §2D1.1, the quantity of both the controlled substance and listed chemical should be considered (see Application Note 12 in the Commentary to §2D1.1).
4. When two or more list I chemicals are used together in the same manufacturing process, calculate the offense level for each separately and use the quantity that results in the greatest base offense level. In any other case, the quantities should be added together (using the List I Chemical Equivalency Table) for the purpose of calculating the base offense level.

Examples:

- (a) The defendant was in possession of five kilograms of ephedrine and 300 grams of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. Therefore, the base offense level for each listed chemical is calculated separately and the list I chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of 26; 300 grams of hydriodic acid result in a base offense level of 16. In this case, the base offense level would be 26.
- (b) The defendant was in possession of five kilograms of ephedrine and two kilograms of phenylacetic acid. Although both of these chemicals are used to manufacture methamphetamine, they are not used together in the same manufacturing process. Therefore, the quantity of phenylacetic acid should be converted to an ephedrine

equivalency using the List I Chemical Equivalency Table and then added to the quantity of ephedrine. In this case, the two kilograms of phenylacetic acid convert to two kilograms of ephedrine (see List I Chemical Equivalency Table), resulting in a total equivalency of seven kilograms of ephedrine.

- 5. Where there are multiple list II chemicals, all quantities of the same list II chemical are added together for purposes of determining the base offense level. However, quantities of different list II chemicals are not aggregated (see Note B to the Chemical Quantity Table). Thus, where multiple list II chemicals are involved in the offense, the base offense level is determined by using the base offense level for the single list II chemical resulting in the greatest base offense level. For example, in the case of an offense involving seven kilograms of methyl ethyl ketone and eight kilograms of acetone, the base offense level for the methyl ethyl ketone is 12 and the base offense level for the acetone is 14; therefore, the base offense level is 14.*
- 6. Where both list I chemicals and list II chemicals are involved, use the greater of the base offense level for the list I chemicals or the list II chemicals (see Note C to the Chemical Quantity Table).*
- 7. Convictions under 21 U.S.C. §§ 841(d)(2), (g)(1), and 960(d)(2) do not require that the defendant have knowledge or an actual belief that the listed chemical was to be used to manufacture a controlled substance unlawfully. Where the defendant possessed or distributed the listed chemical without such knowledge or belief, a 3-level reduction is provided to reflect that the defendant is less culpable than one who possessed or distributed listed chemicals knowing or believing that they would be used to manufacture a controlled substance unlawfully.*
- 8. Subsection (b)(3) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(3) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).*

Background: Offenses covered by this guideline involve list I chemicals and list II chemicals. List I chemicals are important to the manufacture of a controlled substance and usually become part of the final product. For example, ephedrine reacts with other chemicals to form methamphetamine. The amount of ephedrine directly affects the amount of methamphetamine produced. List II chemicals are generally used as solvents, catalysts, and reagents.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 371). Amended effective November 1, 1992 (see Appendix C, amendment 447); November 1, 1995 (see Appendix C, amendment 519); May 1, 1997 (see Appendix C, amendment 541); November 1, 1997 (see Appendix C, amendment 557); November 1, 2000 (see Appendix C, amendments 605 and 606).

§2D1.12. Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy

- (a) Base Offense Level (Apply the greater):
- (1) **12**, if the defendant intended to manufacture a controlled substance or knew or believed the prohibited equipment was to be used to manufacture a controlled substance; or
 - (2) **9**, if the defendant had reasonable cause to believe the prohibited equipment was to be used to manufacture a controlled substance.
- (b) Specific Offense Characteristics
- (1) If the defendant (A) intended to manufacture methamphetamine, or (B) knew, believed, or had reasonable cause to believe that prohibited equipment was to be used to manufacture methamphetamine, increase by **2** levels.
 - (2) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
- (c) Cross Reference
- (1) If the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance unlawfully, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 21 U.S.C. § 843(a)(6), (7).

Application Notes:

1. *If the offense involved the large-scale manufacture, distribution, or importation of prohibited flasks or equipment, an upward departure may be warranted.*
2. *"Offense involved unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully," as used in subsection (c)(1), means that the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), completed the actions sufficient to constitute the offense of unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully.*
3. *Subsection (b)(2) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42*

U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(2) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 371). Amended effective November 1, 1992 (see Appendix C, amendment 447); November 1, 1995 (see Appendix C, amendment 520); November 1, 1997 (see Appendix C, amendment 558); November 1, 2000 (see Appendix C, amendment 605).

§2D1.13. Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements; Presenting False or Fraudulent Identification to Obtain a Listed Chemical; Attempt or Conspiracy

- (a) Base Offense Level (Apply the greatest):
- (1) The offense level from §2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical) if the defendant knew or believed that the chemical was to be used to manufacture a controlled substance unlawfully; or
 - (2) The offense level from §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) reduced by 3 levels if the defendant had reason to believe that the chemical was to be used to manufacture a controlled substance unlawfully; or
 - (3) 6, otherwise.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(d)(3), (g)(1), 843(a)(4)(B), (a)(8).

Application Note:

1. "The offense level from §2D1.11" includes the base offense level and any applicable specific offense characteristic or cross reference; see §1B1.5 (Interpretation of References to Other Offense Guidelines).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 371). Amended effective November 1, 1992 (see Appendix C, amendment 447).

* * * * *

2. UNLAWFUL POSSESSION**§2D2.1. Unlawful Possession; Attempt or Conspiracy**

- (a) Base Offense Level:
- (1) **8**, if the substance is heroin or any Schedule I or II opiate, an analogue of these, or cocaine base; or
 - (2) **6**, if the substance is cocaine, flunitrazepam, LSD, or PCP; or
 - (3) **4**, if the substance is any other controlled substance or a list I chemical.
- (b) Cross References
- (1) If the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) as if the defendant had been convicted of possession of that mixture or substance with intent to distribute.
 - (2) If the offense involved possession of a controlled substance in a prison, correctional facility, or detention facility, apply §2P1.2 (Providing or Possessing Contraband in Prison).

Commentary

Statutory Provision: 21 U.S.C. § 844(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant's own consumption. Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.

Background: Mandatory (statutory) minimum penalties for several categories of cases, ranging from fifteen days' to five years' imprisonment, are set forth in 21 U.S.C. § 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. See §5G1.1(b). Note, however, that 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

Section 2D2.1(b)(1) provides a cross reference to §2D1.1 for possession of more than five grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty under Section 6371 of the Anti-Drug Abuse Act of 1988. Other cases for which enhanced penalties are provided under Section 6371 of the Anti-Drug Abuse Act of 1988 (e.g., for a person

with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base; for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with §5G1.1(b).

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 24); November 1, 1989 (see Appendix C, amendment 304); November 1, 1990 (see Appendix C, amendment 321); November 1, 1992 (see Appendix C, amendment 447); September 23, 1994 (see Appendix C, amendment 509); November 1, 1995 (see Appendix C, amendment 514); November 1, 1997 (see Appendix C, amendments 556 and 558).

§2D2.2. Acquiring a Controlled Substance by Forgery, Fraud, Deception, or Subterfuge; Attempt or Conspiracy

- (a) Base Offense Level: **8**

Commentary

Statutory Provision: 21 U.S.C. § 843(a)(3).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1992 (see Appendix C, amendment 447).

§2D2.3. Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs

- (a) Base Offense Level (Apply the greatest):
- (1) **26**, if death resulted; or
 - (2) **21**, if serious bodily injury resulted; or
 - (3) **13**, otherwise.
- (b) Special Instruction:
- (1) If the defendant is convicted of a single count involving the death or serious bodily injury of more than one person, apply Chapter Three, Part D (Multiple Counts) as if the defendant had been convicted of a separate count for each such victim.

Commentary

Statutory Provision: 18 U.S.C. § 342.

Background: This section implements the direction to the Commission in Section 6482 of the Anti-Drug Abuse Act of 1988. Offenses covered by this guideline may vary widely with regard to harm and risk of harm. The offense levels assume that the offense involved the operation of a common

carrier carrying a number of passengers, *e.g.*, a bus. If no or only a few passengers were placed at risk, a downward departure may be warranted. If the offense resulted in the death or serious bodily injury of a large number of persons, such that the resulting offense level under subsection (b) would not adequately reflect the seriousness of the offense, an upward departure may be warranted.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 25); November 1, 1989 (see Appendix C, amendment 141).

* * * * *

3. REGULATORY VIOLATIONS

§2D3.1. **Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy**

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

Commentary

Statutory Provisions: 21 U.S.C. §§ 842(a)(1), 843(a)(1), (2). For additional statutory provision(s), see Appendix A (Statutory Index).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 421); November 1, 1992 (see Appendix C, amendment 447); November 1, 1995 (see Appendix C, amendment 534).

§2D3.2. **Regulatory Offenses Involving Controlled Substances or Listed Chemicals; Attempt or Conspiracy**

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

Commentary

Statutory Provisions: 21 U.S.C. §§ 842(a)(2), (9), (10), (b), 954, 961. For additional statutory provision(s), see Appendix A (Statutory Index).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 421); November 1, 1992 (see Appendix C, amendment 447); November 1, 1993 (see Appendix C, amendment 481); November 1, 1995 (see Appendix C, amendment 534).

§2D3.3. [Deleted]

Historical Note: Section 2D3.3 (Illegal Use of Registration Number to Distribute or Dispense a Controlled Substance to Another

Registrant or Authorized Person; Attempt or Conspiracy), effective November 1, 1987, amended effective November 1, 1991 (see Appendix C, amendment 421) and November 1, 1992 (see Appendix C, amendment 447), was deleted by consolidation with §2D3.2 effective November 1, 1993 (see Appendix C, amendment 481).

§2D3.4. [Deleted]

Historical Note: Section 2D3.4 (Illegal Transfer or Transshipment of a Controlled Substance; Attempt or Conspiracy), effective November 1, 1987, amended effective November 1, 1990 (see Appendix C, amendment 359) and November 1, 1992 (see Appendix C, amendment 447), was deleted by consolidation with §2D3.2 effective November 1, 1993 (see Appendix C, amendment 481).

§2D3.5. [Deleted]

Historical Note: Section 2D3.5 (Violation of Recordkeeping or Reporting Requirements for Listed Chemicals and Certain Machines; Attempt or Conspiracy), effective November 1, 1991 (see Appendix C, amendment 371), amended effective November 1, 1992 (see Appendix C, amendment 447), was deleted by consolidation with §2D3.2 effective November 1, 1993 (see Appendix C, amendment 481).

PART E - OFFENSES INVOLVING CRIMINAL ENTERPRISES AND RACKETEERING**1. RACKETEERING***Introductory Commentary*

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

Historical Note: Effective November 1, 1987.

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

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

Commentary

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

Application Notes:

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

distinction between the instant offense and criminal history found throughout the guidelines. If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted.

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

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

- (a) Base Offense Level (Apply the greater):
- (1) **6**; or
 - (2) the offense level applicable to the underlying crime of violence or other unlawful activity in respect to which the travel or transportation was undertaken.

Commentary

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

Application Notes:

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

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

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

- (a) Base Offense Level (Apply the greater):
- (1) **12**; or
 - (2) the offense level applicable to the underlying crime or racketeering activity.

Commentary

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

Application Notes:

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

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

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

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

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

Commentary

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

Application Note:

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

Background: This guideline and the statute to which it applies do not require that a murder actually have been committed.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (*see* Appendix C, amendment 144); November 1, 1990 (*see* Appendix C, amendment 311); November 1, 1992 (*see* Appendix C, amendment 449).

§2E1.5. [Deleted]

Historical Note: Section 2E1.5 (Hobbs Act Extortion or Robbery), effective November 1, 1987, amended effective November 1, 1989 (*see* Appendix C, amendment 145), was deleted by consolidation with §§2B3.1, 2B3.2, 2B3.3, and 2C1.1 effective November 1, 1993 (*see* Appendix C, amendment 481).

* * * * *

2. EXTORTIONATE EXTENSION OF CREDIT

§2E2.1. Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means

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

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

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

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

(c) Cross Reference

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

Commentary

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

Application Notes:

1. Definitions of "firearm," "dangerous weapon," "otherwise used," "brandished," "bodily injury," "serious bodily injury," "permanent or life-threatening bodily injury," "abducted," and "physically restrained" are found in the Commentary to §1B1.1 (Application Instructions).
2. See also Commentary to §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) regarding the interpretation of the specific offense characteristics.

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 146-148); November 1, 1991 (see Appendix C, amendment 398); November 1, 1993 (see Appendix C, amendment 479); November 1, 2000 (see Appendix C, amendment 601).

* * * * *

3. GAMBLINGIntroductory Commentary

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

Historical Note: Effective November 1, 1987.

§2E3.1. Gambling Offenses

(a) Base Offense Level:

- (1) **12**, if the offense was (A) engaging in a gambling business; (B) transmission of wagering information; or (C) committed as part of, or to facilitate, a commercial gambling operation; or
- (2) **6**, otherwise.

Commentary

Statutory Provisions: 15 U.S.C. §§ 1172-1175; 18 U.S.C. §§ 1082, 1301-1304, 1306, 1511, 1953, 1955. For additional statutory provision(s), *see* Appendix A (Statutory Index).

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

§2E3.2. [Deleted]

Historical Note: Section 2E3.2 (Transmission of Wagering Information), effective November 1, 1987, was deleted by consolidation with §2E3.1 effective November 1, 1993 (*see* Appendix C, amendment 481).

§2E3.3. [Deleted]

Historical Note: Section 2E3.3 (Other Gambling Offenses), effective November 1, 1987, was deleted by consolidation with §2E3.1 effective November 1, 1993 (*see* Appendix C, amendment 481).

* * * * *

4. TRAFFICKING IN CONTRABAND CIGARETTES**§2E4.1. Unlawful Conduct Relating to Contraband Cigarettes**

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

- (1) **9**; or
- (2) the offense level from the table in §2T4.1 (Tax Table) corresponding to the amount of the tax evaded.

Commentary

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

Application Note:

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

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

Historical Note: Effective November 1, 1987.

* * * * *

5. LABOR RACKETEERINGIntroductory Commentary

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

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

Historical Note: Effective November 1, 1987.

§2E5.1. Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations

- (a) Base Offense Level:
- (1) **10**, if a bribe; or
 - (2) **6**, if a gratuity.

- (b) Specific Offense Characteristics
- (1) If the defendant was a fiduciary of the benefit plan or labor organization, increase by 2 levels.
 - (2) Increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.
- (c) Special Instruction for Fines - Organizations
- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) if a bribe, the value of the benefit received or to be received in return for the unlawful payment; or (C) if a bribe, the consequential damages resulting from the unlawful payment.

Commentary

Statutory Provisions: 18 U.S.C. § 1954; 29 U.S.C. § 186.

Application Notes:

1. "Bribe" refers to the offer or acceptance of an unlawful payment with the specific understanding that it will corruptly affect an official action of the recipient.
2. "Gratuity" refers to the offer or acceptance of an unlawful payment other than a bribe.
3. "Fiduciary of the benefit plan" is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.
4. "Value of the improper benefit to the payer" is explained in the Commentary to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right).
5. If the adjustment for a fiduciary at §2E5.1(b)(1) applies, do not apply the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: This section covers the giving or receipt of bribes and other unlawful gratuities involving employee welfare or pension benefit plans, or labor organizations. The seriousness of the offense is determined by several factors, including the value of the bribe or gratuity and the magnitude of the loss resulting from the transaction.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 149); November 1, 1991 (see Appendix C, amendment 422); November 1, 1993 (see Appendix C, amendment 481).

§2E5.2. [Deleted]

Historical Note: Section 2E5.2 (Theft or Embezzlement from Employee Pension and Welfare Benefit Plans), effective November 1, 1987, amended effective June 15, 1988 (see Appendix C, amendment 28), November 1, 1989 (see Appendix C, amendment 150), and November 1, 1991 (see Appendix C, amendment 399), was deleted by consolidation with §2B1.1 effective November 1, 1993 (see Appendix C, amendment 481).

§2E5.3. False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act

- (a) Base Offense Level (Apply the greater):
- (1) **6**; or
 - (2) If the offense was committed to facilitate or conceal a theft or embezzlement, or an offense involving a bribe or a gratuity, apply §2B1.1 or §2E5.1, as applicable.

Commentary

Statutory Provisions: 18 U.S.C. § 1027; 29 U.S.C. §§ 439, 461, 1131. For additional statutory provision(s), see Appendix A (Statutory Index).

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 151); November 1, 1993 (see Appendix C, amendment 481).

§2E5.4. [Deleted]

Historical Note: Section 2E5.4 (Embezzlement or Theft from Labor Unions in the Private Sector), effective November 1, 1987, amended effective June 15, 1988 (see Appendix C, amendment 29) and November 1, 1989 (see Appendix C, amendment 152), was deleted by consolidation with §2B1.1 effective November 1, 1993 (see Appendix C, amendment 481).

§2E5.5. [Deleted]

Historical Note: Section 2E5.5 (Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act), effective November 1, 1987, amended effective November 1, 1989 (see Appendix C, amendment 153), was deleted by consolidation with §2E5.3 effective November 1, 1993 (see Appendix C, amendment 481).

§2E5.6. [Deleted]

Historical Note: Section 2E5.6 (Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations), effective November 1, 1987, amended effective November 1, 1991 (see Appendix C, amendment 422), was deleted by consolidation with §2E5.1 effective November 1, 1993 (see Appendix C, amendment 481).

PART F - OFFENSES INVOLVING FRAUD OR DECEIT**§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristics
- (1) If the loss exceeded \$2,000, increase the offense level as follows:

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

- (2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by **2** levels.
- (3) If the offense was committed through mass-marketing, increase by **2** levels.
- (4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; or (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.
- (5) If the offense involved—

- (A) the possession or use of any device-making equipment;
- (B) the production or trafficking of any unauthorized access device or counterfeit access device; or
- (C) (i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from another means of identification or obtained by the use of another means of identification,

increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

- (6) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (7) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **13**, increase to level **13**.
- (8) If the offense --
 - (A) substantially jeopardized the safety and soundness of a financial institution; or
 - (B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,

increase by **4** levels. If the resulting offense level is less than level **24**, increase to level **24**.

(c) Special Instruction

- (1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644; 18 U.S.C. §§ 225, 285-289, 471-473, 500, 510, 659, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4), 1031, 1341-1344, 2314, 2315. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *The adjustments in §2F1.1(b)(4) are alternative rather than cumulative. If in a particular case, however, both of the enumerated factors applied, an upward departure might be warranted.*
2. *"More than minimal planning" (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).*
3. *"Mass-marketing," as used in subsection (b)(3), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.*
4. *"Scheme to defraud more than one victim," as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, "victim" refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.*
5. *Subsection (b)(4)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.*
6. *Subsection (b)(4)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product,*

is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).

If the conduct that forms the basis for an enhancement under (b)(4)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.

7. Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. *See* Chapter Three, Part D (Multiple Counts).
8. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred. Consistent with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell \$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the loss would be \$40,000.

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

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

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

(b) Fraudulent Loan Application and Contract Procurement Cases

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

In some cases, the loss determined above may significantly understate or overstate the

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

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

In contrast to other types of cases, loss in a procurement fraud or product substitution case includes not only direct damages, but also consequential damages that were reasonably foreseeable. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose, plus the government's reasonably foreseeable cost of rectifying the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.

(d) *Diversion of Government Program Benefits*

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

(e) *Davis-Bacon Act Cases*

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

9. *For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.*

10. *In the case of a partially completed offense (e.g., an offense involving a completed fraud*

that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.

11. *In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:*
- (a) a primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm;*
 - (b) false statements were made for the purpose of facilitating some other crime;*
 - (c) the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma;*
 - (d) the offense endangered national security or military readiness;*
 - (e) the offense caused a loss of confidence in an important institution;*
 - (f) the offense involved the knowing endangerment of the solvency of one or more victims.*

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

12. *Offenses involving access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. In such a case, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.*

Offenses involving identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than §2F1.1.

13. *If the fraud exploited vulnerable victims, an enhancement will apply. See §3A1.1 (Hate Crime Motivation or Vulnerable Victim).*
14. *Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 would be more apt, and false statements to a customs officer, for which §2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent*

insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than §2F1.1. Otherwise, in such cases, §2F1.1 is to be applied, but a departure from the guidelines may be considered.

15. For purposes of subsection (b)(5)—

"Counterfeit access device" (A) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (B) also includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service. "Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).

"Device-making equipment" (A) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (B) also includes (i) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (ii) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). "Scanning receiver" has the meaning given that term in 18 U.S.C. § 1029(e)(8).

*"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(3), except that such means of identification shall be of an actual (*i.e.*, not fictitious) individual other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).*

"Produce" includes manufacture, design, alter, authenticate, duplicate, or assemble. "Production" includes manufacture, design, alteration, authentication, duplication, or assembly.

"Unauthorized access device" has the meaning given that term in 18 U.S.C. § 1029(e)(3).

16. Subsection (b)(5)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

Examples of conduct to which this subsection should apply are as follows:

(A) *A defendant obtains an individual's name and social security number from a source (*e.g.*, from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.*

(B) *A defendant obtains an individual's name and address from a source (*e.g.*, from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.*

Examples of conduct to which subsection (b)(5)(C)(i) should not apply are as follows:

(A) *A defendant uses a credit card from a stolen wallet only to make a purchase. In such a*

case, the defendant has not used the stolen credit card to obtain another means of identification.

- (B) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.*

Subsection (b)(5)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.

In a case involving unlawfully produced or unlawfully obtained means of identification, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense. Examples may include the following:

- (A) The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.*
- (B) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in the individual's name.*
- (C) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.*

17. In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device. In any such case, loss shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this application note, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 15.

18. For purposes of subsection (b)(6)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

For purposes of subsection (b)(6)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.

The enhancement for sophisticated means under subsection (b)(6)(C) requires conduct that is significantly more complex or intricate than the conduct that may form the basis for an enhancement for more than minimal planning under subsection (b)(2)(A).

If the conduct that forms the basis for an enhancement under subsection (b)(6) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.

19. *"Financial institution," as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.*
20. *An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.*
21. *"The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(8)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).*
22. *If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise."*
23. *If subsection (b)(5), subsection (b)(8)(A), or subsection (b)(8)(B) applies, there shall be a rebuttable presumption that the offense also involved more than minimal planning for purposes of subsection (b)(2).*

If the conduct that forms the basis for an enhancement under subsection (b)(5) is the only conduct that forms the basis of an enhancement under subsection (b)(6), do not apply an enhancement under subsection (b)(6).

Background: *This guideline is designed to apply to a wide variety of fraud cases. The statutory*

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

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

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

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm. The commission of a fraud in the course of a bankruptcy proceeding subjects the defendant to an enhanced sentence because that fraudulent conduct undermines the bankruptcy process as well as harms others with an interest in the bankruptcy estate.

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

Subsections (b)(5)(A) and (B) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105-172.

Subsection (b)(5)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105-318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding," in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" (*i.e.*, produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification," the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part, because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (*i.e.*, produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the

victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

Subsection (b)(6) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.

Subsection (b)(7)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)(8)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)(8)(B) implements the instruction to the Commission in section 2507 of Public Law 101–647.

Subsection (c) implements the instruction to the Commission in section 805(c) of Public Law 104–132.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 30); November 1, 1989 (see Appendix C, amendments 154-156 and 303); November 1, 1990 (see Appendix C, amendment 317); November 1, 1991 (see Appendix C, amendments 364 and 393); November 1, 1992 (see Appendix C, amendment 470); November 1, 1993 (see Appendix C, amendments 481 and 482); November 1, 1995 (see Appendix C, amendment 513); November 1, 1997 (see Appendix C, amendment 551); November 1, 1998 (see Appendix C, amendments 577 and 587); November 1, 2000 (see Appendix C, amendments 595, 596, and 597).

§2F1.2. Insider Trading

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

Commentary

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

Application Note:

1. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should be applied only if the

defendant occupied and abused a position of special trust. Examples might include a corporate president or an attorney who misused information regarding a planned but unannounced takeover attempt. It typically would not apply to an ordinary "tippee."

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

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

Historical Note: Effective November 1, 1987.

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

1. PROMOTING PROSTITUTION OR PROHIBITED SEXUAL CONDUCT

§2G1.1. Promoting Prostitution or Prohibited Sexual Conduct

- (a) Base Offense Level:
- (1) **19**, if the offense involved a minor; or
 - (2) **14**, otherwise.
- (b) Specific Offense Characteristics
- (1) If the offense involved (A) prostitution; and (B) the use of physical force, or coercion by threats or drugs or in any manner, increase by **4** levels.
 - (2) If the offense involved a victim who had (A) not attained the age of 12 years, increase by **4** levels; or (B) attained the age of 12 years but not attained the age of 16 years, increase by **2** levels.
 - (3) If subsection (b)(2) applies; and—
 - (A) the defendant was a parent, relative, or legal guardian of the victim; or
 - (B) the victim was otherwise in the custody, care, or supervisory control of the defendant,increase by **2** levels.
 - (4) If subsection (b)(3) does not apply; and—
 - (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prostitution; or
 - (B) a participant otherwise unduly influenced a minor to engage in prostitution,increase by **2** levels.
 - (5) If a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prostitution; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor, increase by **2** levels.

(c) Cross References

- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a person less than 18 years of age to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).
- (2) If the offense involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the offense involved criminal sexual abuse of a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the "consent" of the victim.
- (3) If the offense did not involve promoting prostitution, and neither subsection (c)(1) nor (c)(2) is applicable, apply §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate.

(d) Special Instruction

- (1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of prostitution or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328; 18 U.S.C. §§ 2421, 2422, 2423(a), 2425.

Application Notes:

1. For purposes of this guideline—

"Minor" means an individual who had not attained the age of 18 years.

"Participant" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"Promoting prostitution" means persuading, inducing, enticing, or coercing a person to engage in prostitution, or to travel to engage in, prostitution.

"Victim" means a person transported, persuaded, induced, enticed, or coerced to engage in,

or travel for the purpose of engaging in, prostitution or prohibited sexual conduct, whether or not the person consented to the prostitution or prohibited sexual conduct. Accordingly, "victim" may include an undercover law enforcement officer.

2. Subsection (b)(1) provides an enhancement for physical force, or coercion, that occurs as part of a prostitution offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. *See* Chapter Five, Part K (Departures). For purposes of subsection (b)(1), "coercion" includes any form of conduct that negates the voluntariness of the behavior of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of an adult victim, rather than a victim less than 18 years of age, this characteristic generally will not apply if the drug or alcohol was voluntarily taken.
3. For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of prostitution or prohibited sexual conduct in respect to another victim.
4. For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, prostitution or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of prostitution or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.
5. Subsection (b)(3) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.
6. If the enhancement in subsection (b)(3) applies, do not apply subsection (b)(4) or §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
7. The enhancement in subsection (b)(4)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prostitution. Subsection (b)(4)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(4)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(4)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prostitution. Accordingly, use of a computer screen name,

without such intent, would not be a sufficient basis for application of the enhancement.

In determining whether subsection (b)(4)(B) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption, for purposes of subsection (b)(4)(B), that such participant unduly influenced the minor to engage in prostitution. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

8. *Subsection (b)(5) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prostitution; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor. Subsection (b)(5)(A) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(5)(A) would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.*
9. *The cross reference in subsection (c)(1) is to be construed broadly to include all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a person less than 18 years of age to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), "sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256.*
10. *Subsection (c)(2) provides a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. § 2241 or § 2242. For example, the cross reference to §2A3.1 shall apply if the offense involved criminal sexual abuse; and (A) the victim had not attained the age of 12 years (see 18 U.S.C. § 2241(c)); (B) the victim had attained the age of 12 years but had not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnaping (see 18 U.S.C. § 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnaping (see 18 U.S.C. § 2242(1)).*
11. *The cross reference in subsection (c)(3) addresses the case in which the offense did not involve promoting prostitution, neither subsection (c)(1) nor (c)(2) is applicable, and the offense involved prohibited sexual conduct other than the conduct covered by subsection (c)(1) or (c)(2). In such case, the guideline for the underlying prohibited sexual conduct is to be used; i.e., §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact).*

Background: *This guideline covers offenses under chapter 117 of title 18, United States Code. Those offenses involve promoting prostitution or prohibited sexual conduct through a variety of means. Offenses that involve promoting prostitution under chapter 117 of such title are sentenced*

under this guideline, unless other prohibited sexual conduct occurs as part of the prostitution offense, in which case one of the cross references would apply. Offenses under chapter 117 of such title that do not involve promoting prostitution are to be sentenced under §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate, pursuant to the cross references provided in subsection (c).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 157 and 158); November 1, 1990 (see Appendix C, amendment 322); November 1, 1996 (see Appendix C, amendment 538); November 1, 2000 (see Appendix C, amendment 592).

§2G1.2. [Deleted]

Historical Note: Section 2G1.2 (Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct), effective November 1, 1987, amended effective November 1, 1989 (see Appendix C, amendments 159 and 160), November 1, 1990 (see Appendix C, amendment 323), November 1, 1991 (see Appendix C, amendment 400), and November 1, 1992 (see Appendix C, amendment 444), was deleted by consolidation with §2G1.1 effective November 1, 1996 (see Appendix C, amendment 538).

* * * * *

2. SEXUAL EXPLOITATION OF A MINOR

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

- (a) Base Offense Level: **27**
- (b) Specific Offense Characteristics
 - (1) If the offense involved a victim who had (A) not attained the age of twelve years, increase by **4** levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by **2** levels.
 - (2) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.
 - (3) If, for the purpose of producing sexually explicit material, the offense involved (A) the knowing misrepresentation of a participant's identity to persuade, induce,

entice, coerce, or facilitate the travel of, a minor to engage sexually explicit conduct; or (B) the use of a computer or an Internet-access device to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by 2 levels.

(c) Special Instruction

- (1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2251(a), (b), (c)(1)(B), 2260.

Application Notes:

1. For purposes of this guideline, "minor" means an individual who had not attained the age of 18 years.
2. For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate victim. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.
3. Subsection (b)(2) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the child and not simply to the legal status of the defendant-child relationship.
4. If the adjustment in subsection (b)(2) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
5. The enhancement in subsection (b)(3)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material. Subsection (b)(3)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(3)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

Subsection (b)(3)(B)(i) provides an enhancement if a computer or an Internet-access device was used to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or otherwise to solicit participation by a minor in such conduct for such purpose. Subsection (b)(3)(B)(i) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 161); November 1, 1990 (see Appendix C, amendment 324); November 1, 1991 (see Appendix C, amendment 400); November 1, 1996 (see Appendix C, amendment 537); November 1, 1997 (see Appendix C, amendment 575); November 1, 2000 (see Appendix C, amendment 592).

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

- (a) Base Offense Level: **17**
- (b) Specific Offense Characteristics
 - (1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.
 - (2) (Apply the Greatest) If the offense involved:
 - (A) Distribution for pecuniary gain, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the retail value of the material, but by not less than **5** levels.
 - (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.
 - (C) Distribution to a minor, increase by **5** levels.
 - (D) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual

conduct, increase by 7 levels.

- (E) Distribution other than distribution described in subdivisions (A) through (D), increase by 2 levels.
- (3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
 - (4) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.
 - (5) If a computer was used for the transmission of the material or a notice or advertisement of the material, increase by 2 levels.
- (c) Cross Reference
- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2251(c)(1)(A), 2252(a)(1)-(3), 2260.

Application Notes:

1. For purposes of this guideline—

"Distribution" means any act, including production, transportation, and possession with intent to distribute, related to the transfer of material involving the sexual exploitation of a minor.

"Distribution for pecuniary gain" means distribution for profit.

"Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. "Thing of value" means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense, knowing or believing the individual is a minor at that time.

"Minor" means an individual who had not attained the age of 18 years.

"Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"Sexual abuse or exploitation" means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor, abusive sexual contact of a minor, any similar offense under state law, or an attempt or conspiracy to commit any of the above offenses. "Sexual abuse or exploitation" does not include trafficking in material relating to the sexual abuse or exploitation of a minor.

"Sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256.

2. *If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(4) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.*

Prior convictions taken into account under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

3. *The cross reference in subsection (c)(1) is to be construed broadly to include all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.*

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 31); November 1, 1990 (see Appendix C, amendment 325); November 1, 1991 (see Appendix C, amendment 372); November 27, 1991 (see Appendix C, amendment 435); November 1, 1996 (see Appendix C, amendment 537); November 1, 1997 (see Appendix C, amendment 575); November 1, 2000 (see Appendix C, amendment 592).

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

- (a) Base Offense Level: **38**

Commentary

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

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

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

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

- (a) Base Offense Level: **15**
- (b) Specific Offense Characteristics
 - (1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.
 - (2) If the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor, increase by **2** levels.
 - (3) If the defendant's possession of the material resulted from the defendant's use of a computer, increase by **2** levels.
- (c) Cross References
 - (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).
 - (2) If the offense involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, shipping, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic), apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic).

Commentary

Statutory Provision: 18 U.S.C. § 2252(a)(4).

Application Notes:

1. For purposes of this guideline—

"Minor" means an individual who had not attained the age of 18 years.

"Visual depiction" means any visual depiction described in 18 U.S.C. § 2256(5) and (8).

2. For purposes of subsection (b)(2), a file that (A) contains a visual depiction; and (B) is stored on a magnetic, optical, digital, other electronic, or other storage medium or device, shall be considered to be one item.

If the offense involved a large number of visual depictions, an upward departure may be warranted, regardless of whether subsection (b)(2) applies.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 372). Amended effective November 27, 1991 (see Appendix C, amendment 436); November 1, 1996 (see Appendix C, amendment 537); November 1, 2000 (see Appendix C, amendment 592).

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

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

(b) Cross References

- (1) If the offense reflected an effort to conceal a substantive offense that involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).
- (2) If the offense reflected an effort to conceal a substantive offense that involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic), apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic).

Commentary

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

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

* * * * *

3. OBSCENITY

§2G3.1. Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor

- (a) Base Offense Level: **10**
- (b) Specific Offense Characteristics
 - (1) (Apply the Greatest) If the offense involved:
 - (A) Distribution for pecuniary gain, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the retail value of the material, but by not less than **5** levels.
 - (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.
 - (C) Distribution to a minor, increase by **5** levels.
 - (D) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.
 - (E) Distribution other than distribution described in subdivisions (A) through (D), increase by **2** levels.
 - (2) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.
- (c) Cross Reference
 - (1) If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) or §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), as appropriate.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1460-1463, 1465, 1466, 1470. For additional statutory

provision(s), see Appendix A (Statutory Index).

Application Note:

1. For purposes of this guideline—

"Distribution" means any act, including production, transportation, and possession with intent to distribute, related to the transfer of obscene matter.

"Distribution for pecuniary gain" means distribution for profit.

"Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. "Thing of value" means anything of valuable consideration.

"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense, knowing or believing the individual is a minor at that time.

"Minor" means an individual who had not attained the age of 16 years.

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

Background: Most federal prosecutions for offenses covered in this guideline are directed to offenses involving distribution for pecuniary gain. Consequently, the offense level under this section generally will be at least 15.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 163); November 1, 1990 (see Appendix C, amendment 326); November 1, 1991 (see Appendix C, amendment 372); November 27, 1991 (see Appendix C, amendment 437); November 1, 2000 (see Appendix C, amendment 592).

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

- (a) Base Offense Level: **12**
- (b) Specific Offense Characteristics
 - (1) If a person who received the telephonic communication was less than eighteen years of age, or if a broadcast was made between six o'clock in the morning and eleven o'clock at night, increase by **4** levels.
 - (2) If **6** plus the offense level from the table at §2F1.1(b)(1) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.

Commentary

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

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

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 164). Amended effective November 1, 2000 (see Appendix C, amendment 592). A former §2G3.2 (Obscene or Indecent Telephone Communications), effective November 1, 1987, was deleted effective November 1, 1989 (see Appendix C, amendment 164).

PART H - OFFENSES INVOLVING INDIVIDUAL RIGHTS**1. CIVIL RIGHTS**

Historical Note: Introductory Commentary to Part H, Subpart 1, effective November 1, 1987, was deleted effective November 1, 1995 (see Appendix C, amendment 521).

§2H1.1. Offenses Involving Individual Rights

- (a) Base Offense Level (Apply the Greatest):
- (1) the offense level from the offense guideline applicable to any underlying offense;
 - (2) **12**, if the offense involved two or more participants;
 - (3) **10**, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or
 - (4) **6**, otherwise.
- (b) Specific Offense Characteristic
- (1) If (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by **6** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 242, 245(b), 246, 247, 248, 1091; 42 U.S.C. § 3631.

Application Notes:

1. "Offense guideline applicable to any underlying offense" means the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law (other than an offense that is itself covered under Chapter Two, Part H, Subpart 1).

In certain cases, conduct set forth in the count of conviction may constitute more than one underlying offense (e.g., two instances of assault, or one instance of assault and one instance of arson). In such cases, use the following comparative procedure to determine the applicable base offense level: (i) determine the underlying offenses encompassed within the count of conviction as if the defendant had been charged with a conspiracy to commit multiple offenses. See Application Note 4 of §1B1.2 (Applicable Guidelines); (ii) determine the Chapter Two offense level (i.e., the base offense level, specific offense characteristics, cross references, and special instructions) for each such underlying offense; and (iii) compare each of the Chapter Two offense levels determined above with the alternative base offense level under subsection (a)(2), (3), or (4). The determination of the applicable alternative base offense level is to be

based on the entire conduct underlying the count of conviction (*i.e.*, the conduct taken as a whole). Use the alternative base offense level only if it is greater than each of the Chapter Two offense levels determined above. Otherwise, use the Chapter Two offense levels for each of the underlying offenses (with each underlying offense treated as if contained in a separate count of conviction). Then apply subsection (b) to the alternative base offense level, or to the Chapter Two offense levels for each of the underlying offenses, as appropriate.

2. "Participant" is defined in the Commentary to §3B1.1 (Aggravating Role).
3. The burning or defacement of a religious symbol with an intent to intimidate shall be deemed to involve the threat of force against a person for the purposes of subsection (a)(3)(A).
4. If the finder of fact at trial or, in the case of a plea of guilty or *nolo contendere*, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, an additional 3-level enhancement from §3A1.1(a) will apply. An adjustment from §3A1.1(a) will not apply, however, if a 6-level adjustment from §2H1.1(b) applies. *See* §3A1.1(c).
5. If subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (*see* Appendix C, amendment 303); November 1, 1990 (*see* Appendix C, amendments 313 and 327); November 1, 1991 (*see* Appendix C, amendment 430); November 1, 1995 (*see* Appendix C, amendment 521); November 1, 2000 (*see* Appendix C, amendment 591).

§2H1.2. [Deleted]

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

§2H1.3. [Deleted]

Historical Note: Section 2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property), effective November 1, 1987, amended effective November 1, 1989 (*see* Appendix C, amendment 165), was deleted by consolidation with §2H1.1 effective November 1, 1995 (*see* Appendix C, amendment 521).

§2H1.4. [Deleted]

Historical Note: Section 2H1.4 (Interference with Civil Rights Under Color of Law), effective November 1, 1987, amended effective November 1, 1989 (*see* Appendix C, amendment 166), was deleted by consolidation with §2H1.1 effective November 1, 1995 (*see* Appendix C, amendment 521).

§2H1.5. [Deleted]

Historical Note: Section 2H1.5 (Other Deprivations of Rights or Benefits in Furtherance of Discrimination), effective November 1, 1987, amended effective November 1, 1989 (see Appendix C, amendment 167) and November 1, 1990 (see Appendix C, amendment 328), was deleted by consolidation with §2H1.1 effective November 1, 1995 (see Appendix C, amendment 521).

* * * * *

2. POLITICAL RIGHTS

§2H2.1. Obstructing an Election or Registration

- (a) Base Offense Level (Apply the greatest):
 - (1) **18**, if the obstruction occurred by use of force or threat of force against person(s) or property; or
 - (2) **12**, if the obstruction occurred by forgery, fraud, theft, bribery, deceit, or other means, except as provided in (3) below; or
 - (3) **6**, if the defendant (A) solicited, demanded, accepted, or agreed to accept anything of value to vote, refrain from voting, vote for or against a particular candidate, or register to vote, (B) gave false information to establish eligibility to vote, or (C) voted more than once in a federal election.

Commentary

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

Application Note:

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

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 168); November 1, 1995 (see Appendix C, amendment 534).

* * * * *

3. PRIVACY AND EAVESDROPPING

§2H3.1. Interception of Communications or Eavesdropping

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

Commentary

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

Application Note:

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

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

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

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

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

(b) Specific Offense Characteristic

- (1) If the offense was committed for pecuniary gain, increase by
- 3**
- levels.

CommentaryStatutory Provision: 18 U.S.C. § 2512.Historical Note: Effective November 1, 1987.**§2H3.3. Obstructing Correspondence**

(a) Base Offense Level:

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

CommentaryStatutory Provision: 18 U.S.C. § 1702. For additional statutory provision(s), see Appendix A (Statutory Index).Background: The statutory provision covered by this guideline is sometimes used to prosecute offenses more accurately described as theft or destruction of mail. In such cases, §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or §2B1.3 (Property Damage or Destruction) is to be applied.Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 313).

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4. PEONAGE, INVOLUNTARY SERVITUDE, AND SLAVE TRADE**§2H4.1. Peonage, Involuntary Servitude, and Slave Trade**

- (a) Base Offense Level:
- 22**

- (b) Specific Offense Characteristics
- (1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by **4** levels; or (B) if any victim sustained serious bodily injury, increase by **2** levels.
 - (2) If a dangerous weapon was used, increase by **2** levels.
 - (3) If any victim was held in a condition of peonage or involuntary servitude for (A) more than one year, increase by **3** levels; (B) between 180 days and one year, increase by **2** levels; or (C) more than 30 days but less than 180 days, increase by **1** level.
 - (4) If any other felony offense was committed during the commission of, or in connection with, the peonage or involuntary servitude offense, increase to the greater of:
 - (A) **2** plus the offense level as determined above, or
 - (B) **2** plus the offense level from the offense guideline applicable to that other offense, but in no event greater than level **43**.

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 1581-1588.

Application Notes:

1. For purposes of this guideline—

"A dangerous weapon was used" means that a firearm was discharged, or that a firearm or dangerous weapon was otherwise used.

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

2. Under subsection (b)(4), "any other felony offense" means any conduct that constitutes a felony offense under federal, state, or local law (other than an offense that is itself covered by this subpart). When there is more than one such other offense, the most serious such offense (or group of closely related offenses in the case of offenses that would be grouped together under §3D1.2(d)) is to be used. See Application Note 3 of §1B1.5 (Interpretation of References to other Offense Guidelines).

3. If the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude, an upward departure may be warranted.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1995 (see Appendix C, amendment 521); May 1, 1997 (see Appendix C, amendment 542); November 1, 1997 (see Appendix C, amendment 559).

PART J - OFFENSES INVOLVING THE ADMINISTRATION OF JUSTICE**§2J1.1. Contempt**

Apply §2X5.1 (Other Offenses).

Commentary

Statutory Provisions: 18 U.S.C. §§ 401, 228. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. *Because misconduct constituting contempt varies significantly and the nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are highly context-dependent, the Commission has not provided a specific guideline for this offense. In certain cases, the offense conduct will be sufficiently analogous to §2J1.2 (Obstruction of Justice) for that guideline to apply.*
2. *For offenses involving the willful failure to pay court-ordered child support (violations of 18 U.S.C. § 228), the most analogous guideline is §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). The amount of the loss is the amount of child support that the defendant willfully failed to pay. Note: This guideline applies to second and subsequent offenses under 18 U.S.C. § 228(a)(1) and to any offense under 18 U.S.C. § 228(a)(2) and (3). A first offense under 18 U.S.C. § 228(a)(1) is not covered by this guideline because it is a Class B misdemeanor.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (*see* Appendix C, amendments 170 and 171); November 1, 1993 (*see* Appendix C, amendment 496); November 1, 1998 (*see* Appendix C, amendment 588).

§2J1.2. Obstruction of Justice

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

(c) Cross Reference

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

Commentary

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

Application Notes:

1. "Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.
2. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation or trial of the obstruction of justice count.
3. In the event that the defendant is convicted under this section as well as for the underlying offense (*i.e.*, the offense that is the object of the obstruction), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).
4. If a weapon was used, or bodily injury or significant property damage resulted, a departure may be warranted. See Chapter Five, Part K (Departures).
5. The inclusion of "property damage" under subsection (b)(1) is designed to address cases in which property damage is caused or threatened as a means of intimidation or retaliation (*e.g.*, to intimidate a witness from, or retaliate against a witness for, testifying). Subsection (b)(1) is not intended to apply, for example, where the offense consisted of destroying a ledger containing an incriminating entry.

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

The specific offense characteristics reflect the more serious forms of obstruction. Because the conduct covered by this guideline is frequently part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense, a cross reference to §2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person.

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

§2J1.3. Perjury or Subornation of Perjury; Bribery of Witness

- (a) Base Offense Level: **12**
- (b) Specific Offense Characteristics
 - (1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to suborn perjury, increase by **8** levels.
 - (2) If the perjury, subornation of perjury, or witness bribery resulted in substantial interference with the administration of justice, increase by **3** levels.
- (c) Cross Reference
 - (1) If the offense involved perjury, subornation of perjury, or witness bribery in respect to a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.
- (d) Special Instruction
 - (1) In the case of counts of perjury or subornation of perjury arising from testimony given, or to be given, in separate proceedings, do not group the counts together under §3D1.2 (Groups of Closely Related Counts).

Commentary

Statutory Provisions: 18 U.S.C. §§ 201(b)(3), (4), 1621-1623. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. "Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

2. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation or trial of the perjury count.
3. In the event that the defendant is convicted under this section as well as for the underlying offense (*i.e.*, the offense with respect to which he committed perjury, subornation of perjury, or witness bribery), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).
4. If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).
5. "Separate proceedings," as used in subsection (d)(1), includes different proceedings in the same case or matter (*e.g.*, a grand jury proceeding and a trial, or a trial and retrial), and proceedings in separate cases or matters (*e.g.*, separate trials of codefendants), but does not include multiple grand jury proceedings in the same case.

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 175); November 1, 1991 (see Appendix C, amendments 401 and 402); November 1, 1993 (see Appendix C, amendment 481).

§2J1.4. Impersonation

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristic
 - (1) If the impersonation was committed for the purpose of conducting an unlawful arrest, detention, or search, increase by **6** levels.
- (c) Cross Reference
 - (1) If the impersonation was to facilitate another offense, apply the guideline for an attempt to commit that offense, if the resulting offense level is greater than the offense level determined above.

Commentary

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

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

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

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

(a) Base Offense Level:

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

(b) Specific Offense Characteristic

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

Commentary

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

Application Notes:

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

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 177); November 1, 1991 (see Appendix C, amendment 401).

§2J1.6. Failure to Appear by Defendant

- (a) Base Offense Level:
- (1) **11**, if the offense constituted a failure to report for service of sentence; or
 - (2) **6**, otherwise.
- (b) Specific Offense Characteristics
- (1) If the base offense level is determined under subsection (a)(1), and the defendant --
 - (A) voluntarily surrendered within 96 hours of the time he was originally scheduled to report, decrease by **5** levels; or
 - (B) was ordered to report to a community corrections center, community treatment center, "halfway house," or similar facility, and subdivision (A) above does not apply, decrease by **2** levels.

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

Commentary

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

Application Notes:

1. "Underlying offense" means the offense in respect to which the defendant failed to appear.

2. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation or trial of the failure to appear count.
3. In the case of a failure to appear for service of sentence, any term of imprisonment imposed on the failure to appear count is to be imposed consecutively to any term of imprisonment imposed for the underlying offense. See §5G1.3(a). The guideline range for the failure to appear count is to be determined independently and the grouping rules of §§3D1.1-3D1.5 do not apply.

In the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense, and the failure to appear count and the count or counts for the underlying offense are grouped together under §3D1.2(c). (Note that 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, although if a sentence of imprisonment on the failure to appear count is imposed, the statute requires that the sentence be imposed to run consecutively to any other sentence of imprisonment. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1-3D1.5 apply. See §3D1.1(b), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a "total punishment" that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, if the combined applicable guideline range for both counts is 30-37 months and the court determines that a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the failure to appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive, failure to appear conduct has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. § 3146(b)(2).)

4. If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (e.g., perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under §3C1.1 (Obstruction of Justice) is made because of the operation of the rules set out in Application Note 3.
5. In some cases, the defendant may be sentenced on the underlying offense (the offense in respect to which the defendant failed to appear) before being sentenced on the failure to appear offense. In such cases, criminal history points for the sentence imposed on the underlying offense are to be counted in determining the guideline range on the failure to appear offense only where the offense level is determined under subsection (a)(1) i.e., where the offense constituted a failure to report for service of sentence).

Background: This section applies to a failure to appear by a defendant who was released pending trial, sentencing, appeal, or surrender for service of sentence. Where the base offense level is

determined under subsection (a)(2), the offense level increases in relation to the statutory maximum of the underlying offense.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 329); November 1, 1991 (see Appendix C, amendment 403); November 1, 1998 (see Appendix C, amendment 579).

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

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

Commentary

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

Application Notes:

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

Background: An enhancement under 18 U.S.C. § 3147 may be imposed only after sufficient notice to the defendant by the government or the court, and applies only in the case of a conviction for a federal offense that is committed while on release on another federal charge.

Legislative history indicates that the mandatory nature of the penalties required by 18 U.S.C. § 3147 was to be eliminated upon the implementation of the sentencing guidelines. "Section 213(h) [renumbered as §200(g) in the Crime Control Act of 1984] amends the new provision in title I of this Act relating to consecutive enhanced penalties for committing an offense on release (new 18 U.S.C. § 3147) by eliminating the mandatory nature of the penalties in favor of utilizing sentencing guidelines." (Senate Report 98-225 at 186). Not all of the phraseology relating to the requirement of a mandatory sentence, however, was actually deleted from the statute. Consequently, it appears that the court is required to impose a consecutive sentence of

imprisonment under this provision, but there is no requirement as to any minimum term. This guideline is drafted to enable the court to determine and implement a combined "total punishment" consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement. Guideline provisions that prohibit the grouping of counts of conviction requiring consecutive sentences (e.g., the introductory paragraph of §3D1.2; §5G1.2(a)) do not apply to this section because 18 U.S.C. § 3147 is an enhancement, not a count of conviction.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 32); November 1, 1989 (see Appendix C, amendment 178); November 1, 1991 (see Appendix C, amendment 431).

§2J1.8. [Deleted]

Historical Note: Section 2J1.8 (Bribery of Witness), effective November 1, 1987, amended effective January 15, 1988 (see Appendix C, amendment 33), November 1, 1989 (see Appendix C, amendment 179), and November 1, 1991 (see Appendix C, amendment 401), was deleted by consolidation with §2J1.3 effective November 1, 1993 (see Appendix C, amendment 481).

§2J1.9. Payment to Witness

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

Commentary

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

Application Notes:

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

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

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

PART K - OFFENSES INVOLVING PUBLIC SAFETY**1. EXPLOSIVES AND ARSON****§2K1.1. Failure to Report Theft of Explosive Materials; Improper Storage of Explosive Materials**

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

Commentary

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

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (*see* Appendix C, amendment 404); November 1, 1993 (*see* Appendix C, amendment 481).

§2K1.2. [Deleted]

Historical Note: Section 2K1.2 (Improper Storage of Explosive Materials), effective November 1, 1987, amended effective November 1, 1991 (*see* Appendix C, amendment 404), was deleted by consolidation with §2K1.1 effective November 1, 1993 (*see* Appendix C, amendment 481).

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

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

(b) Specific Offense Characteristics

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

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

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

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

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

(c) Cross Reference

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a)-(e), (h), (i), 844(d), (g), 1716; 26 U.S.C. § 5685.

Application Notes:

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

8. *Under subsection (c)(1), the offense level for the underlying offense (which may be a federal, state, or local offense) is to be determined under §2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).*
9. *Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), or (a)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*
10. *An upward departure may be warranted in any of the following circumstances: (1) the quantity of explosive materials significantly exceeded 1000 pounds; (2) the explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder explosives (e.g., plastic explosives); (3) the defendant knowingly distributed explosive materials to a person under twenty-one years of age; or (4) the offense posed a substantial risk of death or bodily injury to multiple individuals.*
11. *As used in subsections (b)(3) and (c)(1), "another felony offense" and "another offense" refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 183); November 1, 1991 (see Appendix C, amendment 373); November 1, 1992 (see, Appendix C, amendment 471); November 1, 1993 (see, Appendix C, amendment 478); November 1, 1995 (see Appendix C, amendment 534); November 1, 1997 (see Appendix C, amendment 568).

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

- (a) Base Offense Level (Apply the Greatest):
 - (1) **24**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; or (B) involved the destruction or attempted destruction of a dwelling;
 - (2) **20**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than a dwelling; or (C) endangered a dwelling, or a structure other than a dwelling;
 - (3) **2** plus the offense level from §2F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud; or
 - (4) **2** plus the offense level from §2B1.3 (Property Damage or Destruction).

- (b) Specific Offense Characteristics
- (1) If the offense was committed to conceal another offense, increase by **2** levels.
 - (2) If the base offense level is not determined under (a)(4), and the offense occurred on a national cemetery, increase by **2** levels.
- (c) Cross Reference
- (1) If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.

Commentary

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

Application Notes:

1. If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).
2. Creating a substantial risk of death or serious bodily injury includes creating that risk to fire fighters and other emergency and law enforcement personnel who respond to or investigate an offense.
3. "Explosives," as used in the title of this guideline, includes any explosive, explosive material, or destructive device.
4. "National cemetery " means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

Background: Subsection (b)(2) implements the directive to the Commission in section 2 of Public Law 105–101.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 see Appendix C, amendments 182, 184, and 185); November 1, 1990 see Appendix C, amendment 330); November 1, 1991 see Appendix C, amendment 404); November 1, 1998 see Appendix C, amendment 576).

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

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

If more than one applies, use the greatest:

- (1) If the offense was committed willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life, increase by **15** levels.
 - (2) If the defendant was prohibited by another federal law from possessing the weapon or material, increase by **2** levels.
 - (3) If the defendant's possession of the weapon or material would have been lawful but for 49 U.S.C. § 46505 and he acted with mere negligence, decrease by **3** levels.
- (c) Cross Reference
 - (1) If the defendant used or possessed the weapon or material in committing or attempting another offense, apply the guideline for such other offense, or §2X1.1 (Attempt, Solicitation, or Conspiracy), as appropriate, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 49 U.S.C. § 46505 (formerly 49 U.S.C. § 1472(l)).

Background: This guideline provides an enhancement where the defendant was a person prohibited by federal law from possession of the weapon or material. A decrease is provided in a case of mere negligence where the defendant was otherwise authorized to possess the weapon or material.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 182, 186, 187, and 303); November 1, 1991 (see Appendix C, amendment 404); November 1, 1992 (see Appendix C, amendment 443); November 1, 1995 (see Appendix C, amendment 534); November 1, 1997 (see Appendix C, amendment 560).

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

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

of Explosives Materials; Prohibited Transactions Involving Explosive Materials).

Commentary

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

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

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

§2K1.7. [Deleted]

Historical Note: Section 2K1.7 (Use of Fire or Explosives to Commit a Federal Felony), effective November 1, 1989 (see Appendix C, amendment 188), amended effective November 1, 1990 (see Appendix C, amendment 332), was deleted by consolidation with §2K2.4 effective November 1, 1993 (see Appendix C, amendment 481).

* * * * *

2. FIREARMS

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

- (a) Base Offense Level (Apply the Greatest):
- (1) **26**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or
 - (2) **24**, if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or
 - (3) **22**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant had one prior felony conviction of either a crime of violence or controlled substance offense; or

- (4) **20**, if --
- (A) the defendant had one prior felony conviction of either a crime of violence or a controlled substance offense; or
- (B) the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); and the defendant (i) is a prohibited person; or (ii) is convicted under 18 U.S.C. § 922(d); or
- (5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); or
- (6) **14**, if the defendant (A) is a prohibited person; or (B) is convicted under 18 U.S.C. § 922(d); or
- (7) **12**, except as provided below; or
- (8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1).

(b) Specific Offense Characteristics

- (1) If the offense involved three or more firearms, increase as follows:

	<u>Number of Firearms</u>	<u>Increase in Level</u>
(A)	3-4	add 1
(B)	5-7	add 2
(C)	8-12	add 3
(D)	13-24	add 4
(E)	25-49	add 5
(F)	50 or more	add 6 .

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

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

- (5) If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.
- (6) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.
- (c) Cross Reference
- (1) If the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense, apply --
- (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or
- (B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r)-(w), (x)(1), 924(a), (b), (e)-(i), (k)-(o); 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. "Firearm" includes (i) any weapon (including a starter gun) which will, or is designed to, or may readily be converted to, expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. See 18 U.S.C. § 921(a)(3).
2. "Ammunition" includes ammunition or cartridge cases, primer, bullets, or propellant powder designed for use in any firearm. See 18 U.S.C. § 921(a)(17)(A).
3. A "firearm described in 26 U.S.C. § 5845(a)" includes: (i) a shotgun having a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; a rifle having a barrel or barrels of less than 16 inches in length; or a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; and (v) certain unusual weapons defined in 26 U.S.C. § 5845(e) (that are not conventional, unaltered handguns, rifles, or shotguns). For a more detailed definition,

refer to 26 U.S.C. § 5845.

A "firearm described in 18 U.S.C. § 921(a)(30)" (pertaining to semiautomatic assault weapons) does not include a weapon exempted under the provisions of 18 U.S.C. § 922(v)(3).

4. "Destructive device" is a type of firearm listed in 26 U.S.C. § 5845(a), and includes any explosive, incendiary, or poison gas -- (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses; any type of weapon which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; or any combination of parts either designed or intended for use in converting any device into any destructive device listed above. For a more detailed definition, refer to 26 U.S.C. § 5845(f).
5. "Crime of violence," "controlled substance offense," and "prior felony conviction(s)," are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1), subsection (a), subsection (b), and Application Note 1 of the Commentary, respectively. For purposes of determining the number of such convictions under subsections (a)(1), (a)(2), (a)(3), and (a)(4)(A), count any such prior conviction that receives any points under §4A1.1 (Criminal History Category).
6. "Prohibited person," as used in subsections (a)(4)(B) and (a)(6), means anyone who: (i) is under indictment for, or has been convicted of, a "crime punishable by imprisonment for more than one year," as defined by 18 U.S.C. § 921(a)(20); (ii) is a fugitive from justice; (iii) is an unlawful user of, or is addicted to, any controlled substance; (iv) has been adjudicated as a mental defective or involuntarily committed to a mental institution; (v) being an alien, is illegally or unlawfully in the United States; (vi) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child as defined in 18 U.S.C. § 922(d)(8); or (vii) has been convicted in any court of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33).
7. "Felony offense," as used in subsection (b)(5), means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.
8. Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.
9. For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.

10. Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (*e.g.*, prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1) - (a)(5), subsection (b)(2) is not applicable.
11. A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (*e.g.*, subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and a two-level enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.
12. If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4) unless the offense involved a firearm with an altered or obliterated serial number. This is because the base offense level takes into account that the firearm or ammunition was stolen.

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4) unless the offense involved a stolen firearm or stolen ammunition. This is because the base offense level takes into account that the firearm had an altered or obliterated serial number.

13. Under subsection (b)(6), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (*e.g.*, if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).
14. Under subsection (c)(1), the offense level for the underlying offense (which may be a federal, state, or local offense) is to be determined under §2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).
15. Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).
16. An upward departure may be warranted in any of the following circumstances: (1) the number of firearms significantly exceeded fifty; (2) the offense involved multiple National Firearms Act weapons (*e.g.*, machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (3) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C.

§ 921(a)(17)(B)); or (4) the offense posed a substantial risk of death or bodily injury to multiple individuals.

17. A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. *See* §4B1.4.
18. As used in subsections (b)(5) and (c)(1), "another felony offense" and "another offense" refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.
19. The enhancement under subsection (b)(4) for a stolen firearm or a firearm with an altered or obliterated serial number applies whether or not the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 189); November 1, 1990 (see Appendix C, amendment 333); November 1, 1991 (see Appendix C, amendment 374); November 1, 1992 (see Appendix C, amendment 471); November 1, 1993 (see Appendix C, amendment 478); November 1, 1995 (see Appendix C, amendment 522); November 1, 1997 (see Appendix C, amendments 568 and 575); November 1, 1998 (see Appendix C, amendments 578 and 586); November 1, 2000 (see Appendix C, amendment 605).

§2K2.2. [Deleted]

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

§2K2.3. [Deleted]

Historical Note: Section 2K2.3 (Receiving, Transporting, Shipping or Transferring a Firearm or Ammunition With Intent to Commit Another Offense, or With Knowledge that It Will Be Used in Committing Another Offense), effective November 1, 1989 (see Appendix C, amendment 189), was deleted by consolidation with §2K2.1 effective November 1, 1991 (see Appendix C, amendment 374). A former §2K2.3 (Prohibited Transactions in or Shipment of Firearms and Other Weapons), effective November 1, 1987, was deleted by consolidation with §2K2.2 effective November 1, 1989 (see Appendix C, amendment 189).

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

- (a) If the defendant, whether or not convicted of another crime, was convicted of violating:
 - (1) Section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute.
 - (2) Section 924(c) or section 929(a) of title 18, United States Code, the guideline

sentence is the minimum term of imprisonment required by statute.

(b) Special Instructions for Fines

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 844(h), 924(c), 929(a).

Application Notes:

1. Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Subsection (a) reflects this distinction. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 844(h) is the term required by the statute, and the guideline sentence for a defendant convicted under 18 U.S.C. § 924(c) or § 929(a) is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 844(h), 924(c), and 929(a) requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

A sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history, particularly in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense and has at least two prior felony convictions for a crime of violence or a controlled substance offense that would have resulted in application of §4B1.1 (Career Offender) if that guideline applied to these offenses. See Application Note 3.

2. If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under §2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or §2K2.1(b)(5) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under §2K2.1(b)(5) would not apply.

In a few cases, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (i.e., the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).

- 3. Do not apply Chapter Three (Adjustments) and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of these chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).*
- 4. Imposition of a term of supervised release is governed by the provisions of §5D1.1 (Imposition of a Term of Supervised Release).*
- 5. Subsection (b) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a). This is required because the offense level for the underlying offense may be reduced when there is also a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) in that any specific offense characteristic for possession, brandishing, use, or discharge of a firearm is not applied (see Application Note 2). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. § 3571.*

Background: Section 844(h) of title 18, United States Code, provides a mandatory term of imprisonment. Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment. A sentence imposed pursuant to any of these statutes must be imposed to run consecutively to any other term of imprisonment. To avoid double counting, when a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for explosive or firearm discharge, use, brandishing, or possession is not applied in respect to such underlying offense.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 190); November 1, 1990 (see Appendix C, amendment 332); November 1, 1991 (see Appendix C, amendment 405); November 1, 1993 (see Appendix C, amendments 481 and 489); November 1, 2000 (see Appendix C, amendments 598, 599, and 600).

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

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

Commentary

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

Application Notes:

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

Instructions).

2. *"Federal court facility" includes the courtroom; judges' chambers; witness rooms; jury deliberation rooms; attorney conference rooms; prisoner holding cells; offices and parking facilities of the court clerks, the United States attorney, and the United States marshal; probation and parole offices; and adjoining corridors and parking facilities of any court of the United States. See 18 U.S.C. § 930(f)(3).*
3. *"School zone" is defined at 18 U.S.C. § 922(q). A sentence of imprisonment under 18 U.S.C. § 922(q) must run consecutively to any sentence of imprisonment imposed for any other offense. In order to comply with the statute, when the guideline range is based on the underlying offense, and the defendant is convicted both of the underlying offense and 18 U.S.C. § 922(q), the court should apportion the sentence between the count for the underlying offense and the count under 18 U.S.C. § 922(q). For example, if the guideline range is 30-37 months and the court determines "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense, plus 6 months under 18 U.S.C. § 922(q) would satisfy this requirement.*
4. *Where the firearm was brandished, discharged, or otherwise used, in a federal facility, federal court facility, or school zone, and the cross reference from subsection (c)(1) does not apply, an upward departure may be warranted.*

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

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3. MAILING INJURIOUS ARTICLES

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

§2K3.1. [Deleted]

Historical Note: Section 2K3.1 (Unlawfully Transporting Hazardous Materials in Commerce), effective November 1, 1987, was deleted by consolidation with §2Q1.2 effective November 1, 1993 (see Appendix C, amendment 481).

§2K3.2. Feloniously Mailing Injurious Articles

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

Commentary

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

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

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