

# PRIMER



# RICO GUIDELINE

(Racketeer Influenced and Corrupt Organizations)

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TABLE OF CONTENTS

**I. INTRODUCTION..... 1**

**II. RELEVANT STATUTES..... 1**

**A. THE STATUTORY SCHEME..... 1**

**1. 18 U.S.C. § 1962: Prohibited Activities..... 1**

**2. 18 U.S.C. § 1961: Definitions ..... 4**

**3. 18 U.S.C. § 1963: Criminal Penalties ..... 7**

**4. Double Jeopardy Considerations for RICO Conspiracy and Substantive Offenses..... 8**

**III. SECTION 2E1.1 (UNLAWFUL CONDUCT RELATING TO RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS)..... 9**

**A. GENERALLY..... 9**

**B. DETERMINING THE OFFENSE LEVEL FOR A RICO OFFENSE..... 10**

**1. Relevant Conduct ..... 11**

**2. Calculating the Offense Level for a RICO Offense ..... 13**

**C. APPLICATION CONSIDERATIONS ..... 20**

**1. RICO Count and Other Counts of Conviction ..... 20**

**2. RICO Count and Acceptance of Responsibility (§3E1.1) ..... 20**

**3. RICO Offense as a Predicate Offense for the Career Offender Guideline (§4B1.1) and 18 U.S.C. § 924(c)..... 20**

**4. Ex Post Facto Issues and the “One Book” Rule ..... 21**

## I. INTRODUCTION

The purpose of this primer is to provide a general overview of the pertinent statutes, sentencing guidelines, and relevant case law regarding the Racketeer Influenced and Corrupt Organizations Act,<sup>1</sup> commonly referred to as the “RICO Act” or simply “RICO.” This primer focuses primarily on application of the RICO guideline and related sentencing issues. It is not intended as a comprehensive compilation of case law addressing these issues or as a substitute for independent research and primary authority.

## II. RELEVANT STATUTES

### A. THE STATUTORY SCHEME

The RICO Act<sup>2</sup> provides for criminal prosecution of racketeering activities as part of an ongoing criminal organization. As noted in RICO’s legislative history, RICO is designed to address the infiltration of legitimate enterprises by organized crime and other illegal ventures.<sup>3</sup> Some examples provided in the legislative history include the infiltration of legitimate businesses such as laundry services, retail stores, restaurants and nightclubs, or labor unions to commit gambling, money laundering, loan sharking, or extortion.<sup>4</sup> Under RICO, leaders of criminal organizations can be held liable for crimes they order others to commit, or assist them in committing, in furtherance of the ongoing criminal organization. As discussed below, section 1962 sets forth three substantive offenses and makes it a crime to conspire to commit any of the three substantive offenses, section 1961 provides definitions for terms used in the RICO statute, and section 1963 establishes criminal penalties, including imprisonment, fines, and criminal forfeiture.<sup>5</sup>

#### 1. 18 U.S.C. § 1962: Prohibited Activities

Section 1962(a), (b), and (c) set forth the substantive prohibited activities. Section 1962(d) makes it unlawful to conspire to commit any such prohibited activities. Each of the prohibited activities includes, as a necessary element, proof of a “pattern of racketeering activity” or “collection of an unlawful debt.”<sup>6</sup>

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<sup>1</sup> Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941-48 (codified as amended at 18 U.S.C. §§ 1961-1968).

<sup>2</sup> See 18 U.S.C. §§ 1961-68.

<sup>3</sup> See S. Rep. No. 91-617, 76-77 (1969).

<sup>4</sup> *Id.*

<sup>5</sup> The RICO Act also provides for civil remedies and other procedural requirements against persons who engage in racketeering activities, which are set forth at 18 U.S.C. §§ 1964-68.

<sup>6</sup> 18 U.S.C. § 1962.

**a. 18 U.S.C. § 1962(a)**

Under section 1962(a), it is a crime to “use or invest” any income derived from “a pattern of racketeering activity” or through “collection of an unlawful debt” to establish, acquire an interest in, or operate “any enterprise” engaged in or affecting interstate commerce.<sup>7</sup> To establish an offense under section 1962(a), the government must show that the defendant had derived income from a pattern of racketeering or collection of unlawful debt, and then used or invested some part of that income in the establishment and operation of an enterprise, which was engaged in or its activities affected commerce.<sup>8</sup> An example of a violation of section 1962(a) is a drug dealer using the proceeds of a pattern of drug trafficking crimes to invest in or operate a legitimate business.<sup>9</sup>

**b. 18 U.S.C. § 1962(b)**

Section 1962(b) prohibits acquiring or maintaining an interest in, or control of, any enterprise that is engaged in or affects interstate commerce “through a pattern of racketeering activity or through the collection of an unlawful debt.”<sup>10</sup> This provision essentially makes it unlawful to take over an enterprise that affects interstate commerce through a pattern of racketeering activity or collection of unlawful debt. An example of a section 1962(b) violation is an organized crime figure taking over a legitimate business through a pattern of extortionate and loansharking acts designed to intimidate the owners into selling the business to him.<sup>11</sup>

**c. 18 U.S.C. § 1962(c)**

Section 1962(c) makes it unlawful for any person “employed by or associated with any enterprise” engaged in or affecting interstate or foreign commerce “to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.”<sup>12</sup> For example, employees of the New York State Department of Motor Vehicles violated this provision by using the

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<sup>7</sup> *Id.* § 1962(a).

<sup>8</sup> *See, e.g.*, *United States v. Vogt*, 910 F.2d 1184, 1194 (4th Cir. 1990); *United States v. Carlock*, 806 F.2d 535, 547 (5th Cir. 1986).

<sup>9</sup> *See, e.g.*, *United States v. Robertson*, 514 U.S. 669 (1999) (defendant convicted of narcotic offenses and of violating section 1962(a) by investing the proceeds of those unlawful activities in a gold mine).

<sup>10</sup> 18 U.S.C. § 1962(b).

<sup>11</sup> *See, e.g.*, *United States v. Biasucci*, 786 F.2d 504, 506–07 (2d Cir. 1986) (acquisition of interests in and control over businesses through loansharking activities involving collection of unlawful debt); *see also* *United States v. Jacobson*, 691 F.2d 110, 112 (2d Cir. 1982) (acquisition of bakery’s lease as security for usurious loan).

<sup>12</sup> 18 U.S.C. § 1962(c).

DMV to process fraudulent licenses and registrations for stolen vehicles in exchange for money.<sup>13</sup>

Section 1962(c) requires the existence of two distinct entities: a “person” and an “enterprise” that is not simply the same person referred to by a different name.<sup>14</sup> Criminal liability depends on showing that the person conducted or participated in the conduct of the enterprise’s affairs.<sup>15</sup> For purposes of RICO, a corporate employee (a natural person) is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status, even where the employee is the corporation’s sole owner.<sup>16</sup> Likewise, the existence of an enterprise is separate from the pattern of racketeering activity in which the enterprise engages. The enterprise is proved by evidence of an ongoing organization or by evidence that various associates function as a continuing unit, while the pattern of racketeering activity is proved by evidence of at least two racketeering acts committed by participants in the enterprise.<sup>17</sup>

#### **d. 18 U.S.C. § 1962(d)**

Section 1962(d) provides that “[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.”<sup>18</sup> Unlike the general conspiracy statute applicable to federal crimes, which requires proof that at least one of the conspirators committed an “act to effect the object of the conspiracy,”<sup>19</sup> there is no requirement under section 1962(d) that an “overt act” or specific act be committed in furtherance of a RICO conspiracy.<sup>20</sup>

Furthermore, a defendant who conspires to commit a substantive offense under section 1962(a), (b), or (c) can be convicted of a RICO conspiracy even though the defendant does not personally commit or agree to commit the racketeering activity or collection of unlawful debt required for commission of the underlying substantive

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<sup>13</sup> See *United States v. Alkins*, 925 F.2d 541, 551–53 (2d Cir. 1991).

<sup>14</sup> See *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001).

<sup>15</sup> See *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993).

<sup>16</sup> See *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 163 (“After all, incorporation’s basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.”).

<sup>17</sup> *United States v. Turkette*, 452 U.S. 576, 583 (1981).

<sup>18</sup> 18 U.S.C. § 1962(d).

<sup>19</sup> See *id.* § 371.

<sup>20</sup> See *id.* § 1962(d). See also *Salinas v. United States*, 522 U.S. 52, 61 (1997) (“There is no requirement of some overt act or specific act in the [RICO statute], unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an ‘act to effect the object of the conspiracy.’”).

offense.<sup>21</sup>

## **2. 18 U.S.C. § 1961: Definitions**

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The RICO Act broadly defines certain terms and concepts used in the statute, including the following:

**Racketeering activity:** RICO defines “racketeering activity” as any crime enumerated in subdivisions A–G of that subsection. Notably, the listed crimes are often referred to as “predicate acts,” because they constitute the “predicate” for a RICO violation.<sup>22</sup> Criminal acts committed outside of the United States can serve as RICO predicate offenses, “but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially.”<sup>23</sup>

Subdivision A includes “any act or threat involving” listed state offenses, such as murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in a controlled substance, and other serious crimes, punishable by imprisonment for more than one year.<sup>24</sup> This definition does not list specific state statutes. Rather, as the Supreme Court has held in the context of plea bargaining, a state statutory offense may constitute a racketeering act under subdivision A provided it substantially conforms to the “generic” definition of the state offense referenced at the time RICO was enacted.<sup>25</sup> Further, the language “chargeable under state law” means that the offense was chargeable under state law at the time the underlying conduct was committed.<sup>26</sup>

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<sup>21</sup> See *Salinas*, 522 U.S. at 65–66 (explaining that a defendant can violate section 1962(d) without “himself commit[ing] or agree[ing] to commit two or more” acts of racketeering activity).

<sup>22</sup> See, e.g., *Boyle v. United States*, 556 U.S. 938 (2009).

<sup>23</sup> *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2102 (2016) (providing, by way of example, that “a violation of § 1962 could be premised on a pattern of killings of Americans abroad in violation of § 2332(a)—a predicate that all agree applies extraterritorially—whether or not any domestic predicates are also alleged”); see also *United States v. Vasquez*, 899 F.3d 363, 375 (5th Cir. 2018) (citation omitted) (“A violation of § 1962 may be based on a pattern of racketeering that includes predicate offenses committed abroad . . . [b]ut if the predicates do not apply extraterritorially, then neither does RICO.”), *petition for cert. filed*, (U.S. Nov. 5, 2018) (No. 18-6672).

<sup>24</sup> 18 U.S.C. § 1961(1)(A).

<sup>25</sup> See *Shepard v. United States*, 544 U.S. 13 (2005) (In a plea bargain, where a state’s statute is broader than the generic offense constituting the predicate act, a court may look only to the “terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information” in determining whether the elements of the generic offense were met).

<sup>26</sup> See, e.g., *United States v. Licavoli*, 725 F.2d 1040, 1045–47 (6th Cir. 1984); *United States v. Malatesta*, 583 F.2d 748, 757 (5th Cir. 1978); *United States v. Forsythe*, 560 F.2d 1127, 1134–35 (3d Cir. 1977) (fact that former state bribery statute was recodified to provide for a term of imprisonment not exceeding one year did not preclude prosecution under RICO for conduct prior to enactment of the subsequent bribery statute).

Subdivisions B, C, E, F, and G include “any act which is indictable under” listed federal statutes and offenses.<sup>27</sup> Unlike subdivision A, these provisions are narrower in that the federal offense must be an act that is “indictable under” one of the listed statutes at the time the subdivision was enacted; attempts and conspiracies may not be used as racketeering acts unless they are expressly included within the terms of the statute.<sup>28</sup> For example, a conspiracy to violate the Hobbs Act<sup>29</sup> may be used as a predicate racketeering act under subdivision B because the Hobbs Act statute expressly makes conspiracy a crime.<sup>30</sup>

Subdivision D includes “any offense involving” listed categories of federal offenses.<sup>31</sup> Because this subdivision uses the phrase “any offense involving,” it includes attempts and conspiracies.<sup>32</sup>

Pattern of Racketeering: A “pattern of racketeering activity” requires “at least two acts of racketeering activity,” one of which occurred after the effective date of the RICO statute and the last of which occurred within ten years after the commission of a prior racketeering act.<sup>33</sup> The ten-year limitation excludes any period of imprisonment.<sup>34</sup> As the Supreme Court has held, establishing a pattern of racketeering activity requires more than simply proving two racketeering acts within a statutorily prescribed time period; there must also be proof that the racketeering acts are related to and amount to, or pose a threat of, continued criminal activity.<sup>35</sup>

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<sup>27</sup> 18 U.S.C. § 1961(1)(B), (C), (E), (F), and (G) (listing specific federal statutes constituting racketeering acts). Notably, subdivision G lists as racketeering activity any act indictable under any provision listed in section 2332b(g)(5)(B) of title 18, which adds approximately 50 terrorism-related offenses to the list of racketeering acts. *See* 18 U.S.C. § 2332b (Acts of terrorism transcending national boundaries).

<sup>28</sup> *See* 18 U.S.C. § 1961(1)(B), (C), (E), (F), and (G).

<sup>29</sup> *See id.* § 1951.

<sup>30</sup> *See id.* § 1951(a) (“Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . .”).

<sup>31</sup> 18 U.S.C. § 1961(1)(D).

<sup>32</sup> *See, e.g.,* *United States v. Darden*, 70 F.3d 1507, 1524–25 (8th Cir. 1995) (conspiracy to distribute and possession with intent to distribute controlled substances constitute RICO predicate acts, but simple possession of cocaine does not); *United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988) (conspiracy to possess and distribute a controlled substance constitute RICO predicate acts); *United States v. Weisman*, 624 F.2d 1118, 1123–24 (2d Cir. 1980) (conspiracy to commit offense involving bankruptcy fraud or securities fraud is a RICO predicate act).

<sup>33</sup> 18 U.S.C. § 1961(5).

<sup>34</sup> *See id.* (excluding any period of imprisonment from the ten-year limitations period).

<sup>35</sup> *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (“RICO’s legislative history tells us . . . that the relatedness of racketeering activities is not alone enough to satisfy § 1962’s pattern element. To establish a RICO pattern, it must also be shown that the predicate themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity.”) (emphasis in original); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985).

Unlawful debt: RICO defines an “unlawful debt” as a debt (A) incurred or contracted in gambling activity which is a violation of state or federal law or which is unenforceable under state or federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with gambling in violation of state or federal law or lending money at a rate usurious under state or federal law.<sup>36</sup> Thus, an unlawful debt is a debt that arises from illegal gambling or loansharking activities. The prohibition on the “collection of unlawful debt” under RICO encompasses efforts to collect on a usurious loan without distinguishing whether the collection was for cash or collateral.<sup>37</sup> Unlike the requirement that a “pattern of racketeering” consist of at least two racketeering acts, the element of the “collection of an unlawful debt” can be predicated on a single occurrence, such as the collection of a single unlawful debt.<sup>38</sup>

Person: For purposes of the RICO Act, a “person” includes “any individual or entity capable of holding a legal or beneficial interest in property.”<sup>39</sup>

Enterprise: An “enterprise” includes “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”<sup>40</sup> This definition addresses two categories of associations.<sup>41</sup> The first encompasses organizations such as corporations and partnerships and other “legal entities.”<sup>42</sup> The second covers “any union or group of individuals associated in fact although not a legal entity.”<sup>43</sup> Each category describes a separate type of enterprise covered by the statute—those that are recognized as legal entities and those that are not.<sup>44</sup> Thus, as the Supreme Court has held, the term “enterprise” includes both legitimate and illegitimate enterprises.<sup>45</sup>

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<sup>36</sup> 18 U.S.C. § 1961(6).

<sup>37</sup> *Goldenstein v. Repossessors, Inc.*, 815 F.3d 142, 148 (3d Cir. 2016).

<sup>38</sup> *United States v. Weiner*, 3 F.3d 17, 24 (1st Cir. 1993) (citations omitted) (holding that “a single collection of an unlawful debt satisfies section 1962(c)’s ‘collection of unlawful debt’ requirement”); *United States v. Giovanelli*, 945 F.2d 479, 490 (2d Cir. 1991) (“Unlike a ‘pattern of racketeering activity’ which requires proof of two or more predicate acts, to satisfy RICO’s ‘collection of unlawful debt’ definition the government need only demonstrate a single collection.”); *United States v. Vastola*, 899 F.2d 211, 228 n.21 (3d Cir.), *vacated and remanded on other grounds*, 497 U.S. 1001 (1990); *United States v. Pepe*, 747 F.2d 632, 645 (11th Cir. 1984). *See also H.J. Inc.*, 492 U.S. at 232 (stating that “[e]ach prohibited activity is defined in 18 U.S.C. § 1962 to include, as one necessary element, proof either of ‘a pattern of racketeering activity’ or of ‘collection of an unlawful debt’”).

<sup>39</sup> 18 U.S.C. § 1961(3).

<sup>40</sup> *See id.* § 1961(4).

<sup>41</sup> *Id.*

<sup>42</sup> *Turkette*, 452 U.S. at 581.

<sup>43</sup> *Id.*

<sup>44</sup> *See Boyle*, 556 U.S. at 945.

<sup>45</sup> *Turkette*, 452 U.S. at 584–85 (“There is no inconsistency or anomaly in recognizing that § 1962 applies to



The “enterprise” that is referred to in section 1962(a) and (b) is acquired through an unlawful pattern of racketeering activity or by money obtained from an unlawful pattern of racketeering activity.<sup>46</sup> By contrast, the “enterprise” referred to in section 1962(c) is the vehicle through which the unlawful pattern of racketeering is committed.<sup>47</sup> The Supreme Court has held that “RICO both protects a legitimate ‘enterprise’ from those who would use unlawful acts to victimize it, and also protects the public from those who would unlawfully use an ‘enterprise’ (whether legitimate or illegitimate) as a ‘vehicle’ through which ‘unlawful . . . activity is committed.’”<sup>48</sup> Thus, the Court recognized that under section 1962(c) and (d) a legitimate enterprise may be the “victim” of racketeering activity.<sup>49</sup>

### 3. 18 U.S.C. § 1963: Criminal Penalties

The RICO Act establishes criminal penalties for a violation of section 1962. Pursuant to section 1963(a), a violation of section 1962 is punishable by a fine or a term of imprisonment not to exceed 20 years, or both. If the RICO violation is based on racketeering activity that is charged as a predicate act and for which the maximum penalty includes life imprisonment, then the maximum penalty for the RICO violation is life imprisonment.<sup>50</sup>

In addition, section 1963(a) mandates forfeiture to the United States, irrespective of any provision of state law, of all property, including any property interest acquired or maintained in violation of section 1962,<sup>51</sup> any interest in, security of, claim against, or property or contract right of any kind affording a source of influence in the RICO enterprise,<sup>52</sup> and any proceeds from the racketeering activity or unlawful debt collection.<sup>53</sup> Section 1963(b) specifies the type and nature of “property” subject to criminal forfeiture

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both legitimate and illegitimate enterprises.”).

<sup>46</sup> 18 U.S.C. § 1962(a), (b).

<sup>47</sup> *See id.* § 1962(c).

<sup>48</sup> *See Cedric Kushner Promotions, Ltd.*, 533 U.S. at 164–65 (quoting *Turkette*, 452 U.S. at 591).

<sup>49</sup> Section 1961 defines additional terms used in the RICO statute, such as “State,” “racketeering investigator,” “racketeering investigation,” “documentary material,” and “Attorney General.” *See* 18 U.S.C. § 1961(2), (7)–(10).

<sup>50</sup> If the government seeks a sentence exceeding the 20-year statutory maximum, a jury must find beyond a reasonable doubt (or the defendant must have admitted in pleading guilty) that the defendant committed a racketeering act for which the maximum penalty includes life imprisonment. *See United States v. Nguyen*, 255 F.3d 1335, 1343–44 (11th Cir. 2001) (holding that RICO defendants’ sentences ran afoul of *Apprendi* because they were sentenced to a term greater than 20 years, but the jury did not find the defendants committed a racketeering act carrying a potential life sentence); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>51</sup> 18 U.S.C. § 1963(a)(1).

<sup>52</sup> *See id.* § 1963(a)(2)(A)–(D).

<sup>53</sup> *See id.* § 1963(a)(3).

under the RICO Act, including real property and tangible and intangible personal property,<sup>54</sup> and extends criminal forfeiture to any property that is subsequently transferred to a person other than the defendant, unless the transferee can establish that he or she is a bona fide purchaser.<sup>55</sup> Sections 1963(d)–(m) set forth certain actions and procedures that the government may take, upon a court order, regarding the disposition of property forfeited pursuant to the criminal forfeiture provisions of the RICO Act.<sup>56</sup> RICO criminal forfeiture is to be imposed “in addition to any other sentence” for a violation of section 1962.<sup>57</sup> A criminal forfeiture award is a part of the defendant’s sentence, and not part of the substantive offense of conviction.<sup>58</sup>

#### **4. Double Jeopardy Considerations for RICO Conspiracy and Substantive Offenses**

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The Double Jeopardy Clause prohibits successive prosecutions or punishments for the same offense.<sup>59</sup> Two offenses are separate offenses if each contains an element not contained in the other.<sup>60</sup> The Double Jeopardy Clause may be implicated in two ways: a defendant is prosecuted for a RICO conspiracy and a substantive RICO offense, and a defendant is prosecuted for a substantive RICO offense and for offenses charged as racketeering acts underlying the RICO offense.

The Supreme Court has long recognized that “in most cases separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of the end.”<sup>61</sup> Because a RICO conspiracy contains a different element than a substantive RICO violation, namely an agreement with others to commit a substantive RICO violation, a RICO conspiracy and a substantive RICO violation are not the same offense for double jeopardy purposes and, accordingly, may be punished separately.<sup>62</sup> Likewise, courts have held that a

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<sup>54</sup> *See id.* § 1963(b).

<sup>55</sup> *See id.* § 1963(c).

<sup>56</sup> *See id.* § 1963(d)–(m).

<sup>57</sup> *See id.* § 1963(a).

<sup>58</sup> *Libretti v. United States*, 516 U.S. 29, 39 (1995) (“Congress plainly intended forfeiture of assets to operate as punishment for criminal conduct in violation of the federal drug and racketeering laws, not as a separate substantive offense.”). Indeed, the Supreme Court observed that criminal forfeiture as authorized by the RICO statute “is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional fine,” and, therefore, is subject to the Eighth Amendment’s prohibition against “cruel and unusual punishment” or “excessive fines.” *Alexander v. United States*, 509 U.S. 544, 558 (1993).

<sup>59</sup> *See United States v. Ursery*, 518 U.S. 267, 273 (1996).

<sup>60</sup> *See Blockburger v. United States*, 284 U.S. 299 (1932).

<sup>61</sup> *Iannelli v. United States*, 420 U.S. 770, 777–78 (1975).

<sup>62</sup> *See, e.g., United States v. Marino*, 277 F.3d 11, 39 (1st Cir. 2002); *United States v. Sessa*, 125 F.3d 68, 71 (2d Cir. 1997); *United States v. Rone*, 598 F.2d 564, 569–71 (9th Cir. 1979).

RICO substantive or conspiracy offense and its underlying racketeering acts are separate offenses for double jeopardy purposes and may be prosecuted and cumulatively punished.<sup>63</sup>

Furthermore, a jury's finding that a defendant did not commit a crime in an earlier trial (federal or state) does not preclude the government from later proving that he or she knowingly agreed to facilitate a racketeering scheme under RICO.<sup>64</sup> The government may predicate a RICO conspiracy charge on acquitted conspiracy counts from a previous trial when "a comparison of 'basic' and RICO conspiracy makes clear that acquittal of the former does not compel the conclusion that a jury necessarily decided an essential element of the latter" because "RICO conspiracy and 'basic' conspiracy [ ] have qualitatively different *mens rea* requirements as to agreement and intent."<sup>65</sup> Therefore, "[a] jury's finding that a defendant did not conspire to commit a particular predicate act does not necessarily preclude a subsequent finding that he or she knowingly agreed to facilitate a racketeering scheme that involved, or was intended to involve, that same predicate act."<sup>66</sup>

### III. SECTION 2E1.1 (UNLAWFUL CONDUCT RELATING TO RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS)

#### A. GENERALLY

The guidelines instruct users to determine the applicable Chapter Two guideline by referring to Appendix A (Statutory Index) for the offense of conviction (*i.e.*, the offense

<sup>63</sup> See, e.g., *United States v. Masters*, 978 F.2d 281, 285 (7th Cir. 1992) (rejecting the defendant's argument that cumulative terms for racketeering and racketeering conspiracy violate the Double Jeopardy Clause); *United States v. Pungitore*, 910 F.2d 1084, 1105–07 (3d Cir. 1990) (double jeopardy does not preclude prosecution for RICO offenses charging predicate acts for which the defendant was previously tried and acquitted or previously convicted); *United States v. Ciancaglini*, 858 F.2d 923 (3d Cir. 1988) (defendant's prior RICO conviction did not bar on double jeopardy grounds instant successive prosecution for RICO conspiracy and substantive RICO offense involving same enterprise as prior conviction because successive indictment alleged different pattern of racketeering activity); *United States v. Grayson*, 795 F.2d 278, 282–83 (3d Cir. 1987) ("The language and legislative history of RICO indicates little doubt that Congress, in enacting RICO, sought to allow separate prosecution and punishment of predicate offenses and a subsequent RICO offense.").

<sup>64</sup> See, e.g., *United States v. Zemlyansky*, 908 F.3d 1, 10–11 (2d Cir. 2018) (defendant's prior acquittal on substantive counts of insurance-related mail fraud and money laundering did not preclude government from predicating his RICO conspiracy charge on conduct mirroring those same counts in subsequent trial), *petition for cert. filed*, (U.S. Jan. 29, 2019) (No. 18–7778); *United States v. Burden*, 600 F.3d 204, 228–29 (2d Cir. 2010) (acquittal on state murder charge did not bar its use as a predicate racketeering act for RICO violation); *Licavoli*, 725 F.2d at 1047 (same); *Malatesta*, 583 F.2d at 757 (same); *United States v. Frumento*, 563 F.2d 1083, 1086–89 (3d Cir. 1977) (same).

<sup>65</sup> *Zemlyansky*, 908 F.3d at 11.

<sup>66</sup> *Id.* at 11–12.

conduct charged in the indictment or information of which the defendant was convicted).<sup>67</sup> For a violation of the RICO Act, 18 U.S.C. § 1962, Appendix A specifies the offense guideline at §2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations). Section 2E1.1 has two alternative base offense levels and instructs the court to apply whichever is the greater. There are no specific offense characteristics.

Section 2E1.1 refers the court to other offense guidelines based on the underlying racketeering activity. The Commentary to §2E1.1 specifically directs the court to “look ahead” to certain parts of Chapter Three and, in some instances, to Chapter Four (Criminal History)<sup>68</sup> to determine the appropriate offense level for the RICO offense. Because §2E1.1 covers a wide variety of criminal conduct, in many instances the offense level for the RICO offense will be determined by the offense level for the underlying racketeering activity.

## **B. DETERMINING THE OFFENSE LEVEL FOR A RICO OFFENSE**

Section 2E1.1(a) specifies that the base offense level is the greater of

(1) 19; or

(2) “the offense level applicable to the underlying racketeering activity.”

Section 2E1.1(a), therefore, establishes an alternative minimum base offense level of 19—a floor under which the RICO offense level may not be set regardless of the offense level for the underlying racketeering activity associated with the RICO violation.<sup>69</sup> As such, the comparison between subsections (a)(1) and (a)(2) ensures that a RICO defendant’s base offense level will not be less than the alternative minimum base offense level (*i.e.*, 19).<sup>70</sup>

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<sup>67</sup> U.S. SENTENCING COMM’N, *Guidelines Manual*, §1B1.2 (Nov. 2018) [hereinafter USSG] (explaining how to determine the applicable guidelines).

<sup>68</sup> See USSG §2E1.1, comment. (n.1) (requiring application of Chapter Two offense guideline and adjustments in Chapter Three, Parts A, B, C, and D); *id.* at comment. (n.4) (discussing the treatment of a “prior sentence” as defined in Chapter Four in determining the appropriate offense level). In addition, certain offense guidelines require application of the criminal history provisions under Chapter Four to determine the appropriate base offense level, such as Chapter Two, Part D (Offenses Involving Drugs and Narco-Terrorism), Part K (Offenses Involving Public Safety), and Part L (Offenses Involving Immigration, Naturalization, and Passports).

<sup>69</sup> See *id.* §2E1.1(a)(1) and comment. (n.3). See also *United States v. Morgano*, 39 F.3d 1358, 1378–79 (7th Cir. 1994) (district court properly found RICO base offense level of 19 because §2E1.1(a)’s alternative minimum base offense level of 19 establishes “a floor under which the base offense level may not be set no matter what the offense level may be for the predicate acts associated with the RICO violation”); *United States v. Olson*, 22 F.3d 783, 786–87 (8th Cir. 1994) (district court erred in calculating the defendant’s base offense level at 17 for her RICO conspiracy because §2E1.1(a) provides that the base offense level for a RICO offense is 19 unless the offense level applicable to the underlying racketeering activity is greater); *United States v. Butler*, 954 F.2d 114, 120–22 (2d Cir. 1992) (same).

<sup>70</sup> USSG §2E1.1, comment. (n.3).

## 1. Relevant Conduct

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Section 1B1.3(a) directs the court to consider all relevant conduct in determining the base offense level, specific offense characteristics, and cross references in Chapter Two, and Chapter Three adjustments. Relevant conduct includes “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant,” and, “in the case of a jointly undertaken criminal activity[,]. . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.”<sup>71</sup>

In determining the offense level applicable to the underlying racketeering activity under subsection (a)(2), §1B1.3 directs the court to account for all relevant conduct<sup>72</sup> that qualifies as a racketeering act under section 1961(1).<sup>73</sup> Relevant conduct includes conduct that is charged or uncharged,<sup>74</sup> as well as conduct of which the defendant was acquitted.<sup>75</sup> Thus, the underlying racketeering activity consists of any underlying offense (charged, uncharged, or acquitted) that qualifies under the statute as racketeering activity or collection of unlawful debt.<sup>76</sup>

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<sup>71</sup> See *id.* §1B1.3(a)(1). See also *United States v. Carrozza*, 4 F.3d 70 (1st Cir. 1993).

<sup>72</sup> See USSG §1B1.3.

<sup>73</sup> See 18 U.S.C. § 1961(1) (defining “racketeering activity”).

<sup>74</sup> See *United States v. Flemmi*, 245 F.3d 24, 30 n.4 (1st Cir. 2001) (citations omitted) (“To be sure, a sentencing judge may consider uncharged predicate acts in a RICO case, . . . but the judge nonetheless must stay below the maximum penalty allowed under the charges delineated in the indictment and submitted to the jury.”).

<sup>75</sup> As explained in the Commentary to §1B1.3, this provision does not require that the defendant be convicted of multiple counts. USSG §1B1.3, comment. (backg’d) (“Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range.”); *id.* at comment. (n.5) (“subsection (a)(2)[ ] applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts”). See also *United States v. Pica*, 692 F.3d 79, 88–90 (2d Cir. 2012) (“A district court may treat acquitted conduct as relevant conduct at sentencing, provided that it finds by a preponderance of the evidence that the defendant committed the conduct”); *United States v. Mercado*, 474 F.3d 654, 657 (9th Cir. 2007) (“[T]he constitutional propriety of a sentencing court’s consideration of conduct which underlay an acquitted charge existed before creation of the Guidelines and continues to exist today.”); *United States v. Watts*, 519 U.S. 148, 157 (1997) (sentencing court may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by a preponderance of the evidence).

<sup>76</sup> See, e.g., *United States v. Flores*, 912 F.3d 613, 621 (D.C. Cir. 2019) (holding that the district court committed reversible procedural error when it likely—albeit not explicitly—considered, as relevant conduct under §1B1.3(a)(1)(A), defendant’s murder of a Mexican national in Mexico because it does not constitute “racketeering activity” that is “‘indictable,’ ‘chargeable,’ or ‘punishable’ under one of the statutes identified in § 1961(1)”).

### a. Burden of proof for uncharged underlying offenses

In some cases, a jury verdict may not indicate which of multiple underlying offenses were found to have been committed in furtherance of the RICO violation, or the jury may find some of the charged underlying offenses were committed, but not others. There may also be additional uncharged underlying offenses that may be accounted for as relevant conduct in determining the offense level for the underlying racketeering activity.

The majority of circuits have held that uncharged (or acquitted) underlying offenses (*i.e.*, “predicate acts”) may be accounted for as relevant conduct if the court finds the underlying offense has been proven by a preponderance of the evidence.<sup>77</sup> The circuits reasoned that, unlike a multi-object conspiracy, which is treated under the guidelines at §1B1.2(d) (Applicable Guidelines) as if each object constitutes a single-object conspiracy, a RICO conspiracy itself is a single-object conspiracy with the object being to engage in racketeering in violation of section 1962.<sup>78</sup> That is, “the underlying acts of racketeering in a RICO conspiracy are not considered to be the *objects* of the conspiracy, but simply conduct that is relevant to the central objective—participating in a criminal enterprise.”<sup>79</sup> A conviction for a RICO conspiracy therefore does not require proof of the actual commission of an underlying offense by the defendant or any other conspirator.<sup>80</sup> The underlying offenses serve only to establish the existence of the charged agreement among members of the conspiracy to violate the RICO Act; they do not constitute separate criminal objectives that must each be proven beyond a reasonable doubt.<sup>81</sup>

By contrast, the Eleventh Circuit has held that where the jury finds the defendant guilty of a RICO conspiracy, but does not indicate which of the underlying offenses the

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<sup>77</sup> *United States v. Barragan*, 871 F.3d 689, 717 (9th Cir. 2017); *United States v. Garcia*, 754 F.3d 460, 483 (7th Cir. 2014); *United States v. Yannotti*, 541 F.3d 112, 129–30 (2d Cir. 2008); *United States v. Massino*, 546 F.3d 123, 135 (2d Cir. 2008); *United States v. Corrado*, 227 F.3d 528, 542 (6th Cir. 2000); *Carrozza*, 4 F.3d at 79–80.

<sup>78</sup> Section 1B1.2(d) instructs that “[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.” USSG §1B1.2(d). The Commentary to §1B1.2 cautions courts to take “particular care” in applying subsection (d) and, in cases where the verdict or guilty plea does not specify which offense was the object of the conspiracy, subsection (d) should only be applied where an object offense has been proven beyond a reasonable doubt to the sentencing court as if it were sitting as a trier of fact. USSG §1B1.2, comment. (n.4). *See also* *United States v. Massimino*, 641 F. App’x 153, 170 (3d Cir. 2016) (citation omitted) (affirming “the underlying principle that a RICO conspiracy is a single-object conspiracy in which defendants agree to violate the RICO statute itself, rather than a multitude of separate underlying criminal acts” and concluding “that [ ] §1B1.2(d) has no bearing on these facts.”).

<sup>79</sup> *Corrado*, 227 F.3d at 542 (emphasis in original).

<sup>80</sup> *See Salinas*, 522 U.S. at 64 (noting that “[t]he RICO conspiracy statute, § 1962(d), broadened conspiracy coverage by omitting the requirement of an overt act.”).

<sup>81</sup> *See Carrozza*, 4 F.3d at 79–80; *Yannotti*, 541 F.3d at 129–30; *Corrado*, 227 F.3d at 542; *Garcia*, 754 F.3d at 483.



defendant committed, the defendant's offense level is properly based upon the underlying offenses that the court finds are proven beyond a reasonable doubt as if the court were sitting as trier of fact.<sup>82</sup>

## **2. Calculating the Offense Level for a RICO Offense**

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To determine whether to use the offense level for subsection (a)(1) or subsection (a)(2), the court must calculate the offense level for both subsections (a)(1) and (a)(2) according to the instructions in the Commentary to §2E1.1. Thus, to calculate the offense level for subsection (a)(1), the court uses the minimum base offense level 19 and applies the applicable Chapter Three adjustments from Parts A (Victim-Related Adjustments), B (Role in the Offense), and C (Obstruction and Related Adjustments).<sup>83</sup> Likewise, to calculate the offense level applicable to the underlying racketeering activity under subsection (a)(2), the court calculates the applicable Chapter Two offense guidelines for the underlying offenses and the Chapter Three adjustments from Parts A, B, C, and then applies the grouping rules in D (Multiple Counts) as needed.<sup>84</sup> The court compares the offense level for subsection (a)(1) to the offense level for subsection (a)(2) and uses whichever subsection results in the greater offense level.<sup>85</sup>

### **a. Single Underlying Offense**

Underlying racketeering activity may consist of a single racketeering act, such as the collection of a single unlawful debt.<sup>86</sup> In that case, the court follows the approach outlined above to calculate the offense level for both subsections (a)(1) and (a)(2) and uses whichever subsection results in the greater offense level.

### **b. Multiple Underlying Offenses**

When there are multiple underlying offenses, Application Note 1 to §2E1.1 provides specific guidance for calculating a combined offense level for the underlying racketeering activity to determine whether subsection (a)(1) or subsection (a)(2) results in the greater

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<sup>82</sup> See *Nguyen*, 255 F.3d at 1335, 1341 (reaffirming its previous holding in *United States v. DiGiorgo*, 193 F.3d 1175, 1177–78 (11th Cir. 1999) (defendants' offense level was properly based upon predicate acts that the court found the defendants had committed beyond a reasonable doubt)).

<sup>83</sup> See USSG §2E1.1, comment. (n.1).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* ("Use whichever subsection results in the greater offense level."). See also *id.* §3D1.3, comment. (n.1) (defining the "offense level" for a count as "the offense level from Chapter Two after all adjustments from Parts A, B, and C of Chapter Three").

<sup>86</sup> See, e.g., *Weiner*, 3 F.3d at 24 ("a single collection of an unlawful debt satisfies section 1962(c)'s 'collection of unlawful debt' requirement"); *Giovanelli*, 945 F.2d at 490 ("[T]o satisfy RICO's 'collection of unlawful debt' definition the government need only demonstrate a single collection.").

offense level. Application Note 1 instructs the court to treat each underlying offense as if it were a separate count of conviction.<sup>87</sup> For each underlying offense, the court applies the applicable Chapter Two offense guideline, including specific offense characteristics, cross-references, and Chapter Three adjustments from Parts A, B, and C.<sup>88</sup> The court then applies the grouping rules in Chapter Three, Part D, to determine the combined offense level for the underlying racketeering activity.<sup>89</sup>

For offense guidelines that are determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm (*i.e.*, drug trafficking, bribery, money laundering, fraud, and other similar offenses), the offense guideline is applied once and the offense level is calculated based on the aggregate harm or quantity.<sup>90</sup> Thus, where multiple underlying offenses use the same offense guideline and group under §3D1.2(d), the court applies the Chapter Two offense guideline and any adjustments in Chapter Three, Parts A, B, and C, based on the aggregate harm or quantity.<sup>91</sup>

Offenses that use different offense guidelines do not group under §3D1.2(d) merely by being listed on the “included” list.<sup>92</sup> Different offense guidelines, however, may group

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<sup>87</sup> See USSG §2E1.1, comment. (n.1).

<sup>88</sup> See *id.* §1B1.5(c) (“If the offense level is determined by a reference to another offense guideline . . . the adjustments in Chapter Three (Adjustments) also are determined in respect to the referenced offense guideline, except as otherwise expressly provided.”); *id.* comment. (n.2) (instructing that a reference to use of another guideline if that guideline results in a greater offense level means the offense level taking into account only the Chapter Two offense, *unless* the offense guideline expressly provides for consideration of both the Chapter Two offense level and applicable Chapter Three adjustments, such as the Commentary to §2E1.1) (emphasis added). *But see* *United States v. Damico*, 99 F.3d 1431, 1436–38 (7th Cir. 1996) (district court properly applied the 4-level leadership role adjustment in subsection (a)(2) based on defendant’s role in the overall RICO conspiracy, holding “the predicate-by-predicate approach under Application Note 1 applies, as the note states, only for the purpose of establishing a RICO defendant’s base offense level, and not for the purpose of applying Chapter Three adjustments”); *United States v. Ivezaj*, 568 F.3d 88, 99 (2d Cir. 2009) (district court properly determined that the role adjustment in subsection (a)(2) is applied based on the defendant’s role in the overall RICO enterprise; concluding that “the language of the Guidelines is clear that the requirement to look at each individual act in a RICO offense is only for the purpose of establishing the base offense level, not for applying the Chapter Three adjustments”); *United States v. Yeager*, 210 F.3d 1315, 1317 (11th Cir. 2000) (concluding that it is appropriate to judge a RICO defendant’s role in the offense in subsection (a)(2) with respect to the overall RICO conspiracy for the purpose of applying an enhancement under §3B1.1(a)); *United States v. Coon*, 187 F.3d 888, 899 (8th Cir. 1999) (affirming aggravating role adjustments in subsection (a)(2) based on the defendants’ role in the overall RICO enterprise).

<sup>89</sup> See USSG §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts), 3D1.2 (Groups of Closely Related Counts), 3D1.3 (Offense Level Applicable to Each Group of Closely Related Counts), 3D1.4 (Determining the Combined Offense Level).

<sup>90</sup> See *id.* §3D1.2(d) (listing offenses that are grouped based on aggregate harm or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior).

<sup>91</sup> See *id.* §3D1.3(b) and comment. (n.3).

<sup>92</sup> See *id.* §§3D1.2(d), comment. (n.6); 3D1.3(b), comment. (n.3).



under a different rule in §3D1.2 if the offense conduct involves the same victim and the same act or transaction, or involves the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan, or when one predicate act embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another predicate act.<sup>93</sup>

Similarly, certain offense guidelines are specifically “excluded” from grouping under §3D1.2(d), such as robbery, assault, murder, kidnapping, and other similar crimes.<sup>94</sup> Such offenses, however, may group with other offenses under a different rule in §3D1.2.

### Examples

Example 1: The defendant was convicted of one count of violating section 1962(d) (RICO conspiracy). The underlying racketeering activity consists of three racketeering acts of distribution of a controlled substance and possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841. The defendant possessed a firearm and supervised at least two other participants in committing the drug trafficking offenses.

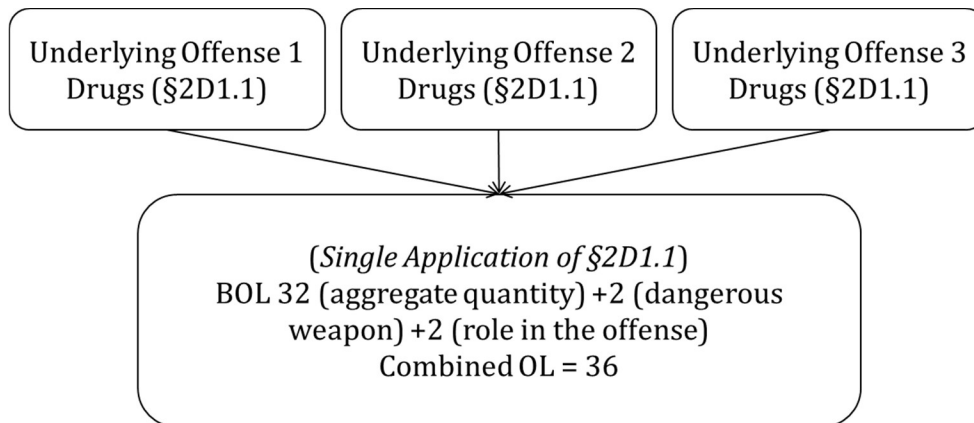
To determine whether subsection (a)(1) or subsection (a)(2) results in the greater offense level, the court calculates the offense level for subsection (a)(1) by starting with the minimum base offense level 19 and adding two levels for the defendant’s role in the RICO offense (§3B1.1(c)), resulting in an offense level of 21.

To determine the offense level applicable to the underlying racketeering activity, the court determines that the applicable Chapter Two guideline for the underlying offenses is §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses) Attempt or Conspiracy). Because §2D1.1 is on the “included” list under §3D1.2(d), the underlying offenses are grouped together as if they were a single count of conviction and the offense guideline is applied once. Based on the aggregate quantity of drugs, the base offense level is level 32. Two levels are added for possession of a dangerous weapon (§2D1.1(b)(1)) and two levels are added for role in the offense (§3B1.1(c)). The resulting offense level for the underlying racketeering activity is level 36.

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<sup>93</sup> See *id.* §3D1.2(a), (b), and (c).

<sup>94</sup> See *id.* §3D1.2(d) (providing list of “excluded” offenses from operation of Rule (d)).



Because the offense level for subsection (a)(2), level 36, is greater than the offense level for subsection (a)(1), level 21, the court uses subsection (a)(2) as the offense level for the RICO offense.

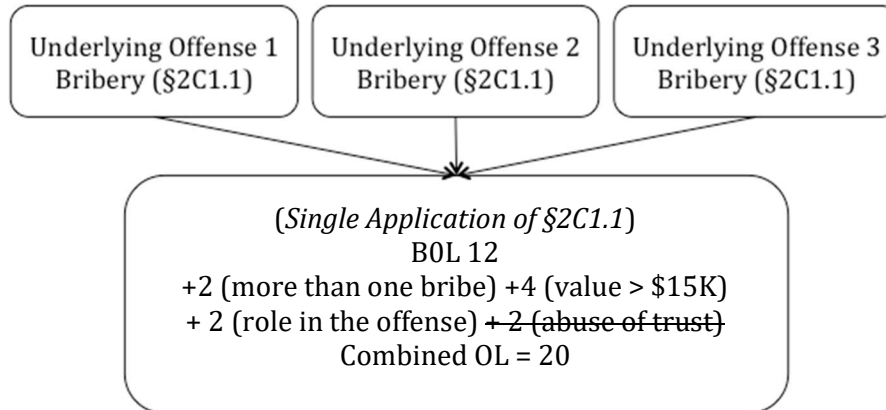
Example 2: The defendant was convicted of violating section 1962(d). The underlying offenses consist of three racketeering acts of bribery in violation of 18 U.S.C. § 201. The defendant managed less than five participants in the RICO enterprise. Although the defendant was not a public official, the defendant used his position of trust in a private corporation to commit the bribery offenses in furtherance of the RICO enterprise.

To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, the court calculates the offense level for subsection (a)(1) by starting with the minimum base offense level 19 and adding two levels for the defendant's managerial role in the overall RICO enterprise (§3B1.2(c)) and two levels for abuse of a position of trust (§3B1.3), resulting in an offense level of 23.

In determining the offense level for subsection (a)(2), the applicable Chapter Two guideline for the underlying bribery offenses is §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe). Because §2C1.1 is on the "included" list under §3D1.2(d), the court treats the underlying bribery offenses as if they were a single count of conviction and uses a single application of the offense guideline. Starting with base offense level 12, two levels are added for more than one bribe (§2C1.1(b)(1)) and four levels are added for aggregate loss of more than \$15,000 (§2C1.1(b)(2)). Two levels are added for the defendant's managerial role in the bribery offenses involving less than five participants (§3B1.1(c)). Although the defendant abused a position of trust in the bribery scheme, the Commentary to §2C1.1 instructs that the abuse of trust adjustment is inapplicable under the §2C1.1 offense guideline.<sup>95</sup> The resulting offense level for the underlying racketeering activity is level 20.

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<sup>95</sup> See *id.* §2C1.1, comment. (n.6). See also *United States v. Butt*, 955 F.2d 77, 88–90 (1st Cir. 1992) (holding that subsection (a)(1), as a generic RICO base offense level, does not fall within the limitation of §3B1.3, and thus applying abuse of trust adjustment is not impermissible double counting).

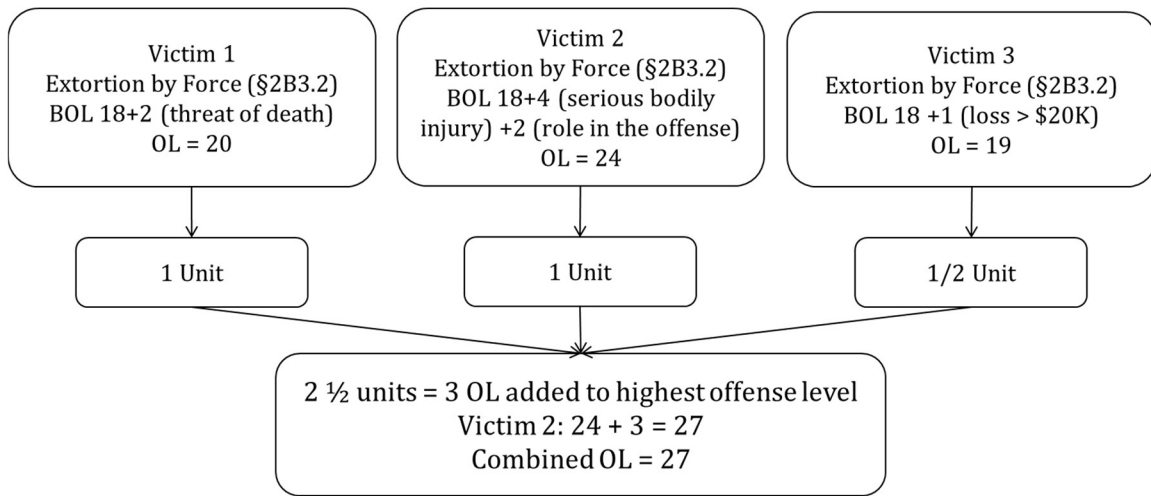


Because the offense level for the underlying racketeering activity under subsection (a)(2), level 20, is less than the offense level for subsection (a)(1), level 23, the court uses subsection (a)(1) as the offense level for the RICO offense.

Example 3: The defendant was convicted of one count of violating section 1962(c). The underlying racketeering activity consists of three racketeering acts of extortion by force involving three victims. A participant in the RICO enterprise threatened to kill the first victim and seriously injured the second victim. The third victim ultimately complied with the extortion and lost his business as a result. The business was valued at \$85,000. The defendant was the leader of the overall RICO enterprise involving more than five participants and personally supervised another associate in the extortion of the second victim.

To determine whether the offense level for subsection (a)(1) or (a)(2) is greater, the court determines that the offense level for subsection (a)(1) is level 23: the minimum base offense level 19, plus four levels for the defendant's role in the overall RICO enterprise (§3B1.1(a)). For subsection (a)(2), the applicable Chapter Two guideline for the underlying extortion offenses is §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage). The extortion offenses are not grouped because each offense involves a different victim.<sup>96</sup> Extortion One (victim one) has an offense level of 20: base offense level 18, plus two levels for threat of death (§3B3.2(b)(1)). Extortion Two (victim two) has an offense level of 24: base offense level 18, plus four levels for serious bodily injury (§2B3.2(b)(4)(B)) and two levels for the defendant's role in the extortion of the second victim (§3B1.1(c)). Extortion Three (victim three) has an offense level of 19: base offense level 18, plus one level for loss of more than \$20,000 (§2B3.2(b)(2)). Pursuant to §3D1.4, three units are added to the offense with the highest offense level, resulting in a combined offense level of 27 for the underlying racketeering activity.

<sup>96</sup> See USSG §3D1.2(d) and comment. (backg'd.).



Because the resulting offense level for subsection (a)(2), level 27, is greater than the offense level for subsection (a)(1), level 23, the court uses subsection (a)(2) as the offense level for the RICO offense.

### c. Applying cross-references in offense guidelines

In some cases, the Chapter Two offense guideline applicable to an underlying offense may include a determination of the applicability of a “cross reference” to another offense guideline, such as the cross reference in the robbery guideline at §2B3.1(c), the extortion guideline at §2B3.2(c), or the drug trafficking guideline at §2D1.1(d). In the event the cross reference applies, the court applies the Chapter Two offense guideline applicable to the cross reference and the Chapter Three adjustments from Parts A, B, C, and D to determine the combined offense level for the underlying racketeering activity.

### d. Analogizing state crimes (Application Note 2)

When the underlying offense that constitutes a racketeering act is a violation of state law, the Commentary to §2E1.1 at Application Note 2 instructs the court to use the Chapter Two offense guideline corresponding to the most analogous federal offense.<sup>97</sup> For instance, if the underlying offense is conspiracy to commit murder under state law, the offense guideline for the most analogous federal offense is §2A1.5 (Conspiracy or Solicitation to Commit Murder).<sup>98</sup> Similarly, if the underlying offense is murder under state

<sup>97</sup> See *id.* §2E1.1, comment. (n.2). See also *id.* §2X5.1 (for a felony offense for which there is no specified guideline, apply the “most analogous offense guideline”).

<sup>98</sup> See *United States v. Scott*, 642 F.3d 791, 801–02 (9th Cir. 2011) (“The special verdict form indicates the jury found [defendant] guilty of conspiring to murder under state law, so the district court properly analogized to the federal offense of conspiracy to murder.”).

law, the offense guideline for the most analogous federal offense is §2A1.1 (First Degree Murder), even absent premeditation or malice aforethought.<sup>99</sup>

**e. “Prior sentence” rule (Application Note 4)**

The Commentary to §2E1.1, at Application Note 4, explains that conduct may be charged in the RICO count of conviction as part of a pattern of racketeering activity even when the defendant has previously been convicted and sentenced for that conduct.<sup>100</sup> However, for purposes of calculating the RICO guideline, if the previously imposed sentence resulted from a conviction that occurred before “the last overt act” (*i.e.*, the last underlying offense) of the instant RICO offense, that previously imposed sentence is to be treated as a prior sentence under §4A1.2(a)(1) (Prior Sentence) as part of the defendant’s criminal history. It should not be treated as relevant conduct for purposes of determining the offense level for the instant RICO offense.<sup>101</sup>

Notably, Application Note 4 refers to the “last overt act of the instant offense”<sup>102</sup> and not to the last overt act that is charged in the indictment or other charging instrument. Thus, applicability of the “prior sentence” rule in Application Note 4 turns on the date the last underlying offense occurred regardless of whether that underlying offense was charged in the indictment.

The distinction between treating a previously convicted racketeering act as relevant conduct or as a prior sentence highlights that the RICO Act allows separate prosecution and punishment of the underlying acts of racketeering activity and the subsequent RICO violation.<sup>103</sup> Similarly, a RICO violation should be considered separate from a previously

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<sup>99</sup> See *United States v. Minicone*, 960 F.2d 1099, 1110 (2d Cir. 1992) (defendant convicted of RICO conspiracy based on his involvement in the enterprise’s gambling activity and second degree murder under the New York Penal Code; district court properly analogized the definition of first degree murder in 18 U.S.C. § 1111 and used the applicable guideline for first degree murder at §2A1.1); see also *United States v. Carr*, 424 F.3d 213, 231 (2d Cir. 2005) (district court properly applied base offense level for federal offense of first degree murder, reiterating its conclusion in *Minicone* that the absence of reference to premeditation or malice aforethought in the state second degree murder statute does not mean that federal first degree murder is not the most analogous federal offense).

<sup>100</sup> See USSG §2E1.1, comment. (n.4).

<sup>101</sup> *Id.* Application Note 4 was intended “to clarify the treatment of certain conduct for which the defendant previously has been sentenced as either part of the instant offense or prior criminal record.” See USSG App. C, amend. 142 (eff. Nov. 1, 1989). See also *Minicone*, 960 F.2d at 1111 (rejecting government’s argument that the district court erred in assessing prior conviction only in calculating criminal history and not in calculating the base offense level, explaining that the “district court reasonably construed Note 4 to mean that the conduct underlying the previously imposed sentence should not be used in calculating the base offense level for the instant [RICO] offense”).

<sup>102</sup> See USSG §2E1.1, comment. (n.4).

<sup>103</sup> *United States v. Riccobene*, 709 F.2d 214, 232 (3d Cir. 1983) (“The predicate offenses . . . are not themselves the RICO violation[;] they are merely one element of the crime. [RICO] does not prohibit the

sentenced racketeering act. Although racketeering activity constitutes an element of the RICO offense, a previously sentenced racketeering act indicates that the defendant is a repeat offender who violated the law once by committing the predicate act, for which the defendant was convicted and sentenced, and violated the law again by engaging in a pattern of racketeering activity in violation of the RICO Act.

## C. APPLICATION CONSIDERATIONS

### 1. RICO Count and Other Counts of Conviction

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When the RICO count is one of multiple counts of conviction, the court must determine the offense level for the RICO count and for each of the other counts of conviction, and apply the grouping rules in Chapter Three, Part D, to determine a single combined offense level that encompasses all counts to which the defendant has been convicted.<sup>104</sup> For instance, if the defendant was convicted of one count of RICO conspiracy charging two racketeering acts of extortion and two substantive counts of extortion, in violation of 18 U.S.C. § 1951(a), or if the defendant was convicted of one count of RICO conspiracy and one count of obstruction of justice, in violation of 18 U.S.C. § 1510, the court applies the grouping rules in Chapter Three, Part D, to determine a combined offense level for all counts of conviction.

### 2. RICO Count and Acceptance of Responsibility (§3E1.1)

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A defendant who has accepted responsibility in accordance with §3E1.1 qualifies for a decrease of two to three levels.<sup>105</sup> The acceptance of responsibility adjustment is applied after determining the offense level for the RICO count (and the combined offense level for multiple counts of conviction).

### 3. RICO Offense as a Predicate Offense for the Career Offender Guideline (§4B1.1) and 18 U.S.C. § 924(c)

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A RICO conviction may qualify as a predicate offense for purposes of the career offender guideline at §4B1.1 and for a violation of 18 U.S.C. § 924(c).

Section 4B1.1 provides that a defendant is a career offender if the defendant is at least 18 years old at the time of the instant offense, the instant offense is a “crime of violence” or “controlled substance offense” as those terms are defined at §4B1.2 (Definition

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commission of the individual racketeering acts. Rather, it bans the operation of an ongoing enterprise by means of those acts.”) *overruled in part on other grounds* by Griffin v. United States, 502 U.S. 46 (1991), *as recognized* by United States v. Bergrin, 650 F.3d 257, n.5 (3d Cir. 2011).

<sup>104</sup> USSG Ch. 3, intro. comment.

<sup>105</sup> *Id.* §3E1.1.



of Terms Used in Section 4B1.1), and the defendant has at least two prior felony convictions that are either a “crime of violence” or “controlled substance offense.” Because a RICO conviction hinges on proof of the underlying offenses comprising the “pattern of racketeering activity,” the court must determine whether the underlying offenses qualify as “crimes of violence” or “controlled substance offenses” under §4B1.2 to determine whether the RICO conviction qualifies as a predicate offense for the career offender enhancement.<sup>106</sup>

Section 924(c) provides that a person who uses or carries a firearm during and in relation to, or possesses a firearm in furtherance of, a “crime of violence” or “drug trafficking crime,” as those terms are defined in section 924(c), shall be sentenced to a term of imprisonment ranging from five to 25 years consecutive to the sentence for the underlying offense. In a RICO case, where there is proof of the commission of at least two racketeering acts (*i.e.*, a pattern of racketeering activity) that qualify either as a “crime of violence” or “drug trafficking crime” under section 924(c), a RICO conviction can serve as a predicate offense for a violation of section 924(c).<sup>107</sup>

#### **4. *Ex Post Facto* Issues and the “One Book” Rule**

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Section 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)) directs the court to use the *Guidelines Manual* in effect on the date of sentencing.<sup>108</sup> But if application of the current guidelines would violate the *Ex Post Facto* Clause of the U.S. Constitution,<sup>109</sup> the court shall use the version of the *Guidelines Manual* in effect on the date that the offense was committed, which is referred to as the “one book” rule.<sup>110</sup>

RICO offenses are continuing offenses and may extend across different versions of the *Guidelines Manual* without violating the *Ex Post Facto* Clause.<sup>111</sup> Thus, a defendant who

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<sup>106</sup> See *Scott*, 642 F.3d at 801 (RICO conspiracy qualifies as “crime of violence” for career offender enhancement based on the determination that underlying racketeering acts involving murder qualified as crimes of violence under §4B1.2(a)).

<sup>107</sup> *United States v. Ayala*, 601 F.3d 256, 267 (4th Cir. 2010) (RICO conspiracy to commit crimes including murder, kidnapping, and robbery is a crime of violence for purposes of 18 U.S.C. § 924(c) liability); *Ivezaj*, 568 F.3d at 96 (RICO count qualifies as crime of violence where government proved at least two underlying racketeering acts qualified as crimes of violence under 18 U.S.C. § 924(c)).

<sup>108</sup> USSG §1B1.11(a).

<sup>109</sup> U.S. CONST. art. I, § 9, cl. 3 (prohibiting the passage of a law that criminally punishes conduct that was lawful when committed or increases punishment for conduct after it has occurred).

<sup>110</sup> USSG §1B1.11(b). See also *Peugh v. United States*, 569 U.S. 530, 533 (2013) (holding that “there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense”).

<sup>111</sup> See, e.g., *United States v. Jackson*, 983 F.2d 757, 771 (7th Cir. 1993), *overruled on other grounds by Ratzlaf v. United States*, 510 U.S. 135 (1994); *United States v. Moscony*, 927 F.2d 742, 754–56 (3d Cir. 1991); *United*

participates in a RICO conspiracy and who does not withdraw from that conspiracy before the effective date of a *Guidelines Manual* providing a higher offense level will be sentenced pursuant to the more recent edition of the *Guidelines Manual*.<sup>112</sup> For example, a defendant was convicted of a RICO conspiracy spanning 15 years from 2001 to 2016 with two racketeering acts, one of which was a 2002 attempted murder of a rival gang member. Prior to November 1, 2004, the base offense level for attempted murder under §2A2.1(a)(1) was level 28.<sup>113</sup> Effective November 1, 2004, the base offense level for attempted murder under §2A2.1(a)(1) increased to level 33.<sup>114</sup> Because the defendant's involvement in the RICO conspiracy continued beyond 2004, the later edition of the *Guidelines Manual* in effect at the time of the defendant's sentencing is applied and the base offense level for the underlying attempted murder offense is 33.<sup>115</sup>

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States v. Eisen, 974 F.2d 246, 268–69 (2d Cir. 1992); *Butler*, 954 F.2d at 120–21.

<sup>112</sup> USSG §1B1.11, comment. (backg'd). *See also* United States v. Korando, 29 F.3d 1114, 1120 (7th Cir. 1994) (citing *Jackson*, 983 F.2d at 771).

<sup>113</sup> *See, e.g.*, USSG §2A2.1(a)(1) (Nov. 1, 2003).

<sup>114</sup> *See* USSG §2A2.1(a)(1) (Nov. 1, 2004).

<sup>115</sup> *See, e.g.*, United States v. Torres, 390 F. App'x 646, 648 (9th Cir. 2010) (district court properly used 2006 *Guidelines Manual* instead of 2003 *Guidelines Manual* where the defendant's admission during his guilty plea established that his participation in conspiracy to commit murder and narcotics trafficking extended past November 1, 2004). *See also* United States v. Hurley, 63 F.3d 1, 19–20 (1st Cir. 1995) (district court properly applied for the RICO violation the money laundering guideline in effect at the time of sentencing where the RICO conspiracy continued at least until after November 1, 1991, when the new and broader money laundering guideline took effect); *Minicone*, 960 F.2d at 1111 (no *ex post facto* violation where RICO conspiracy continued after sentencing guidelines took effect in 1987, even though predicate acts occurred prior to date of the guidelines).