

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of intent to re-promulgate temporary, emergency amendment as permanent amendment; and other proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, and certain other provisions of law, the Commission is considering promulgating amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. The Commission seeks comment on the proposed amendments, alternative proposed amendments, and any other aspect of the sentencing guidelines, policy statements, and commentary. The Commission may submit amendments to the Congress not later than May 1, 1999.

Part I sets out the Commission's proposed re-promulgation of a telemarketing fraud amendment as a permanent amendment. On September 23, 1998, the Commission submitted this telemarketing fraud amendment to Congress as a temporary, emergency amendment in response to the Telemarketing Fraud Protection Act of 1998, Pub. L. 105-184.

Part II sets out a proposed "Economic Crime Package." The Economic Crime Package developed from the Commission's work in the past two years to examine the sufficiency of guidelines covering certain economic crimes, particularly fraud, theft, and tax offenses. The primary focus of this examination has been: (1) To develop a loss table that incorporates the more-than-minimal-planning enhancement and increases sentence severity for large-dollar loss offenses; (2) to develop a loss definition that, among other things, is more consistent across offense types and easier to use; (3) to consolidate the theft, property destruction, and fraud guidelines in order to provide uniformity of applicable commentary; and (4) to make necessary conforming changes to all other guidelines that refer to the fraud and theft loss tables.

Recent highlights of the Commission's work in this area include (1) soliciting, in January 1998, public comment on various amendment proposals and issues for comment (see 63 FR 602-25); (2) conducting, in March 1998, two public hearings, one of which (in San Francisco, California) was dedicated exclusively to economic crimes; (3) Commissioner consideration, in April 1998, of an "economic crime package" of amendments to the sentencing guidelines; and (4) conducting field testing, in the summer of 1998, of the proposed loss definition with the Criminal Law Committee of the Judicial Conference, probation officers, and other guideline users.

The Economic Crime Package primarily is composed of the following: (1) The Theft, Property Destruction, and Fraud Package; (2) the Tax Package; (3) More than Minimal Planning Conforming Amendments; (4) Amendments for Referring Guidelines; and (5) Other Technical and Conforming Amendments. The proposed amendments in this part are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates alternative proposals and that the Commission invites comment and suggestions for appropriate policy choices; for example, in a case in which the Commission is considering whether a particular enhancement should provide only a minimum offense level or a minimum offense level with an additional two-level increase, each option would appear in bracketed text. Second, the Commission has highlighted certain issues for comment and invites suggestions for specific guideline language.

Part III proposes to make certain amendments to the probation and supervised release guidelines that are consistent with recently enacted legislation.

Finally, Part IV presents several issues for which the Commission requests public comment.

DATES: The Commission will announce at a later date the deadline for public comment on these proposed amendments and issues for comment, and the date for any public hearing(s) that may be scheduled.

ADDRESSES: Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, NE, Suite 2-500, Washington, DC 20002-8002, Attention: Public Information.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 273-4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year, pursuant to 28 U.S.C. 994(p).

(**Note:** The publication of these proposed amendments and issues for comment was approved before October 21, 1998.)

Authority: 28 U.S.C. 994(a), (o), (p), (x); Pub. L. 105-184, section 6, June 23, 1998, 112 Stat. 520.

Richard P. Conaboy,
Chairman.

Part I—Notice of Proposed Re-Promulgation of Telemarketing Fraud Amendment as Permanent Amendment

1. Synopsis of Proposed Amendment: On September 23, 1998, in response to directives contained in the Telemarketing Fraud Protection Act of 1998, Pub. L. 105-184, the Commission submitted to Congress a temporary, emergency amendment that provided (1) a two-level increase and a minimum offense level of level 12 in the fraud guideline (§ 2F1.1) for offenses that involve sophisticated means; and (2) a two-level increase in the vulnerable victim guideline (§ 3A1.1) for offenses that involve a large number of vulnerable victims. The amendment, particularly the sophisticated means enhancement, built upon and broadened an amendment submitted to Congress on May 1, 1998, which created an enhancement in § 2F1.1 for sophisticated concealment. The Commission specified an effective date of November 1, 1998 for the emergency amendment.

The Commission proposes to re-promulgate this amendment as a permanent, non-emergency amendment and submit it to Congress not later than May 1, 1999. Under the terms of the congressionally granted authority, the emergency amendment is temporary unless re-promulgated in the next amendment cycle under regularly applicable amendment procedures. See Pub. L. 100-182, § 21, set forth as an editorial note under 28 U.S.C. § 994.

Proposed Amendment: Section 2F1.1(b) is amended by striking

subdivision (3) and all that follows through the end of the subsection and inserting the following:

“(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; or (B) violation of any 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 (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.

(6) 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.

(7) 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.”

The Commentary to § 2F1.1 captioned “Application Notes” is amended by striking Application Note 14 and all that follows through the end of the Application Notes and inserting the following:

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

16. ‘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.

17. 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.

18. ‘The defendant derived more than \$1,000,000 in gross receipts from the offense,’ as used in subsection (b)(7)(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).

19. 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.’

20. If subsection (b)(7) (A) or (B) applies, there shall be a rebuttable presumption that the offense involved ‘more than minimal planning.’

The Commentary to § 2F1.1 captioned “Application Notes” is amended by redesignating Notes 3 through 13 as Notes 4 through 14, respectively; and by inserting after Note 2 the following new Note 3:

“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.”

The Commentary to § 2F1.1 captioned “Application Notes” is amended in Note 1 by striking “§ 2F1.1(b)(3)” and inserting “§ 2F1.1(b)(4)”; in redesignated Note 5 (formerly Note 4), by striking “(b)(3)(A)” and inserting “(b)(4)(A)”; and in redesignated Note 6 (formerly Note 5), by striking “(b)(3)(B)” and inserting “(b)(4)(B)”.

The Commentary to § 2F1.1 captioned “Background” is amended by inserting after the fifth paragraph the following new paragraph:

“Subsection (b)(5) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.”

Section 3A1.1(b) is amended to read as follows:

“(b)(1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.

(2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by 2 additional levels.”

The Commentary to § 3A1.1 captioned "Application Notes" is amended in Note 2 in the first paragraph by striking "victim" includes any person" before "who is" and inserting "vulnerable victim" means a person (A)"; and by inserting after "(Relevant Conduct)" the following:

“(B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct”.

The Commentary to § 3A1.1 captioned "Application Notes" is amended in Note 2 in the second paragraph by striking "where" each place it appears and inserting "in which".

The Commentary to § 3A1.1 captioned "Application Notes" is amended in Note 2 in the third paragraph by striking "offense guideline specifically incorporates this factor" and inserting "factor that makes the person a vulnerable victim is incorporated in the offense guideline".

The Commentary to § 3A1.1 captioned "Background" is amended by adding at the end the following additional paragraph:

"Subsection (b)(2) implements, in a broader form, the instruction to the Commission in section 6(c)(3) of Public Law 105-184."

The Commentary to § 2B5.1 captioned "Application Notes" is amended in Note 1 by inserting "United States" before "Virgin Islands".

Part II—The Economic Crime Package

In May, 1997, the Commission set as one of its priorities the systematic study and analysis of the guidelines for fraud, theft, and tax offenses. After approximately two years of data collection, analyses, public comment, and public hearings, the Commission developed a comprehensive "Economic Crime Package".

The Economic Crime Package is composed of the following: (A) The Theft, Property Destruction, and Fraud Package; (B) the Tax Package; (C) More than Minimal Planning Conforming Amendments; (D) Amendments for Referring Guidelines; and (E) other technical and conforming amendments.

In addition to seeking comment on the Economic Crime Package, the Commission invites suggestions for options, other than those presented in the Package, for treating theft, fraud, and tax offenses in the guidelines.

(A) The Theft, Property Destruction, and Fraud Package

2. Synopsis of Proposed Amendment: The "Theft, Property Destruction, and Fraud Package" has the following

principal features: (A) A consolidated theft, fraud, and property destruction guidelines; (B) a new loss table for fraud and theft offenses, with more than minimal planning "built in"; and (C) a clarified loss definition.

The new consolidated guideline begins with a base offense level of level 6. This base offense level has the effect of increasing the base offense level for theft and property destruction cases. However, this increase will be offset, for the most part, by a higher floor offense level in the new loss table for these offenses. The current loss table for theft and property destruction has its first offense level increase at amounts exceeding \$100, whereas the offense level increase in the new loss table will begin at amounts exceeding \$2000.

The proposed guideline also provides for a loss table that builds more than minimal planning into the table, instead of maintaining this factor as a separate two-level enhancement. The first level from the former enhancement is built in at amounts exceeding \$10,000; the second level is built in at amounts exceeding \$20,000. The proposed loss table also provides an increase in offense level severity beginning at amounts exceeding \$40,000. Because more than minimal planning is built into the loss table, the package also presents options for departure language that would either prohibit or discourage a departure from the guideline range based on more than minimal planning, or lack thereof.

The enhancement for sophisticated means is included in the consolidated guideline based on the assumption that the enhancement, promulgated as a temporary, emergency amendment effective November 1, 1998, will be repromulgated as a permanent amendment during the next amendment cycle. (See, Part I—Notice of Repromulgation of Telemarketing Fraud Amendment as Permanent Amendment.) Other changes in the guideline structure include (A) the addition of risk of death to the risk of serious bodily injury enhancement and an increase in the floor offense level from level 13 to level 14 in this enhancement; (B) options for a floor offense level and offense level increase for the gross receipts enhancement; and (C) options for a bribery cross reference and other, general cross references.

The clarified loss definition begins with the general rule that loss is the greater of actual loss or intended loss. The loss definition also: (A) Defines "actual loss," "reasonably foreseeable," and "intended loss"; (B) provides flexibility in determining the loss amount, giving consideration to a

number of factors; (C) provides that gain shall be used instead of loss if gain is greater than loss and more accurately reflects the seriousness of the offense; (D) provides rules for crediting amounts the defendant paid back to the victim; (E) provides special rules relating to certain kinds of cases, such as "Ponzi" schemes; (F) presents options on whether interest can be considered in the loss calculation; and (G) sets out upward and downward departure considerations.

Proposed Amendment: Strike the heading to Part B of Chapter Two, the heading to Subpart 1 of Part B of Chapter Two, the Introductory Commentary to such subpart, §§ 2B1.1, 2B1.3, and 2F1.1, and insert the following:

Part B—Basic Economic Offenses

1. Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, Fraud, and Insider Trading

Introductory Commentary

These sections address basic forms of property offenses: theft, embezzlement, fraud, forgery, counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States), insider trading, transactions in stolen goods, and simple property damage or destruction. (Arson is dealt with separately in Part K, Offenses Involving Public Safety.) These guidelines apply to offenses prosecuted under a wide variety of federal statutes, as well as offenses that arise under the Assimilative Crimes Act.

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; 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:

Loss (apply the greatest)	Increase in level
(A) More than \$2,000	Add 1.
(B) More than \$5,000	Add 2.
(C) More than \$10,000	Add 4.
(D) More than \$20,000	Add 6.
(E) More than \$40,000	Add 8.
(F) More than \$80,000	Add 10.
(G) More than \$200,000	Add 12.
(H) More than \$500,000	Add 14.
(I) More than \$1,200,000	Add 16.
(J) More than \$2,500,000	Add 18.
(K) More than \$7,500,000	Add 20.
(L) More than \$20,000,000	Add 22.
(M) More than \$50,000,000	Add 24.

Loss (apply the greatest)	Increase in level
(N) More than \$100,000,000	Add 26.

(2) If the offense involved theft from the person of another, increase by 2 levels.

(3) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(4) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.

(5) If the offense was committed through mass-marketing, increase by 2 levels.

(6) If (A) the offense involved theft of property from a national cemetery; or (B) property of a national cemetery was damaged or destroyed, increase by 2 levels.

(7) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; or (B) a violation of any 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 10, increase to level 10.

(8) 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.

(9) If the offense involved (A) the conscious or reckless risk of death or 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 14, increase to level 14.

(10) If (A) the offense involved an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts, and (B) the offense level as determined above is less than level 14, increase to level 14.

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

[Gross Receipts, Option 1: [(12) If (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense; and (B) the offense level as determined above is less than level 24, increase to level 24.]

[Gross Receipts, Option 2: [(12) If (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels. If the resulting offense level is less than level 24, increase to level 24.]

[Note: The Commission also has the option to keep the current 4-level enhancement (as well as the floor) gross receipts SOC.]

(c) Cross References.

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy), § 2D2.1 (Unlawful Possession; Attempt or Conspiracy), § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate, if the resulting offense level is greater than that determined above.

(2) If the offense involved (A) arson; or (B) property destruction by use of explosives, apply § 2K1.4 (Arson: Property Destruction by Use of Explosives).

[(3) If the offense involved (A) commercial bribery, or (B) bribery, gratuity, or a related offense involving a public official, apply § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) or a guideline from Chapter Two, Part C (Offenses Involving Public Officials), as most appropriate [, if the resulting offense level is greater than that determined above].]

[(4) If (A) none of subdivisions (1), (2), or (3) of this subsection apply; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, 1341, 1342, or 1343); and (C) the conduct set forth in the count of conviction is more specifically covered by another guideline in Chapter Two, apply that other guideline.]

(d) Special Instruction.

(1) If the defendant was convicted under 18 U.S.C. § 1030(a)(4) or (5), 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, 1983-1988, 1990c; 18 U.S.C. §§ 225, 285-289, 471-473, 500, 510, 511, 553(a)(1), (2), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025-1028, 1029, 1030(a)(5), 1031, 1341-1344, 1361, 1363, 1702, 1703, 1708, 1831, 1832, 2113(b), 2312-2317, 2321; 29 U.S.C. §§ 439, 461, 501(c), 1131. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—
 'Financial institution' means (A) any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; (B) 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; (C) any health, medical or hospital insurance association; (D) brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; (E) futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and (F) any similar entity, whether or not insured by the federal government.
 'Union or employee pension fund' and 'health, medical, or hospital insurance association,' 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.

'Firearm' and 'destructive device' are defined in the Commentary to § 1B1.1 (Application Instructions).

'Foreign instrumentality,' 'foreign agent,' and 'trade secret' have the meaning given those terms in 18 U.S.C. § 1839(1), (2), and (3), respectively.

'Mass-marketing,' 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.

'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.

'Theft from the person of another' means the taking, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing or non-forcible purse-snatching, such as the theft of a purse from a shopping cart.

2. For purposes of subsection (b)(1)—

(A) General Rule. Loss is the greater of the actual loss or the intended loss.

'Actual loss' means the reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). 'Reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances of the particular case, should have known would likely follow, in the ordinary course of events, as a result of that conduct.

'Intended loss' means the pecuniary harm intended to be caused by the conduct for which the defendant is accountable under § 1B1.3, even if that harm would have been unlikely or impossible to accomplish (e.g., as in a government sting operation).

(B) Determination of Loss. The court need not determine the precise amount of the loss. Rather, it need only make a reasonable estimate of that amount, based on available information and using, as appropriate and practicable under the circumstances to best effectuate the general rule in subdivision (A), factors such as the following:

(i) The fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, or destroyed; or if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing property taken or otherwise unlawfully acquired or destroyed.

(ii) The cost of repairs to damaged property, not to exceed the replacement cost had the property been destroyed.

(iii) The approximate number of victims multiplied by the average loss to each victim.

(iv) More general factors, such as the scope and duration of the offense and

revenues generated by similar operations.

(C) Gain. The court shall use gain instead of loss under subsection (b)(1) if both (i) gain is greater than loss (which may be zero); and (ii) gain more accurately reflects the seriousness of the offense.

(D) Credits Against Loss. Except as provided in subdivision (F)(i), loss shall be reduced by the value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the defendant knew or should have known that the offense had been detected.

In the case of collateral, the value of the economic benefit is the amount the victim has recovered as of the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the value is its fair market value as of the time of sentencing.

In any other case, the value of the economic benefit is its fair market value as of the time of transfer to the victim.

However, in cases in which the economic benefit transferred to the victim has little or no value to the victim because it is substantially different from what the victim intended to receive, loss shall not be reduced by the value of that economic benefit.

For purposes of this subdivision: (i) "economic benefit" includes money, property, or services performed; and (ii) "transferred" means pledged or otherwise provided as collateral, returned, or otherwise conveyed.

Option 1: [(E) Opportunity Costs. Interest (of any kind), anticipated profits, and other opportunity costs shall not be included in determining loss. However, there may be cases in which the amount of interest, anticipated profits, and other opportunity costs is so substantial that not including that amount as part of the loss would substantially understate the seriousness of the offense or the culpability of the defendant. In such cases, an upward departure may be warranted.]

Option 2: [(E) Interest. Interest shall be included in determining loss only if it is bargained for as part of a lending transaction that is involved in the offense. The court shall include any such interest that is accrued and unpaid as of the time the defendant knew or should have known that the offense had been detected.]

(F) Special Rules. The following special rules shall be used to assist in determining actual loss in the cases indicated:

(i) Fraudulent Investment Schemes. In a case involving a fraudulent investment

scheme, such as a Ponzi scheme, actual loss is the sum of the net actual losses of each victim who lost all or part of that victim's principal investment as a result of the fraudulent investment scheme. Because this subdivision provides, in cases covered hereunder, for determination of the net loss of each victim, subdivision (D), relating generally to credits against loss, shall not apply to such cases.

(ii) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes. In a case involving stolen or counterfeit credit cards (see 15 U.S.C. § 1602(k)), stolen or counterfeit access devices (see 18 U.S.C. § 1029(e)(1)), or purloined numbers or codes, the actual loss includes any unauthorized charges made with the credit cards, access devices, or numbers or codes. The actual loss determined for each such credit card, access device, or number or code shall be not less than \$100.

(iii) Diversion of Government Program Benefits. In a case involving diversion of government program benefits, actual loss is the value of the benefits diverted from intended recipients or uses.

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

(G) Upward Departure Considerations. There may be cases in which the loss substantially understates the seriousness of the offense or the culpability of the defendant. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.

(ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest.

(iii) The offense created a risk of substantial loss beyond the loss determined above.

(iv) The offense (I) endangered national security or military readiness; or (II) caused a loss of confidence in an important institution.

(v) The offense (I) endangered the solvency or financial security of one or more victims; or (II) impacted numerous victims and the loss determination

substantially understates the aggregate harm.

(H) Downward Departure Considerations. There also may be cases in which the loss substantially overstates the seriousness of the offense or the culpability of the defendant. In such cases, a downward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a downward departure is warranted:

(i) The primary objective of the offense was a mitigating, non-monetary objective. For example, the primary objective of the offense was to fund medical treatment for a sick parent. [However, if, in addition to that primary objective, a substantial objective of the offense was to benefit the defendant economically, a downward departure would not be warranted.]

(ii) The defendant made complete, or substantially complete, restitution prior to the time the defendant knew or should have known that the offense had been detected.

(I) Appropriate Deference. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. Accordingly, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

3. In some cases in which the amount of intended loss exceeds the actual loss, whether some of the intended loss would have occurred may be speculative. In such cases, the offense level ordinarily applicable to that amount of intended loss sometimes must be reduced, in accordance with § 2X1.1. (Conspiracies, Attempts, Solicitations). Specifically, in a case involving only inchoate offense conduct (i.e., a case in which the defendant was convicted only of an attempt, conspiracy, or solicitation, and in which the offense involved only intended loss), a decrease of three levels sometimes may apply, as provided under § 2X1.1.

Similarly, in the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud in which both actual loss and additional intended loss result), the offense level is to be determined, and may be decreased in some cases, in accordance with the provisions of § 2X1.1, whether the defendant is convicted of the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. As explained more fully in Application Note 4 of the Commentary to § 2X1.1, in such a case, a three-level decrease in the offense level for the

intended loss sometimes may apply, except that the offense level for the intended loss, with or without a three-level decrease, shall not be used if it is less than the offense level for the actual loss.

Options on Discouraged or Prohibited Departure Based on MMP:

[4. [Option 1: The Commission has determined that the amount of loss involved in a particular case is a more appropriate factor in distinguishing the seriousness of an offense than is the extent of planning. Accordingly, (A) a sentence below the applicable guideline range [Option 2: [ordinarily]] would not be warranted in a case merely because it involved only minimal planning; and (B) a sentence above the applicable guideline range [Option 2: [ordinarily]] would not be warranted in a case merely because it involved more-than-minimal planning.]

5. Subsection (b)(7)(A) applies in the case of a misrepresentation that the defendant was an employee or authorized agent of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies include (A) the mail solicitation by a group of defendants of contributions to a non-existent famine relief organization; (B) the diversion by a defendant of donations given for a religiously affiliated school as a result of telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school; and (C) the posing by a defendant as a federal collection agent in order to collect a delinquent student loan.

Subsection (b)(7)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in § 2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in § 4A1.1 (Criminal History Category)).

The enhancements in subsection (b)(7) are alternative rather than cumulative; however, if both of the enumerated factors apply in a particular

case, an upward departure may be warranted.

7. For purposes of subsection (b)(8)(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)(8)(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.

If the conduct that forms the basis for an enhancement under subsection (b)(8) 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.

8. For purposes of subsection (b)(10), a minimum measure of loss is provided in the case of an ongoing, sophisticated operation (such as an auto theft ring or "chop shop") to steal vehicles or vehicle parts or to receive stolen vehicles or vehicle parts. "Vehicles" refers to all forms of vehicles, including aircraft and watercraft.

9. For purposes of subsection (b)(11), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of experiencing any of the conditions described in subdivisions (A) through (D) of this note.

10. For purposes of subsection (b)(12), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. "Gross receipts" means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained

directly or indirectly as a result of the offense. See 18 U.S.C. §§ 982(a)(4), 1344.

11. Subsection (c)[(4)] provides a cross reference to another Chapter Two guideline in cases in which the defendant is convicted of a general fraud statute, and the conduct set forth in the count of conviction is more specifically covered by that other Chapter Two guideline. 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 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports) would be more apt, and false statements to a customs officer, for which § 2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) 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.

Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. If the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply § 2L2.1 or § 2L2.2, as appropriate, rather than this guideline, pursuant to subsection (c)(3).

12. 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.

Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, insider trading, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States). It also covers offenses involving altering or removing motor vehicle identification numbers, trafficking in automobiles or automobile parts with altered or obliterated identification numbers, odometer laws and regulations, obstructing correspondence, the falsification of documents or records relating to a benefit plan covered by the

Employment Retirement Income Security Act, and the failure to maintain, or falsification of, documents required by the Labor Management Reporting and Disclosure Act.

Because federal fraud statutes often are 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. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline. Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.

Both direct and consequential pecuniary harm that is reasonably foreseeable to result from the offense will be taken into account in determining the loss. Accordingly, in any particular case, the determination of loss may include consideration of factors not specifically set forth in this guideline. For example, in an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer," as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), "loss" is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service. The Commission does not intend that the cost to the government of prosecution and criminal investigation of an offense covered by this guideline will be included in the determination of loss, even if such costs are reasonably foreseeable.

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear;

such crimes are robberies and are covered under § 2B3.1 (Robbery).

A minimum offense level of 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of an organized scheme is used as an alternative to loss in setting a minimum offense level.

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 the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Subsection (b)(5) implements, in a broader form, the instruction to the Commission in section 6(b)(1) of Public Law 105-184. Subsection (b)(6) implements the instruction to the Commission in section 2 of Public Law 105-101. Subsection (b)(8) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105-184. Subsection (b)(9)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322. Subsection (b)(11) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73. Subsection (b)(12) implements the instruction to the Commission in section 2507 of Public Law 101-647. Subsection (d)(1) implements the instruction to the Commission in section 805(c) of Public Law 104-132."

(B) *The Tax Package*

3. Synopsis of Proposed Amendment: The following proposed amendment provides increases that are similar to the loss table presented in the consolidated theft, fraud, and property destruction

guideline, except at amounts between \$12,500 and \$80,000.

Proposed Amendment: Strike the tax table in § 2T4.1 and insert a new table as follows:

“§ 2T4.1. Tax Table.

Tax loss (apply the greatest)	Offense level
(A) \$2,000 or less	6
(B) More than \$2,000	8
(C) More than \$5,000	10
(D) More than \$12,500	12
(E) More than \$30,000	14
(F) More than \$80,000	16
(G) More than \$200,000	18
(H) More than \$500,000	20
(I) More than \$1,200,000	22
(J) More than \$2,500,000	24
(K) More than \$7,500,000	26
(L) More than \$20,000,000	28
(M) More than \$50,000,000	30
(N) More than \$100,000,000	32.”

Issue for Comment: On May 1, 1998, the Commission submitted to Congress an amendment that provided a two-level enhancement in the fraud guideline, § 2F1.1, for sophisticated concealment. The Commission also submitted amendments that generally conformed the sophisticated means enhancement in §§ 2T1.1, 2T1.4 and 2T3.1 to the sophisticated concealment enhancement provided in the fraud guideline.

Subsequent to these amendments, the Congress enacted the Telemarketing Fraud Protection Act of 1998, Pub. L. 105-184. This Act required the Commission to act under emergency authority and, among other things, specifically required the Commission to provide “an additional appropriate sentencing enhancement, if [a telemarketing] offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States.”

The Commission responded to this directive by building on the amendment to § 2F1.1 that added sophisticated concealment. The new amendment, which was submitted to Congress in September, 1998, broadened the scope of the “sophisticated concealment” enhancement to cover “sophisticated means” of executing or concealing a fraud offense.

The Commission invites comment on whether it should amend §§ 2T1.1, 2T1.4, and 2T3.1 to generally conform the sophisticated concealment enhancement (and the accompanying commentary) to the sophisticated means enhancement added to the fraud guideline in response to the Telemarketing Fraud Protection Act. The Commission also invites comment on whether it should provide a

minimum offense level of [12] for tax offenses that involve either sophisticated concealment or sophisticated means (if the Commission conforms the enhancement in §§ 2T1.1, 2T1.4, and 2T3.1).

(C) More Than Minimal Planning Conforming Amendments

4. Synopsis of Proposed Amendment: The following amendment makes conforming changes that necessarily follow from the incorporation of more than minimal planning into the loss table. The amendment proposes to strike references to more than minimal planning in appropriate places throughout the guidelines.

Proposed Amendment: The Commentary to § 1B1.1 captioned “Application Notes” is amended in Note 1(f) in the first paragraph by striking the last sentence as follows: “‘More than minimal planning’ also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which § 3C1.1 (Obstructing or Impeding the Administration of Justice) applies.”

The Commentary to § 1B1.1 captioned “Application Notes” is amended in Note 1(f) by striking the second paragraph as follows:

“‘More than minimal planning’ is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Consequently, this adjustment will apply especially frequently in property offenses.”

The Commentary to § 1B1.1 captioned “Application Notes” is amended in Note 1(f) by striking the last two paragraphs as follows:

“In a theft, going to a secluded area of a store to conceal the stolen item in one’s pocket would not alone constitute more than minimal planning. However, repeated instances of such thefts on several occasions would constitute more than minimal planning. Similarly, fashioning a special device to conceal the property, or obtaining information on delivery dates so that an especially valuable item could be obtained, would constitute more than minimal planning.

In an embezzlement, a single taking accomplished by a false book entry would constitute only minimal planning. On the other hand, creating purchase orders to, and invoices from, a dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accompanied by false entries.”

The Commentary to § 1B1.1 captioned “Application Notes” is amended in

Note 4 in the second paragraph by striking the last sentence as follows:

“For example, the adjustments from § 2F1.1(b)(2) (more than minimal planning) and § 3B1.1 (Aggravating Role) are applied cumulatively.”

Section 2B1.1(b)(4) is amended by striking subdivision (A) as follows:

“(A) If the offense involved more than minimal planning, increase by 2 levels; or”.

Section 2B1.1(b)(4)(B) is amended by striking “(B)”; and by striking “4” and inserting “2”.

The Commentary to § 2B1.1 captioned “Application Notes” is amended in Note 1 by striking “‘More than minimal planning,’”; and by striking “‘firearm,’” and inserting “‘Firearm’”.

The Commentary to § 2B1.1 captioned “Application Notes” is amended by striking Note 13 as follows:

“13. If subsection (b)(6) (A) or (B) applies, there shall be a rebuttable presumption that the offense involved ‘more than minimal planning.’”

The Commentary to § 2B1.1 captioned “Application Notes” is amended by redesignating Notes 14, 15, and 16 as Notes 13, 14, and 15, respectively.

The Commentary to § 2B1.1 captioned “Background” is amended in the first paragraph by striking the last sentence as follows:

“Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.”

The Commentary to § 2B1.1 captioned “Background” is amended by striking the second paragraph as follows:

“The guidelines provide an enhancement for more than minimal planning, which includes most offense behavior involving affirmative acts on multiple occasions. Planning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof.”

Section 2B1.3(b) is amended by striking subdivision (3) as follows:

“(3) If the offense involved more than minimal planning, increase by 2 levels.”; and by redesignating (b)(4) as (b)(3).

The Commentary to § 2B1.3 captioned “Application Notes” is amended in Note 1 by striking the first paragraph as follows:

“‘More than minimal planning’ is defined in the Commentary to § 1B1.1 (Application Instructions).”

Section 2F1.1(b) is amended by striking subdivision (2) as follows:

“(2) If the offense involved (A) more than minimal planning, or (B) a scheme

to defraud more than one victim, increase by 2 levels.”.

The Commentary to § 2F1.1 captioned “Application Notes” is amended by striking Note 2 as follows:

“2. ‘More than minimal planning’ (subsection (b)(2)(A)) is defined in the Commentary to § 1B1.1 (Application Instructions).”;

by striking Note 4 as follows:

“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.”;

by striking Note 20 as follows:

“20. If subsection (b)(7) (A) or (B) applies, there shall be a rebuttable presumption that the offense involved ‘more than minimal planning.’”; by redesignating Note 3 as Note 2, and by redesignating Notes 5 through 19 as Notes 3 through 17, respectively.

The Commentary to § 2F1.1 captioned “Background” is amended by striking the third paragraph as follows:

“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.”.

The Commentary to § 3D1.3 captioned “Application Notes” is amended in Note 3 by striking the last sentence as follows:

“In addition, the adjustment for ‘more than minimal planning’ frequently will apply to multiple count convictions for property offenses.”.

The “Illustrations of the Operation of the Multiple-Count Rules” after guideline 3D1.5 is amended in the fifth sentence of illustration 2 by inserting “and” before “1 level”; by striking “; and 2 levels are added because the conduct involved repeated acts with some planning (§ 2F1.1(b)(2)(A))”; and

in the last sentence by striking “9” and inserting “7”.

(D) Amendments for Referring Guidelines

5. Synopsis of Proposed Amendment: Currently, many guideline provisions refer to the loss tables in the theft (§ 2B1.1) and fraud (§ 2F1.1) guidelines. In general, the following amendments show how the guidelines that refer to either § 2B1.1 or § 2F1.1 are proposed to be amended if the Commission were to adopt the consolidated guideline presented in Proposed Amendment 1, above.

The proposed amendment accomplishes the following: (A) Presents a reference monetary table to be used as an alternative to the loss table in the consolidated guideline for guidelines that already build in more than minimal planning; (B) sets out the guidelines that would refer to this new reference monetary table; (C) presents three options for amending the pornography and obscenity guidelines; (D) presents two options for amending the copyright and structuring transactions guidelines; (E) presents two options for amending § 2B3.2 for offenses involving the invasion of a protected computer; (F) consolidates the bank gratuity and principal gratuity guidelines; and (G) presents technical and conforming amendments that would be required if the Commission consolidates the theft, fraud, and property destruction guidelines.

5(A). Reference Monetary Table

Proposed Amendment: Chapter Two, Part X is amended by adding at the end the following new subpart:

“6. Reference Monetary Table

§ 2X6.1. Reference Monetary Table

Amount (apply the greatest)	Increase in level
(A) More than \$2,000	Add 1.
(B) More than \$5,000	Add 2.
(C) More than \$10,000	Add 3.
(D) More than \$20,000	Add 4.
(E) More than \$40,000	Add 6.
(F) More than \$80,000	Add 8.
(G) More than \$200,000	Add 10.
(H) More than \$500,000	Add 12.
(I) More than \$1,200,000	Add 14.
(J) More than \$2,500,000	Add 16.
(K) More than \$7,500,000	Add 18.
(L) More than \$20,000,000	Add 20.
(M) More than \$50,000,000	Add 22.
(N) More than \$100,000,000	Add 24.”.

5(B). Guidelines That Will Refer to Reference Monetary Table

Proposed Amendment: Section 2B5.1(b) is amended by striking:

“(1) If the face value of the counterfeit items exceeded \$2,000, increase by the corresponding number of levels from the table at § 2F1.1 (Fraud and Deceit).”, and inserting:

“(1) If the face value of the counterfeit items exceeded \$2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).”.

Section 2B6.1(b) is amended by striking:

“(1) If the retail value of the motor vehicles or parts involved exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).”, and inserting:

“(1) If the retail value of the motor vehicles or parts involved exceeded \$2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).”.

Section 2F1.2(b) is amended by striking:

“(1) Increase by the number of levels from the table in § 2F1.1 corresponding to the gain resulting from the offense.”, and inserting:

“(1) If the gain resulting from the offense exceeded \$2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).”.

Section 2B4.1(b) is amended by striking:

“(1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1.”, and inserting:

“(1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded \$2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).”.

Section 2B3.3(b) is amended by striking:

“(1) If the greater of the amount obtained or demanded exceeded \$2,000, increase by the corresponding number of levels from the table in § 2F1.1.”, and inserting:

“(1) If the greater of the amount obtained or demanded exceeded \$2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).”.

Section 2Q2.1(b)(3) is amended by striking:

“(A) If the market value of the fish, wildlife, or plants exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit); or”,

and inserting:

“(A) If the market value of the fish, wildlife, or plants exceeded \$2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table), [but in no event more than [18] levels]; or”.

Section 2C1.1(b)(2) is amended by striking:

“(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded \$2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).”.

and inserting:

“(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded \$2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).”.

Section 2C1.2(b)(2) is amended by striking:

“(A) If the value of the gratuity exceeded \$2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).”.

and inserting:

“(A) If the value of the gratuity exceeded \$2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).”.

Section 2C1.7(b)(1) is amended by striking:

“(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded \$2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit); or”.

and inserting:

“(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded \$2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).”.

Section 2E5.1(b) is amended by striking:

“(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.”.

and inserting:

“(2) If the value of the prohibited payment or the value of the improper

benefit to the payer, whichever is greater, exceeded \$2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).”.

5(C). Pornography and Obscenity Guidelines

Proposed Amendment: [Option 1: Section 2G2.2(b) is amended by striking:

“(2) If the offense involved distribution, increase by the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels.”.

and inserting:

“(2) If the offense involved distribution, increase by the number of levels from the table in § 2X6.1 (Reference Monetary Table) corresponding to the retail value of the material, but in no event by less than [5] levels.”.

[Option 2: Section 2G2.2(b)(2) is amended by inserting “(Fraud and Deceit)” after “§ 2F1.1”.

[Option 3: Section 2G2.2(b)(2) is amended by striking “the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event by less than”.

The Commentary to § 2G2.2 captioned “Application Notes” is amended by adding at the end the following new note:

“4. Subsection (b)(2) provides a five-level enhancement if the offense involved distribution. If the offense involved distribution by a large-scale commercial enterprise [(i.e., a commercial enterprise distributing material having a retail value that is more than [\$40,000]), an upward departure may be warranted.”.

[Option 1: Section 2G3.1(b) is amended by striking:

“(1) If the offense involved an act related to distribution for pecuniary gain, increase by the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels.”.

and inserting:

“(1) If the offense involved an act related to distribution for pecuniary gain, increase by the number of levels from the table in § 2X6.1 (Reference Monetary Table) corresponding to the retail value of the material, but in no event by less than [5] levels.”.

[Option 2: Section 2G3.1(b)(1) is amended by inserting “(Fraud and Deceit)” after “§ 2F1.1”.

[Option 3: Section 2G3.1(b)(1) is amended by striking “the number of levels from the table in § 2F1.1 corresponding to the retail value of the

material, but in no event by less than 5”.

and inserting “[5]”.

The Commentary to § 2G3.1 captioned “Application Note” is amended by striking “Note” and inserting “Notes”; and adding at the end the following new note:

“2. Subsection (b)(1) provides a [five-level] enhancement if the offense involved an act related to distribution for pecuniary gain.. If the offense involved distribution by a large-scale commercial enterprise [(i.e., a commercial enterprise distributing material having a retail value that is more than [\$40,000]), an upward departure may be warranted”.

[Option 1: Section 2G3.2(b) is amended by striking:

“(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.”.

and inserting:

“(2) If 6 plus the number of levels from the table in § 2X6.1 (Reference Monetary Table) corresponding to the volume of commerce attributable to the defendant results in a greater offense level than the offense level determined above, increase to the greater offense level.”.

[Option 2: Section 2G3.2(b) is amended by striking:

“(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.”.

and inserting:

“(2) If 6 plus the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the volume of commerce attributable to the defendant results in a greater offense level than the offense level determined above, increase to the greater offense level.”.

[Option 3: Section 2G3.2(b) is amended by striking:

“(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.”.

The Commentary to § 2G3.2 is amended by striking:

“Background: Subsection (b)(1) provides an enhancement where an obscene telephonic communication was received by a minor less than 18 years of age or where a broadcast was made during a time when such minors were likely to receive it. Subsection (b)(2) provides an enhancement for large-scale

“dial-a-porn” or obscene broadcasting operations that results in an offense level comparable to the offense level for such operations under § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter). The extent to which the obscene material was distributed is approximated by the volume of commerce attributable to the defendant.”;

and by inserting:

“Application Notes:

1. 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.

2. If the offense involved communications or broadcasting operations by a large-scale commercial enterprise [i.e., a commercial enterprise engaging in a volume of commerce having a value that is more than [\$40,000]], an upward departure may be warranted.”.

5(D). Copyright and Structuring Transactions

Proposed Amendment: [Option 1: Section 2B5.3(b) is amended by striking:

“(1) If the retail value of the infringing items exceeded \$2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).”, and inserting:

“(1) If the retail value of the infringing items exceeded \$2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).”.

[Option 2: Maintains current reference to the fraud table.

[Option 1: Section § 2S1.3 is amended by striking:

“(a) Base Offense Level: 6 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.”,

and inserting:

“(a) Base Offense Level: 6 plus the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table), if the value of the funds exceeded \$2,000.

[Option 2: Section § 2S1.3 is amended by striking:

“(a) Base Offense Level: 6 plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.”,

and inserting:

“(a) Base Offense Level: 6 plus the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit),

if the value of the funds exceeded \$2,000.”.

5(E). Trespass Offenses Involving Invasion of Protected Computers

Proposed Amendment: [Option 1: Section 2B2.3(b) is amended by striking:

“(3) If the offense involved invasion of a protected computer resulting in a loss exceeding \$2,000, increase the offense level by the number of levels from the table in § 2F1.1 corresponding to the loss.”,

and inserting:

“(3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded \$2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).”.

[Option 2: Section 2B2.3(b) is amended by striking:

“(3) If the offense involved invasion of a protected computer resulting in a loss exceeding \$2,000, increase the offense level by the number of levels from the table in § 2F1.1 corresponding to the loss.”,

and inserting:

“(3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded \$2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).”.

5(F). Consolidation of Bank Gratuity and Principal Gratuity Guidelines

Proposed Amendment: Section 2C1.2(b)(2) is amended by striking:

“(A) If the value of the gratuity exceeded \$2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).”, and inserting:

“(A) If the value of the unlawful payment exceeded \$2,000, increase by the corresponding number of levels from the table in § 2X6.1 (Reference Monetary Table).”.

Section 2C1.2(b)(2)(B) is amended by striking “gratuity” and inserting “unlawful payment”.

The Commentary to § 2C1.2 captioned “Statutory Provision” is amended by striking “Provision” and inserting “Provisions”; by inserting “\$” following “U.S.C. §”; and by inserting “, 212–214, 217” following “(1)”.

The Commentary to § 2C1.2 captioned “Application Notes” is amended by adding at the end the following new note:

“5. An unlawful payment may be anything of value; it need not be a monetary payment.”.

The Commentary to § 2C1.2 captioned “Background” is amended by striking

the second and third sentences as follows:

“A corrupt purpose is not an element of this offense. An adjustment is provided where the value of the gratuity exceeded \$2,000, or where the public official was an elected official or held a high-level decision-making or sensitive position.”,

and inserting:

“It also applies to the offer to, or acceptance by, a bank examiner of any unlawful payment; the offer or receipt of anything of value for procuring a loan or discount of commercial paper from a Federal Reserve Bank; and the acceptance of a fee or other consideration by a federal employee for adjusting or canceling a farm debt.”.

Strike § 2C1.6 in its entirety.

5(G). Technical and Conforming Amendments

Synopsis of Proposed Amendment:

The following amendments are technical and conforming amendments that would be required if the Commission adopts the amendments in (A) that propose to consolidate the theft, fraud, and property destruction guidelines.

Proposed Amendment: The Commentary to § 1B1.1 captioned “Application Notes” is amended in Note 4 in the second paragraph by striking the second sentence.

The Commentary to § 1B1.3 captioned “Application Notes” is amended in Note 5 by striking “§ 2F1.1 (Fraud and Deceit)” and inserting “§ 2B1.1 (Theft, Property Destruction, and Fraud)”.

Chapter Two is amended by striking “§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)” wherever it appears and inserting “§ 2B1.1 (Theft, Property Destruction, and Fraud)”;

and by striking “§ 2F1.1 (Fraud and Deceit)” wherever it appears and inserting “§ 2B1.1 (Theft, Property Destruction, and Fraud)”.

The Commentary to § 2C1.1 captioned “Application Notes” is amended in Note 2 by striking “and includes both actual and intended loss”.

The Commentary to § 2C1.7 captioned “Application Notes” is amended in Note 3 by striking “and includes both actual and intended loss”.

Section 2F1.2 is deleted in its entirety; and Chapter Two, Part B is amended by adding at the end the following new guideline:

“§ 2B1.4. Insider Trading

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud)

corresponding to the gain resulting from the offense.

Commentary

Statutory Provisions: 15 U.S.C. 78j and 17 CFR 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."

The Commentary to § 2B5.3 captioned "Background" is amended in the first paragraph by striking ", which will generally exceed the loss or gain due to the offense".

Section 2H3.3(a)(2) is amended by inserting "or destruction" after "theft".

Section 2H3.3(a) is amended by striking subdivision (3).

The Commentary to § 2H3.3 captioned "Background" is amended by striking "or § 2B1.3 (Property Damage or Destruction)".

Section 2K1.4(a) is amended in subdivision (3) by striking "if the offense was committed in connection with a scheme to defraud; or" and inserting a period; and by striking subdivision (4).

Section 2K1.4(b) is amended in subdivision (2) by striking "(a)(4)" and inserting "(a)(3)".

The Commentary to § 2N2.1 captioned "Application Notes" is amended in Note 2 by inserting "theft, property destruction, and" after "involved"; and by striking "theft, bribery, revealing trade secrets, or destruction of property" and inserting "bribery".

The Commentary to § 2N3.1 captioned "Background" is amended by striking "the guideline for fraud and deception,

§ 2F1.1," and inserting "§ 2B1.1 (Theft, Property Destruction, and Fraud)".

The Commentary to § 3B1.3 captioned "Application Notes" is amended by adding at the end the following new note:

"4. The following additional illustrations of an abuse of a position of trust pertain to theft or embezzlement from employee pension or welfare benefit plans or labor unions:

(A) If the offense involved theft or embezzlement from an employee pension or welfare benefit plan and the defendant was a fiduciary of the benefit plan, an adjustment under this section for abuse of a position of trust will apply. Fiduciary of the benefit plan is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.

(B) If the offense involved theft or embezzlement from a labor union and the defendant was a union officer or occupied a position of trust in the union (as set forth in 29 U.S.C. § 501(a)), an adjustment under this section for an abuse of a position of trust will apply."

Section 3D1.2(d) is amended by striking "2B1.3" and inserting "2B1.4"; and by striking "§§ 2F1.1, 2F1.2";.

Section 3D1.3(b) is amended by striking "(e.g., theft and fraud)".

The Commentary to § 3D1.3 captioned "Application Notes" is amended in Note 3 by striking "(e.g., theft and fraud)".

The "Illustrations of the Operation of the Multiple-Count Rules" after § 3D1.5 is amended in illustration 4 by striking "§ 2F1.1 (Fraud and Deceit)" and inserting "2B1.1 (Theft, Property Destruction, and Fraud)"; and by striking illustration 2 in its entirety; and by redesignating illustrations 3 and 4 as illustrations 2 and 3.

Chapter Eight is amended by striking "Larceny, Embezzlement, and Other Forms of Theft" wherever it appears and inserting "Theft, Property Destruction, and Fraud".

Chapter Eight is amended by striking "2F1.1 (Fraud and Deceit)" wherever it appears and inserting "§ 2B1.1 (Theft, Property Destruction, and Fraud)".

The Commentary to § 8A1.2 captioned "Application Notes" is amended in Note 3(i) by striking "\$" before

"§ 2B1.1"; and by striking "(Larceny, Embezzlement, and Other Forms of Theft), § 2F1.1 (Fraud and Deceit)" and inserting "(Theft, Property Destruction, and Fraud)".

Section 8C2.1 subsection (a) is amended by striking "2B1.3" and inserting "2B1.4"; and by striking "§§ 2F1.1, 2F1.2";.

Section 8C2.1 subsection (a) is amended by striking "2C1.6".

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. § 1281 by striking "2B1.3" and inserting "2B1.1";

in the lines referenced to 16 U.S.C. §§ 114, 117c, 123, 146, 413, and 433 by striking "2B1.3";

in the lines referenced to any of 18 U.S.C. §§ 32(a)(b), 33, 37, 43, 112(a), 970(a), 1030(a)(5), 1361, 1363, 1366, 1702, 1705, 1706, 1857, 2275, 2276, 2280, 2281, 2332a, by striking "2B1.3" and inserting "2B1.1";

in the lines referenced to any of 18 U.S.C. §§ 1852 through 1854 by striking "2B1.3";

in the line referenced to 49 U.S.C. App. § 1687(g) by striking "2B1.3" and inserting "2B1.1".

in the line referenced to 18 U.S.C. § 217 by striking "2C1.6" and inserting "2C1.2"; in the lines referenced to any of 7 U.S.C. §§ 6, 6b(A), 6b(B), 6b(C), 6c, 6h, 6o, 13(a)(2), 13(a)(3), 13(a)(4), 23, 270, 2024(b), and 2024(c) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 12 U.S.C. § 631 by striking "2F1.1" and inserting "2B1.1";

in the lines referenced to any of 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 80-b-6, 158, 645(a), 714m(a), 1644, 1681q, and 1693n(a) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 15 U.S.C. § 645(b) by striking ", 2F1.1";

in the line referenced to 15 U.S.C.

§ 714m(b) by striking ", 2F1.1"; in the lines referenced to any of 16 U.S.C. §§ 831t(b) and 831t(c) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 152 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 153 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 500 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 501 by striking "2F1.1" and inserting "2B1.1";

in the lines referenced to any of 18 U.S.C. §§ 502, 503, 505-510, 513, 514, and 642 by striking "2F1.1" and inserting "2B1.1";

in the lines referenced to any of 18 U.S.C. § 656, 657, 659, 663, 665(a), and 666(a)(1)(A), by striking ", 2F1.1";

in the lines referenced to any of 18 U.S.C. §§ 709 and 712 by striking "2F1.1" and inserting "2B1.1";

in the lines referenced to any of 18 U.S.C. §§ 911, 914, 915, 917, 1001–1007, 1010–1022 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1023 by striking "2F1.1";

in the lines referenced to any of 18 U.S.C. §§ 1025, 1026, 1028, 1029, 1030(a)(6), 1031, 1032 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1033 by striking "2F1.1";

in the lines referenced to any of 18 U.S.C. §§ 1035, 1341–1344, 1347, 1422, 1704, 1708, 1712, 1716C, 1720, 1728, 1919, 1920, 1923, 2072, 2073, 2197, and 2272 by striking "2F1.1" and inserting "2B1.1";

in the lines referenced to any of 18 U.S.C. §§ 2315 and 2316 by striking "2F1.1";

in the lines referenced to any of 19 U.S.C. §§ 1434–1436, 1919, and 2316 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 20 U.S.C. § 1097(a) by striking "2F1.1";

in the lines referenced to any of 20 U.S.C. §§ 1097(b) and 1097(d) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 21 U.S.C. § 333(a)(2) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 22 U.S.C. §§ 1980(g), 2197(n), and 4221 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 25 U.S.C. § 450d by striking "2F1.1";

in the line referenced to 26 U.S.C. § 7208 by striking "2F1.1" and inserting "2B1.1";

in the lines referenced to any of 26 U.S.C. §§ 7214 and 7232 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 29 U.S.C. § 1141 by striking "2F1.1" and inserting "2B1.1";

in the lines referenced to any of 38 U.S.C. §§ 787 and 3502 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 41 U.S.C. § 423(e) striking "2F1.1" and inserting "2B1.1";

in the lines referenced to any of 42 U.S.C. §§ 408, 1307(a), 1307(b), 1320a–7b, 1383(d)(2), 1383a(a), 1383a(b), 1395nn(a), 1395nn(c), 1396h(a), 1713 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 1760(g) by striking "2F1.1";

in the line referenced to 42 U.S.C. § 1761(o)(1) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 1761(o)(2), by striking "2F1.1";

in the line referenced to 42 U.S.C. § 3220(a) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 3220(b) by striking "2F1.1";

in the line referenced to 42 U.S.C. § 3426 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 3791 by striking "2F1.1";

in the line referenced to 42 U.S.C. § 3792 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 3795 by striking "2F1.1";

in the line referenced to 42 U.S.C. § 5157 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 45 U.S.C. § 359(a) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 46 U.S.C. § 1276 by striking "2F1.1" and inserting "2B1.1";

in the lines referenced to any of 49 U.S.C. §§ 121, 11903, 14912, 16102, 80116, by striking "2F1.1" and inserting "2B1.1";

in the lines referenced to any of 7 U.S.C. § 13(d) and 13(f) by striking "2F1.2" and inserting "2B1.4";

in the line referenced to 15 U.S.C. § 78j by striking "2F1.2" and inserting "2B1.4"; and

in the line referenced to 18 U.S.C. § 1902 by striking "2F1.2" and inserting "2B1.4".

Part III—Conditions of Probation and Supervised Release

6. Synopsis of Proposed Amendment: In the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. 105–119, Congress amended sections 3563(a) and 3583(d) of title 18, United States Code, to add a new mandatory condition of probation for persons convicted of sex offenses. The new mandatory condition requires a person convicted of a sex offense (as described in 18 U.S.C. § 4042(c)(4)) to report that person's address and any change of residence to the probation officer supervising the case and to register as a sex offender in any State where the person resides, works, or is a student. These amendments to sections 3563(a) and 3583(d) become effective one year after November 26, 1997.

The following proposed amendment would add this new condition to the mandatory conditions of probation and supervised release listed in §§ 5B1.3 and 5D1.3.

Proposed Amendment: Subsection 5B1.3(a) is amended by adding at the end the following new subdivision:

"(9) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any

subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student (see 18 U.S.C. § 3563(a)(8))."

Subsection 5D1.3(a) is amended by adding at the end the following new subdivision:

"(7) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student (see 18 U.S.C. § 3583(d))."

Part IV—Issues for Comment

7. *Unauthorized Compensation*: As a result of enacted legislation, the maximum term of imprisonment for violations of 18 U.S.C. § 209 is now five years if the conduct is willful. Before that change, the maximum term of imprisonment for any violation of 18 U.S.C. § 209 was one year. The Commission invites comment on whether, in view of the increased maximum term of imprisonment for violations of 18 U.S.C. § 209, the guideline offense levels in § 2C1.4 (Payment or Receipt of Unauthorized Compensation) should be increased, and, if so, by what amount.

8. *Cloning of Wireless Telephones*: (A). The Wireless Telephone Protection Act, Pub. L. 105–418 (the "Act"), provides a general directive to the Commission to review and amend, if appropriate, the sentencing guidelines and policy statements to provide an appropriate penalty for offenses involving the cloning of wireless telephones, including attempts and conspiracies. The Commission invites comment on whether and how it should amend the guidelines for offenses involving the cloning of wireless telephones, including offenses involving an attempt or conspiracy to clone a wireless telephone. See 18 U.S.C. § 1029(e)(9) (as amended by the Act).

Specifically, should the Commission amend § 2F1.1 (Fraud), the guideline to which such offenses are referenced, to provide a tailored enhancement (specific offense characteristic) if the offense, including any relevant conduct, involved the use of hardware (a "copycat box") or software which has been configured for altering or modifying a wireless telephone? If so, what should be the magnitude of such an enhancement? Should the

Commission provide a specific offense characteristic in § 2F1.1, or a cross reference to other offense guidelines, if the cloning offense facilitated, or was in connection with, another offense? If such a specific offense characteristic or a cross reference is warranted, by how many levels should the sentence for such offenders be increased?

(B). If the Commission does not adopt a comprehensive revision of the guidelines and commentary for theft, property destruction, and fraud offenses, such as the comprehensive revision set forth in the Economic Crime Package proposed in Amendment 2, above (which, in the proposed loss definition, includes a special rule for access devices and purloined numbers), should the Commission nevertheless adopt a special rule for cases involving stolen, unauthorized, or counterfeit access devices used in cloning offenses? Such a special rule could, for example, provide for a minimal loss amount of \$100 in the case of each such access device.

9. *Nuclear, Chemical, and Biological Weapons*: Section 1423(a) of the Defense Authorization Act for Fiscal Year 1997 expressed the sense of Congress that the guidelines for the offenses of importation, attempted importation, exportation, and attempted exportation of nuclear, biological, and chemical weapons materials provide inadequate punishment for those offenses. Section 1423(b) of that Act urged the Commission to amend the guidelines to increase the penalties for such offenses under (1) section 11 of the Export Administration Act of 1979 (50 U.S.C. App. 2410); (2) sections 38 and 40 of the Arms Export Control Act (22 U.S.C. 2778 and 2780); (3) the International Economic Powers Act (50 U.S.C. 1701 et seq.); and (4) section 309(c) of the Nuclear Non-Proliferation Act of 1978 (22 U.S.C. 2156a(c)).

The Commission invites comment on whether, as Congress suggests, the guidelines, particularly §§ 2M5.1 (Evasion of Export Controls) and 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License) provide inadequate penalties for these offenses. If the guidelines provide inadequate punishment, how should the Commission address that inadequacy? Should the base offense level be increased? Are there specific offense

characteristics that should be added to the guidelines to take into account more egregious offense conduct?

Alternatively, should encouraged upward departure commentary be added to these guidelines for cases in which more egregious conduct occurs?

Section 511 of the Antiterrorism and Effective Death Penalty Act of 1996 pertains to biological weapons. It incorporates attempt and conspiracy into 18 U.S.C. § 175, which prohibits the production, stockpiling, transferring, acquiring, retaining, or possession of biological weapons. It also expands the scope of biological weapons provisions in chapter 10 of title 18 by expanding the meaning of biological agents.

Section 201 of the Chemical Weapons Convention Implementation Act of 1998 creates a new offense at 18 U.S.C. § 229. The new offense makes it unlawful for a person knowingly (1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or (2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt or conspire to violate paragraph (1). The penalty, set out in 18 U.S.C. § 229A, is any term of years, or, if the death of another person results, death or life imprisonment.

The Commission also invites comment as to how the guidelines should be amended to cover these statutes. One approach could be to amend § 2M6.1 (Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities) to include conduct that violates these statutes. If the Commission were to select this approach, what changes, if any, would be appropriate to accommodate these offenses? For example, should an alternative base offense level be added in the case of biological or chemical materials, weapons, or facilities? Are there specific offense characteristics that should be added to take into account the range of likely offense conduct? Should commentary encouraging an upward (or downward) departure be added for cases in which certain atypical conduct occurs?

10. *Tax Privacy Issues*: The Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, created an offense, codified at 26 U.S.C. § 7217, that makes it unlawful for the President, Vice President, anyone

employed in their executive offices, or certain other high-ranking officials of the executive branch to request the Internal Revenue Service to conduct or terminate an audit or other investigation of the tax liability of any person. The maximum term of imprisonment is 5 years.

The Act also amended 26 U.S.C. § 7213, which makes it unlawful for federal and state employees and certain other persons to disclose tax return information. The Act amended § 7213 to also make it unlawful to disclose tax-related computer software. The maximum term of imprisonment for such offenses is 5 years.

The Taxpayer Browsing Protection Act, Pub. L. 105-35, created an offense, codified at 26 U.S.C. § 7213A, that makes it unlawful for federal and state employees and certain other persons to inspect tax return information in any way other than that authorized under the Internal Revenue Code. The maximum term of imprisonment for such offenses is one year.

These new provisions are similar in nature to another tax offense, codified at 26 U.S.C. § 7216, which makes it unlawful for persons who are in the business of preparing tax returns to knowingly or recklessly disclose any such information or to use any such information for any purpose other than the preparation of the tax return. The maximum term of imprisonment for such offenses is one year.

The Commission invites comment on whether and/or how the sentencing guidelines might be amended to address violations of 26 U.S.C. §§ 7213, 7213A, 7216, and 7217. One approach may be to rework the guideline pertaining to the interception of communications or eavesdropping, § 2H3.1, because arguably all of the offenses described above implicate the privacy interests of the taxpayer whose tax information was the subject of the offense. An alternative approach would be to create a new guideline dealing with the invasion of privacy with respect to the audit, inspection, or disclosure of tax information. Are there other approaches that might be appropriate to address these offenses? The Commission invites alternative suggestions with proposed offense levels.

[FR Doc. 98-31756 Filed 11-27-98; 8:45 am]

BILLING CODE 2210-40-P, 2211-01-P