# SENTENCING GUIDELINES AND POLICY STATEMENTS


APRIL 13, 1987



(Incorporating technical, clarifying, and conforming amendments submitted to Congress May 1, 1987)

105309

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

# UNITED STATES SENTENCING COMMISSION

*William W. Wilkins, Jr., Chairman*

*Michael K. Block*

*Stephen G. Breyer*

*Helen G. Corrothers*

*George E. MacKinnon*

*Ilene H. Nagel*

*Paul H. Robinson*

*Benjamin F. Baer (ex officio)*

*Ronald L. Gainer (ex officio)*



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## RECORD OF SENTENCING COMMISSION VOTES

Pursuant to Sections 217(a) and 235(a)(1)(b)(i) of the Comprehensive Crime Control Act of 1984, as amended, the Commission voted to submit to the Congress the initial set of sentencing guidelines. The vote of the Commission was as follows:

| | | |
|---|---|---|
| William W. Wilkins, Jr. | -- | yes |
| Michael K. Block | -- | yes |
| Stephen G. Breyer | -- | yes |
| Helen G. Corrothers | -- | yes |
| George E. MacKinnon | -- | yes |
| Ilene H. Nagel | -- | yes |
| Paul H. Robinson | -- | no |

Pursuant to Section 994(p) of Title 28, United States Code, the Commission subsequently voted to submit to the Congress certain technical, conforming, and clarifying amendments to the initial set of sentencing guidelines. The vote of the Commission was as follows:

| | | |
|---|---|---|
| William W. Wilkins, Jr. | -- | yes |
| Michael K. Block | -- | yes |
| Stephen G. Breyer | -- | yes |
| Helen G. Corrothers | -- | yes |
| George E. MacKinnon | -- | yes |
| Ilene H. Nagel | -- | yes |
| Paul H. Robinson | -- | abstain |

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## PART A - INTRODUCTION

### 1. Authority

The United States Sentencing Commission ("Commission") is an independent agency in the judicial branch composed of seven voting and two non-voting, ex officio members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.

### 2. The Statutory Mission

The Comprehensive Crime Control Act of 1984 foresees guidelines that will further the basic purposes of criminal punishment, i.e., deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender. It delegates to the Commission broad authority to review and rationalize the federal sentencing process.

The statute contains many detailed instructions as to how this determination should be made, but the most important of them instructs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of "bank robbery/committed with a gun/$2500 taken." An offender characteristic category might be "offender with one prior conviction who was not sentenced to imprisonment." The Commission is required to prescribe guidelines ranges that specify an appropriate sentence for each class of convicted persons, to be determined by coordinating the offense behavior categories with the offender characteristic categories. The statute contemplates the guidelines will establish a range of sentences for every coordination of categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum imprisonment cannot exceed the minimum by more than the greater of 25 percent or 6 months. 28 U.S.C. § 994(b)(2).

The sentencing judge must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the judge to depart from the guidelines and sentence outside the range. In that case, the judge must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to see if the guideline was correctly applied. If the judge departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act requires the offender to serve virtually all of any prison sentence imposed, for it abolishes parole and substantially restructures good behavior adjustments.

The law requires the Commission to send its initial guidelines to Congress by April 13, 1987, and under the present statute they take effect automatically on November 1, 1987. Pub. L. No. 98-473, §235, reprinted at 18 U.S.C. § 3551. The Commission may submit guideline amendments each year to Congress between the beginning of a regular

session and May 1. The amendments will take effect automatically 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The Commission, with the aid of its legal and research staff, considerable public testimony and written commentary, has developed an initial set of guidelines which it now transmits to Congress. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines by submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts throughout the nation.

## 3. The Basic Approach

To understand these guidelines and the rationale that underlies them, one must begin with the three objectives that Congress, in enacting the new sentencing law, sought to achieve. Its basic objective was to enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system. To achieve this objective, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by "good time" credits. In addition, the parole commission is permitted to determine how much of the remainder of any prison sentence an offender actually will serve. This usually results in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence handed down by the court.

Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.

Honesty is easy to achieve: The abolition of parole makes the sentence imposed by the court the sentence the offender will serve. There is a tension, however, between the mandate of uniformity (treat similar cases alike) and the mandate of proportionality (treat different cases differently) which, like the historical tension between law and equity, makes it difficult to achieve both goals simultaneously. Perfect uniformity -- sentencing every offender to five years -- destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that lumps together armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, is far too broad.

At the same time, a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect. A bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected (and therefore may already be counted, to a different degree, in the punishment for the underlying offense); and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies, depending on how much other harm has occurred. (Thus, one cannot easily assign points for each kind of harm and simply add them up, irrespective of context and total amounts.)

The larger the number of subcategories, the greater the complexity that is created and the less workable the system. Moreover, the subcategories themselves, sometimes too broad and sometimes too narrow, will apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system of subcategories, would have to make a host of decisions about whether the underlying facts are sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different judges will apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to eliminate.

In view of the arguments, it is tempting to retreat to the simple, broad-category approach and to grant judges the discretion to select the proper point along a broad sentencing range. Obviously, however, granting such broad discretion risks correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. That is to say, such an approach risks a return to the wide disparity that Congress established the Commission to limit.

In the end, there is no completely satisfying solution to this practical stalemate. The Commission has had to simply balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any ultimate system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the moral principle of "just deserts." Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Thus, if a defendant is less culpable, the defendant deserves less punishment. Others argue that punishment should be imposed primarily on the basis of practical "crime control" considerations. Defendants sentenced under this scheme should receive the punishment that most effectively lessens the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of these points of view have urged the Commission to choose between them, to accord one primacy over the other. Such a choice would be profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor.

A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation. As a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result.

For now, the Commission has sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that uses data estimating the existing sentencing system as a starting point. It has analyzed data drawn from 10,000 presentence investigations, crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and resulting statistics, and data from other relevant sources, in order to determine which distinctions are important in present practice. After examination, the Commission has accepted, modified, or rationalized the more important of these distinctions.

This empirical approach has helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, is short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit many distinctions that some may believe important, yet they include most of the major distinctions that statutes and presentence data suggest make a significant difference in sentencing decisions. Important distinctions that are ignored in existing practice probably occur rarely. A sentencing judge may take this unusual case into account by departing from the guidelines.

The Commission's empirical approach has also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of moral consensus might make it difficult to say exactly what punishment is deserved for a particular crime, specified in minute detail. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient, readily available data might make it difficult to say exactly what punishment will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have in fact made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a moral or crime-control perspective.

The Commission has not simply copied estimates of existing practice as revealed by the data (even though establishing offense values on this basis would help eliminate disparity, for the data represent averages). Rather, it has departed from the data at different points for various important reasons. Congressional statutes, for example, may suggest or require departure, as in the case of the new drug law that imposes increased and mandatory minimum sentences. In addition, the data may reveal inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from present practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these initial guidelines are but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission has developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, and therefore effective, sentencing system.

## 4. The Guidelines' Resolution of Major Issues

The guideline-writing process has required the Commission to resolve a host of important policy questions, typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction will briefly discuss several of those issues. Commentary in the guidelines explains others.

### (a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense with which the defendant was charged and of which he was convicted ("charge offense" sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a real offense system. After all, the present sentencing system is, in a sense, a real offense system. The sentencing court (and the parole commission) take account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process, given the potential existence of hosts of adjudicated "real harm" facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable, and, in the Commission's view, risked return to wide disparity in practice.

The Commission therefore abandoned the effort to devise a "pure" real offense system and instead experimented with a "modified real offense system", which it published for public comment in a September 1986 preliminary draft.

This version also foundered in several major respects on the rock of practicality. It was highly complex and its mechanical rules for adding harms (e.g., bodily injury added the same punishment irrespective of context) threatened to work considerable unfairness. Ultimately, the Commission decided that it could not find a practical or fair and efficient way to implement either a pure or modified real offense system of the sort it originally wanted, and it abandoned that approach.

The Commission, in its January 1987 Revised Draft and the present guidelines, has moved closer to a "charge offense" system. The system is not, however, pure; it has a number of real elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that

make up the federal criminal law have forced the Commission to write guidelines that are descriptive of generic conduct rather than tracking purely statutory language. For another, the guidelines, both through specific offense characteristics and adjustments, take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken.

Finally, it is important not to overstate the difference in practice between a real and a charge offense system. The federal criminal system, in practice, deals mostly with drug offenses, bank robberies and white collar crimes (such as fraud, embezzlement, and bribery). For the most part, the conduct that an indictment charges approximates the real and relevant conduct in which the offender actually engaged.

The Commission recognizes its system will not completely cure the problems of a real offense system. It may still be necessary, for example, for a court to determine some particular real facts that will make a difference to the sentence. Yet, the Commission believes that the instances of controversial facts will be far fewer; indeed, there will be few enough so that the court system will be able to devise fair procedures for their determination. See United States v. Fatico, 579 F.2d 707 (2d Cir.1978) (permitting introduction of hearsay evidence at sentencing hearing under certain conditions), on remand, 458 F. Supp. 388 (E.D.N.Y. 1978), aff'd, 603 F.2d 1053 (2d Cir. 1979) (holding that the government need not prove facts at sentencing hearing beyond a reasonable doubt), cert. denied, 444 U.S. 1073 (1980).

The Commission also recognizes that a charge offense system has drawbacks of its own. One of the most important is its potential to turn over to the prosecutor the power to determine the sentence by increasing or decreasing the number (or content) of the counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin, or theft of $10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of $30,000. Further, a sentencing court may control any inappropriate manipulation of the indictment through use of its power to depart from the specific guideline sentence. Finally, the Commission will closely monitor problems arising out of count manipulation and will make appropriate adjustments should they become necessary.

(b) Departures.

The new sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance. . . that was not adequately taken into consideration by the Sentencing Commission . . .". 18 U.S.C. § 3553(b). Thus, in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of §5H1.4, and the last sentence of §5K2.12, list a few factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the

Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two basic reasons. First is the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that in the initial set of guidelines it need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's sentencing data indicate make a significant difference in sentencing at the present time. Thus, for example, where the presence of actual physical injury currently makes an important difference in final sentences, as in the case of robbery, assault, or arson, the guidelines specifically instruct the judge to use this factor to augment the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data do not permit the Commission, at this time, to conclude that the factor is empirically important in relation to the particular offense. Of course, a factor (say physical injury) may nonetheless sometimes occur in connection with a crime (such as fraud) where it does not often occur. If, however, as the data indicate, such occurrences are rare, they are precisely the type of events that the court's departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed. Of course, the Commission recognizes that even its collection and analysis of 10,000 presentence reports are an imperfect source of data sentencing estimates. Rather than rely heavily at this time upon impressionistic accounts, however, the Commission believes it wiser to wait and collect additional data from our continuing monitoring process that may demonstrate how the guidelines work in practice before further modification.

It is important to note that the guidelines refer to three different kinds of departure. The first kind, which will most frequently be used, is in effect an interpolation between two adjacent, numerically oriented guideline rules. A specific offense characteristic, for example, might require an increase of four levels for serious bodily injury but two levels for bodily injury. Rather than requiring a court to force middle instances into either the "serious" or the "simple" category, the guideline commentary suggests that the court may interpolate and select a midpoint increase of three levels. The Commission has decided to call such an interpolation a "departure" in light of the legal views that a guideline providing for a range of increases in offense levels may violate the statute's 25 percent rule (though others have presented contrary legal arguments). Since interpolations are technically departures, the courts will have to provide reasons for their selection, and it will be subject to review for "reasonableness" on appeal. The Commission believes, however, that a simple reference by the court to the "mid-category" nature of the facts will typically provide sufficient reason. It does not foresee serious practical problems arising out of the application of the appeal provisions to this form of departure.

The second kind involves instances in which the guidelines provide specific guidance for departure, by analogy or by other numerical or non-numerical suggestions. For example, the commentary to §2G1.1 (Transportation for Prostitution), recommends a downward adjustment of eight levels where commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures

will reflect the suggestions, and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.

A third kind of departure will remain unguided. It may rest upon grounds referred to in Chapter 5, Part H, or on grounds not mentioned in the guidelines. While Chapter 5, Part H lists factors that the Commission believes may constitute grounds for departure, those suggested grounds are not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly unusual.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas, and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts have urged the Commission not to attempt any major reforms of the agreement process, on the grounds that any set of guidelines that threatens to radically change present practice also threatens to make the federal system unmanageable. Others, starting with the same facts, have argued that guidelines which fail to control and limit plea agreements would leave untouched a "loophole" large enough to undo the good that sentencing guidelines may bring. Still other commentators make both sets of arguments.

The Commission has decided that these initial guidelines will not, in general, make significant changes in current plea agreement practices. The court will accept or reject any such agreements primarily in accordance with the rules set forth in Fed.R.Crim.P. 11(e). The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate.

The Commission nonetheless expects the initial set of guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. Insofar as a prosecutor and defense attorney seek to agree about a likely sentence or range of sentences, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which judges will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation. Since they will have before them the norm, the relevant factors (as disclosed in the plea agreement), and the reason for the agreement, they will find it easier than at present to determine whether there is sufficient reason to accept a plea agreement that departs from the norm.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . ." 28 U.S.C. § 994(j). Under present sentencing practice, courts sentence to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are "serious." If the guidelines were to permit courts to impose probation instead of prison in many or all such cases, the present sentences would continue to be ineffective.

The Commission's solution to this problem has been to write guidelines that classify as "serious" (and therefore subject to mandatory prison sentences) many offenses for which probation is now frequently given. At the same time, the guidelines will permit the sentencing court to impose short prison terms in many such cases. The Commission's view is that the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement or intermittent confinement). For offense levels eleven and twelve, the court must impose at least one half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

(e) Multi-Count Convictions.

The Commission, like other sentencing commissions, has found it particularly difficult to develop rules for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The reason it is difficult is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to life sentences of imprisonment--sentences that neither "just deserts" nor "crime control" theories of punishment would find justified.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment when multiple offenses that are the subjects of separate counts take place.

These rules are set out in Chapter Three, Part D. They essentially provide: (1) When the conduct involves fungible items, e.g., separate drug transactions or thefts of money, the amounts are added and the guidelines apply to the total amount. (2) When nonfungible harms are involved, the offense level for the most serious count is increased (according to a somewhat diminishing scale) to reflect the existence of other counts of conviction.

The rules have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures where necessary to produce a mitigated sentence.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These criminal statutes pose two problems. First, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it cannot comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission has sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses are particularly important in light of the need for enforcement of the general regulatory scheme. The Commission has sought to treat these offenses in these initial guidelines. It will address the less common regulatory offenses in the future.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses, dividing them into four categories.

First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper treatment of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense is as follows:

(1) The guideline provides a low base offense level (6) aimed at the first type of recordkeeping or reporting offense. It gives the court the legal authority to impose a punishment ranging from probation up to six months of imprisonment.

(2) Specific offense characteristics designed to reflect substantive offenses that do occur (in respect to some regulatory offenses), or that are likely to occur, increase the offense level.

(3) A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will be treated like the substantive offense.

The Commission views this structure as an initial effort. It may revise its approach in light of further experience and analysis of regulatory crimes.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission began by estimating the average sentences now being served within each category. It also examined

the sentence specified in congressional statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's forthcoming detailed report will contain a comparison between estimates of existing sentencing practices and sentences under the guidelines.

While the Commission has not considered itself bound by existing sentencing practice, it has not tried to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences in many instances will approximate existing practice, but adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons now receive probation, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who now receive probation from those who receive more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a current sentencing practice of very wide variability in which some defendants receive probation while others receive several years in prison for the same offense. Moreover, inasmuch as those who currently plead guilty often receive lesser sentences, the guidelines also permit the court to impose lesser sentences on those defendants who accept responsibility and those who cooperate with the government.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the new drug law and the career offender provisions of the sentencing law, require the Commission to promulgate rules that will lead to substantial prison population increases. These increases will occur irrespective of any guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum, or career offender, sentences), will lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons, estimate at approximately 10 percent, over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table. For technical and practical reasons it has 43 levels. Each row in the table contains levels that overlap with the levels in the preceding and succeeding rows. By overlapping the levels, the table should discourage unnecessary litigation. Both prosecutor and defendant will realize that the difference between one level and another will not necessarily make a difference in the sentence that the judge imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud. At the same time, the rows work to increase a sentence proportionately. A change of 6 levels roughly doubles the sentence irrespective of the level at which one starts. The Commission, aware of the legal requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months, also wishes to permit courts the greatest possible range for exercising discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the judge within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many, rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation as to which category an offender fell within would become more likely. Where a table has many smaller monetary distinctions, it minimizes the likelihood of litigation, for the importance of the precise amount of money involved is considerably less.

## 5. A Concluding Note

The Commission emphasizes that its approach in this initial set of guidelines is one of caution. It has examined the many hundreds of criminal statutes in the United States Code. It has begun with those that are the basis for a significant number of prosecutions. It has sought to place them in a rational order. It has developed additional distinctions relevant to the application of these provisions, and it has applied sentencing ranges to each resulting category. In doing so, it has relied upon estimates of existing sentencing practices as revealed by its own statistical analyses, based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from existing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with these guidelines will lead to additional information and provide a firm empirical basis for revision.

Finally, the guidelines will apply to approximately 90 percent of all cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in this initial set of guidelines. They will, however, be addressed in the near future. Their exclusion from this initial submission does not reflect any judgment about their seriousness. The Commission has also deferred promulgation of guidelines pertaining to fines, probation and other sanctions for organizational defendants, with the exception of antitrust violations. The Commission also expects to address this area in the near future.

## PART B - GENERAL APPLICATION PRINCIPLES

### §1B1.1. Application Instructions

(a) Determine the guideline section in Chapter Two most applicable to the statute of conviction. See §1B1.2 (Applicable Guidelines). The statutory index (Appendix A) provides a listing to assist in this determination. If more than one guideline is referenced for the particular statute, select the guideline most appropriate for the conduct of which the defendant was convicted.

(b) Determine the base offense level and apply any appropriate specific offense characteristics contained in the particular guideline in Chapter Two.

(c) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(d) If there are multiple counts of conviction, repeat steps one through three for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three. The resulting offense level is the total offense level.

(f) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.

(g) Determine the guideline range in Part A of Chapter Five that corresponds to the total offense level and criminal history category.

(h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

### §1B1.2. Applicable Guidelines

(a) The court shall apply the guideline in Chapter Two (Offense Conduct) most applicable to the offense of conviction. *Provided*, however, in the case of conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline in such chapter most applicable to the stipulated offense.

(b) The court shall determine any applicable specific offense characteristic, victim-related adjustment, or departure from the guidelines attributable to offense conduct, according to the principles in §1B1.3 (Relevant Conduct).

*Commentary*

*§1B1.2. This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). As a general rule, the court is to apply the guideline covering the offense conduct most applicable to the offense of conviction. Where a particular statute proscribes a variety of conduct which might constitute the subject of different guidelines, the court will decide which guideline applies based upon the nature of the offense conduct charged.*

*However, there is a limited exception to this general rule. Where a stipulation as part of a plea of guilty or nolo contendere specifically establishes facts that prove a more serious offense or offenses than the offense or offenses of conviction, the court is to apply the guideline most applicable to the more serious offense or offenses established. The sentence that may be imposed is limited, however, by the statute governing the offense of conviction. See Chapter Five, Part G (Implementing the Total Sentence of Imprisonment). For example, if the defendant pleads guilty to theft, but admits the elements of robbery as part of the plea agreement, the robbery guideline is to be applied. The sentence, however, may not exceed the maximum sentence for theft. See H. REP. 98-1017, 98th Cong., 2d Sess. 99 (1984). Similarly, if the defendant pleads guilty to one robbery but admits the elements of two additional robberies as part of a plea agreement, the guideline applicable to three robberies is to be applied.*

*The exception to the general rule has a practical basis. In cases where the elements of an offense more serious than the offense of conviction are established by the plea, it is of no real benefit to the defendant and may unduly complicate the sentencing process if the applicable guideline does not reflect the seriousness of the defendant's actual conduct. Without this exception, the court would be forced to use an artificial guideline and then depart from it to the degree the court found necessary based upon the more serious conduct established by the plea. The probation officer would be required to calculate a guideline (for the offense of conviction) which might contain characteristics difficult to establish in the context of the actual offense conduct. For example, the guideline in Chapter Two, §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), contains monetary distinctions which are different in content and effect from the monetary distinctions in the guideline applicable to robbery, §2B3.1. Yet, without the exception, the probation officer might also need to apply the robbery guideline to assist the court in determining the appropriate degree of departure. This cumbersome, artificial procedure is avoided by using the exception rule in guilty or nolo contendere plea cases where it is applicable.*

*As with any plea agreement, the court must first determine that the agreement is acceptable, in accordance with the policies stated in Chapter Six, Part B (Plea Agreements). The limited exception provided here applies only after the court has determined that a plea, otherwise fitting the exception, is acceptable.*

*Section 1B1.2(b) directs the court, once it has determined the applicable guideline under §1B1.2(a) to determine any applicable specific offense characteristics (under that guideline), any applicable victim-related adjustment from Chapter Three, Part A, and any guideline departures attributable to the offense conduct Chapter Five, Part K, using a "relevant conduct" standard, as that standard is defined in §1B1.3. In many instances, it will be appropriate that the court*

*consider the actual conduct of the offender, even when such conduct does not constitute an element of the offense. As described above, this may occur when an offender stipulates certain facts in a plea agreement. It is more typically so when the court considers the applicability of specific offense characteristics within individual guidelines, when it considers various adjustments, and when it considers whether or not to depart from the guidelines for reasons relating to offense conduct. In such instances, the court should consider all conduct, circumstances, and injury relevant to the offense (as well as all relevant offender characteristics). See §1B1.3 (Relevant Conduct).*

§1B1.3. Relevant Conduct

To determine the seriousness of the offense conduct, all conduct, circumstances, and injuries relevant to the offense of conviction shall be taken into account.

(a) Unless otherwise specified under the guidelines, conduct and circumstances relevant to the offense of conviction means:

acts or omissions committed or aided and abetted by the defendant, or by a person for whose conduct the defendant is legally accountable, that (1) are part of the same course of conduct, or a common scheme or plan, as the offense of conviction, or (2) are relevant to the defendant's state of mind or motive in committing the offense of conviction, or (3) indicate the defendant's degree of dependence upon criminal activity for a livelihood.

(b) Injury relevant to the offense of conviction means harm which is caused intentionally, recklessly or by criminal negligence in the course of conduct relevant to the offense of conviction.

*Commentary*

*A judge should consider all relevant offense and offender characteristics. Conduct and circumstances of the offense of conviction are restricted to:*

1. *conduct directed toward preparation for or commission of the offense of conviction, and efforts to avoid detection and responsibility for the offense of conviction;*

2. *conduct indicating that the offense of conviction was to some degree part of a broader purpose, scheme, or plan;*

3. *conduct that is relevant to the state of mind or motive of the defendant in committing the crime;*

4. *conduct that is relevant to the defendant's involvement in crime as a livelihood.*

*The first three criteria are derived from two sources, Rule 8(a) of the Federal Rules of Criminal Procedure, governing joinder of similar or related offenses, and Rule 404(b) of the Federal Rules of Evidence, permitting admission of evidence of other crimes to establish motive, intent, plan, and common scheme. These rules provide standards that govern consideration at trial of crimes "of the same or similar character," and utilize concepts and terminology familiar to judges, prosecutors, and defenders. The governing standard should be liberally construed in*

*favor of considering information generally appropriate to sentencing. When other crimes are inadmissible under the Rule 404(b) standard, such crimes may not be "relevant to the offense of conviction" under the criteria that determine this question for purposes of Chapter Two; such crimes would, however, be considered in determining the relevant offender characteristics to the extent authorized by Chapter Three (Adjustments), and Chapter Four (Criminal History and Criminal Livelihood) and Chapter Five, Part H (Specific Offender Characteristics). This construction is consistent with the existing rule that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense . . . for the purpose of imposing an appropriate sentence," 18 U.S.C. § 3577, so long as the information "has sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F. Supp. 751 (D. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983).*

*The last of these criteria is intended to ensure that a judge may consider at sentencing, information that, although not specifically within other criteria of relevance, indicates that the defendant engages in crime for a living. Inclusion of this information in sentencing considerations is consistent with 28 U.S.C. § 994(d)(11).*

## §1B1.4. Determining the Offense Level

In determining the offense level:

(a) determine the base offense level from Chapter Two;

(b) make any applicable adjustments for specific offense characteristics from Chapter Two in the order listed;

(c) make any applicable adjustments from Chapter Three;

(d) make any applicable adjustments from Chapter Four, Part B (Career Offenders and Criminal Livelihood).

*Commentary*

*Application of the guidelines for offense conduct is intended to be simple and straightforward. Once the appropriate base offense level is determined, all specific offense characteristics are to be applied in the order listed to determine the applicable offense level.*

*The adjustments in Chapter Three that may apply include Part A (Victim-Related Adjustments), Part B (Role in the Offense), Part C (Obstruction), Part D (Multiple Counts), and Part E (Acceptance of Responsibility). Chapter Four, Part B (Career Offenders and Criminal Livelihood), if applicable, is also to be treated as an adjustment to the offense level.*

## §1B1.5. Interpretation of References to Other Offense Guidelines

Unless otherwise expressly indicated, a reference to another guideline, or an instruction to apply another guideline, refers to the entire guideline,

i.e., the base offense level plus all applicable adjustments for specific offense characteristics.

*Commentary*

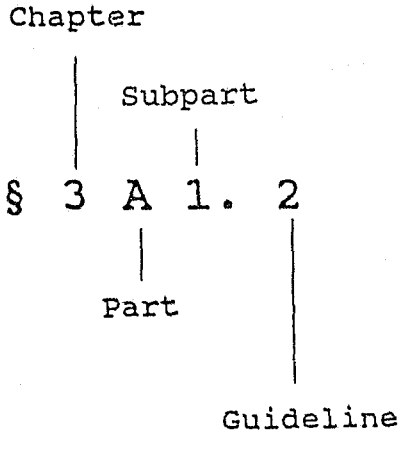
*References to other offense guidelines are most frequently designated "Cross References," but may also appear in the portions of the guideline entitled "Base Offense Level" (e.g., §§2D1.2(a)(1), 2H1.2(a)(2)), or "Specific Offense Characteristics" (e.g., §§2A4.1(b)(5)(B), 2Q1.2(b)(5)). These references may be to a specific guideline, or may be more general (e.g., to the guideline for the "underlying offense"). Such references are to be construed to incorporate the specific offense characteristics as well as the base offense level. For example, if the guideline reads "2 plus the offense level from §2A2.2 (Aggravated Assault)," the user would determine the offense level from §2A2.2, including any applicable adjustments for planning, weapon use, degree of injury and motive, and then increase by 2 levels. If the victim was vulnerable, the adjustment from §3A1.1 (Vulnerable Victim) also would apply.*

## §1B1.6 Structure of the Guidelines

The guidelines are presented in numbered chapters divided into alphabetical parts. The parts are divided into subparts and individual guidelines. Each guideline is identified by three numbers and a letter corresponding to the chapter, part, subpart and individual guideline.

The first number is the chapter, the letter represents the part of the chapter, the second number is the subpart, and the final number is the guideline. Section 2B1.1, for example, is the first guideline in the first subpart in Part B of Chapter Two. Or, §3A1.2 is the second guideline in the first subpart in Part A of Chapter Three. Policy statements are similarly identified.

To illustrate:



§1B1.7. Significance of Commentary

The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. See 18 U.S.C. § 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.

# CHAPTER TWO - OFFENSE CONDUCT

## OVERVIEW

Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level. When a particular offense warrants a more individualized sentence, specific offense characteristics are provided within the guidelines. Certain factors relevant to criminal conduct that are not provided in specific guidelines are set forth in Chapter Three, Part A (Victim-Related Adjustments) and Chapter Five, Part K (Departures). The statutes appearing at the beginning of each part are illustrative and do not necessarily include all the statutes covered by the guidelines in that part.

## PART A - OFFENSES AGAINST THE PERSON

### 1. HOMICIDE

18 U.S.C. § 115
18 U.S.C. § 351
18 U.S.C. §§ 1111 - 1112
18 U.S.C. § 1114
18 U.S.C. § 1116
18 U.S.C. § 1153
18 U.S.C. § 1751
18 U.S.C. § 1952A

§2A1.1. First Degree Murder

(a) Base Offense Level: 43

§2A1.2. Second Degree Murder

(a) Base Offense Level: 33

§2A1.3. Voluntary Manslaughter

(a) Base Offense Level: 25

§2A1.4. Involuntary Manslaughter

(a) Base Offense Level:

(1) 10, if the conduct was criminally negligent; or

(2) **14**, if the conduct was reckless.

*Commentary*

*§2A1.1 (18 U.S.C. § 1111). The Commission has concluded that, in the absence of capital punishment, life imprisonment is the appropriate punishment for the "willful, deliberate, malicious, and premeditated killing" to which 18 U.S.C. § 1111 applies.*

*The same statute also applies when death results from certain enumerated felonies--arson, escape, murder, kidnapping, treason, espionage, sabotage, rape, burglary or robbery. Life imprisonment is not necessarily appropriate in all such situations. For example, if in robbing a bank, the defendant merely passed a note to the teller, as a result of which she had a heart attack and died, a sentence of life imprisonment clearly would be inappropriate. If the defendant did not cause death intentionally or knowingly, the court may depart. The extent of the departure should be based upon the defendant's state of mind (e.g., recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, the Commission does not envision that departure below that specified in §2A1.2 (Second Degree Murder) is likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.*

*§2A1.2 (18 U.S.C. § 1111). Second degree murder is subject to a penalty of imprisonment for any term of years or for life.*

*§2A1.3 (18 U.S.C. § 1112). The statutory recognition that voluntary manslaughter should not be punished as severely as murder is reflected in the lower base offense level. The maximum penalty for voluntary manslaughter is ten years' imprisonment.*

*§2A1.4 (18 U.S.C. § 1112). The federal statute for involuntary manslaughter provides no distinction between reckless and criminally (i.e., grossly) negligent homicide. Recognizing the difference in conduct, the guideline sets the offense level for criminally negligent homicide at 10 and reckless homicide at 14. The Commission recommends a sentence at level 14 when a homicide results from driving while under the influence of alcohol or drugs.*

* * * * *

## 2. ASSAULT

18 U.S.C. §§ 111 - 115
18 U.S.C. § 351
18 U.S.C. §§ 1113 - 1114
18 U.S.C. §§ 1116 - 1117
18 U.S.C. § 1153
18 U.S.C. § 1751

### §2A2.1. Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder

(a) Base Offense Level: **20**

(b) Specific Offense Characteristics

(1) If an assault involved more than minimal planning, increase by **2** levels.

(2) (A) If a firearm was discharged, increase by **5** levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by **4** levels; (C) if a firearm or other dangerous weapon was brandished or its use was threatened, increase by **3** levels.

(3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

| Degree of Bodily Injury | Increase in Level |
|---|---|
| (A) Bodily Injury | add **2** |
| (B) Serious Bodily Injury | add **4** |
| (C) Permanent or Life-Threatening Bodily Injury | add **6** |

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed **9** levels.

(4) If a conspiracy or assault was motivated by a payment or offer of money or other thing of value, increase by **2** levels.

§2A2.2. Aggravated Assault

(a) Base Offense Level: **15**

(b) Specific Offense Characteristics

(1) If the assault involved more than minimal planning, increase by **2** levels.

(2) (A) If a firearm was discharged, increase by **5** levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by **4** levels; (C) if a firearm or other dangerous weapon was brandished or its use was threatened, increase by **3** levels.

(3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

| Degree of Bodily Injury | Increase in Level |
|---|---|
| (A) Bodily Injury | add **2** |
| (B) Serious Bodily Injury | add **4** |
| (C) Permanent or Life-Threatening Bodily Injury | add **6** |

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed **9** levels.

(4) If the assault was motivated by a payment or offer of money or other thing of value, increase by 2 levels.

§2A2.3. Minor Assault

(a) Base Offense Level:

(1) 6, if the conduct involved striking, beating, or wounding; or

(2) 3, otherwise.

*Commentary*

*There are a number of federal provisions that address varying degrees of assault and battery. The punishments under these statutes differ considerably, even among provisions directed to substantially similar defendant conduct. For example, if the assault is upon certain federal officers "while engaged in or on account of . . . official duties," the maximum term of imprisonment under 18 U.S.C. § 111 is three years. If a dangerous weapon is used in the assault on a federal officer, the maximum sentence is ten years. However, if the same weapon is used to assault a person not otherwise specifically protected, the maximum sentence under 18 U.S.C. § 113(c) is five years. If the assault results in serious bodily injury, the maximum sentence under 18 U.S.C. § 113(f) is ten years, unless the injury constitutes maiming by scalding, corrosive, or caustic substances under 18 U.S.C. § 114, in which case the maximum term of imprisonment is twenty years. Assault with intent to commit murder carries various maximum penalties and is covered by §2A2.1. Assault with intent to commit rape is covered under §2A3.1.*

*Definitions applicable to the assault section are found at 18 U.S.C. §§ 111, 113, 115, and 2245, except definitions for bodily injury. For convictions under the Assimilative Crimes Act, it is the nature of the conduct that is relevant. The federal code provides broad descriptions that encompass the variety of terms different jurisdictions use to describe similar conduct. Definitions of various degrees of bodily injury are found in different parts of the federal code, see 18 U.S.C. § 1365(g)(3), (4); 18 U.S.C. § 1515(5); 21 U.S.C. § 802(25), as amended, as well as under the parole guidelines. For sentencing purposes the levels of bodily injury are:*

1. *Permanent or Life-Threatening Bodily Injury. Permanent or life-threatening bodily injury means injury causing a substantial risk of death, major disability, impairment, loss of a bodily function or significant disfigurement that is likely to be permanent.*

2. *Serious Bodily Injury. Serious bodily injury means injury causing extreme pain, substantial impairment of a bodily function or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.*

3. *Bodily Injury. Bodily injury means any other significant physical injury.*

*§2A2.1 (18 U.S.C. §§ 113(a), 351(c), (d), 373, 1113, 1116(a), 1117, 1751(c), (d), 1952A(a)). This section applies to the offenses of assault with intent to commit murder, conspiracy to commit murder, solicitation to commit murder, and attempted murder.*

*Conspiratorial conduct proscribed by 18 U.S.C. § 1117 allows for a statutory maximum sentence of life imprisonment. Solicitation to commit murder is proscribed by 18 U.S.C. § 373, a provision that generally punishes solicitation to commit a crime of violence, defined as "conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against the person or property of another in violation of the laws of the United States." The maximum sentence of imprisonment under this statute is one-half the maximum term for the crime solicited; or twenty years if the punishment for the crime solicited is death.*

*The statutes that prohibit attempted murder, or assaults with intent to commit murder, vary widely in the punishment they impose. Assault with intent to commit murder, 18 U.S.C. § 113(a), carries a maximum sentence of twenty years' imprisonment. An attempted assassination of certain essential government officials, 18 U.S.C. § 351(c), carries a maximum sentence of life. An attempted murder of foreign officials, 18 U.S.C. § 1116(a), carries a maximum sentence of twenty years. An attempt to commit murder, absent an assault, 18 U.S.C. § 113(a), carries a maximum sentence of three years' imprisonment. 18 U.S.C. § 1113.*

*The aggravating factors are planning, weapon use, injury, and commission of the crime for hire. All of the factors can apply in the case of an assault; only the last can apply in the case of a conspiracy that does not include an assault; and none can apply in the case of a mere solicitation.*

*§2A2.2 (18 U.S.C. §§ 111, 112, 113(b),(c),(f), 114, 115(a), (b)(1), 351(e), 1751(e)). This section applies to serious (aggravated) assaults where there is no intent to kill. Although rare, such offenses may involve planning or be committed for hire. Consequently, the structure follows §2A2.1.*

*§2A2.3 (18 U.S.C. §§ 111, 112, 113(d), 113(e), 115(a), (b)(1), 351(e), 1751(e)). Simple assault and simple battery are considered under this section. The base offense level for simple assault is the statutory maximum penalty for the least serious assault. 18 U.S.C. § 113(e). The additional penalty for striking, beating, or wounding reflects a statutory distinction that provides a maximum six-month term of imprisonment. 18 U.S.C. § 113(d).*

* * * * *

## 3. CRIMINAL SEXUAL ABUSE

18 U.S.C. § 113(a)
18 U.S.C. § 1153
18 U.S.C. §§ 2241 - 2244

### §2A3.1. Criminal Sexual Abuse; Attempt or Assault with the Intent to Commit Criminal Sexual Abuse

(a) Base Offense Level: **27**

(b) Specific Offense Characteristics

(1) If the criminal sexual abuse was accomplished as defined in 18 U.S.C. § 2241 (including, but not limited to, the use or display of any dangerous weapon), increase by 4 levels.

(2) (A) If the victim had not attained the age of twelve years, increase by 4 levels; otherwise, (B) if the victim was under the age of sixteen, increase by 2 levels.

(3) If the victim was in the custody, care, or supervisory control of the defendant, was a corrections employee, or a person held in the custody of a correctional facility, increase by 2 levels.

(4) (A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels.

(5) If the victim was abducted, increase by 4 levels.

§2A3.2. Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts

(a) Base Offense Level: 15

(b) Specific Offense Characteristic

(1) If the victim was in the custody, care, or supervisory control of the defendant, increase by 1 level.

§2A3.3. Criminal Sexual Abuse of a Ward (Statutory Rape) or Attempt to Commit Such Acts

(a) Base Offense Level: 9

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the abusive sexual contact was accomplished as defined in 18 U.S.C. § 2241 (including, but not limited to, the use or display of any dangerous weapon), increase by 9 levels.

(2) If the abusive sexual contact was accomplished as defined in 18 U.S.C. § 2242, increase by 4 levels.

*Commentary*

*This section of the guidelines is modeled after recent federal legislation dealing with criminal sexual abuse, 18 U.S.C. §§ 2241 to 2245. Definitions of terms applicable to this section are set forth under 18 U.S.C. § 2245. Apply §§2A3.2, 2A3.3, or 2A3.4 only if §2A3.1 is not applicable.*

*§2A3.1 (18 U.S.C. §§ 2241-2242). Sexual offenses addressed in this section are crimes of violence. Because of their dangerousness, attempts are treated the same as completed acts of criminal sexual abuse. The statutory maximum penalty is any term of years or life imprisonment. The base offense level represents sexual abuse as set forth in 18 U.S.C. § 2242. The enhancement for use of force, threat of death, serious bodily injury, kidnapping, or criminal sexual abuse by other means is defined in 18 U.S.C. § 2241. This is intended to include any use or threatened use of a dangerous weapon.*

*One of the important distinctions Congress has made under the new legislation involves the victimization of children under age twelve. 18 U.S.C. § 2241. Any criminal sexual abuse, including statutory rape, with children under twelve is punished more seriously than in the past and for sentencing purposes is governed by §2A3.1. An enhancement for this age distinction is provided.*

*An enhancement for a custodial relationship between defendant and victim is warranted in cases of criminal sexual abuse. Whether the custodial relationship is temporary or permanent, the defendant in such a case is a person the victim trusts or to whom the victim is entrusted. This sentencing aggravation represents the potential for greater and prolonged psychological damage. An enhancement is also provided for physical injury.*

*§2A3.2 (18 U.S.C. § 2243). This section applies to statutory rape, i.e., sexual acts that would be lawful but for the victim's incapacity to give lawful consent. It is assumed that a four-year age difference exists between the victim and the defendant, as is specified by statute. 18 U.S.C. § 2243. The statutory maximum penalty is five years' imprisonment. An enhancement is provided for defendants who victimize minors under their supervision or care.*

*If the defendant committed the criminal sexual act in furtherance of a commercial sex scheme such as pandering, transporting prostitutes, or pornographic materials, the court may depart from the guideline and impose a higher sentence.*

*§2A3.3 (18 U.S.C. § 2243). Under the new legislation, wards have been placed in the category of persons unable to consent to sexual acts. A ward is a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant. The statutory maximum penalty is one year imprisonment.*

*§2A3.4 (18 U.S.C. §§ 2244-2245). The distinction between sexual act and sexual contact is provided by statute. 18 U.S.C. § 2245. The base offense level includes abusive sexual contact with a minor or ward and any abusive sexual contact with other adults not included under 18 U.S.C. §§ 2244(a)(1) and 2244(a)(2). The maximum penalty for these offenses is six months' imprisonment. The enhancement for force, threat, or other means defined in 18 U.S.C. § 2241 results from a five-year increase in the statutory maximum penalty. The enhancement for victims who are incapable of appraising the nature of their conduct or who are physically incapable of resisting is consistent with the statutory increase of the maximum penalty to three years.*

* * * * *

## 4. KIDNAPPING, ABDUCTION, OR UNLAWFUL RESTRAINT

18 U.S.C. § 115
18 U.S.C. § 351
18 U.S.C. §§ 876-877
18 U.S.C. § 1201-1203
18 U.S.C. § 1751

### §2A4.1. Kidnapping, Abduction, Unlawful Restraint

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

(b) Specific Offense Characteristics

(1) If a ransom demand or a demand upon government was made, increase by **6** levels.

(2) (A) If the victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) if the victim sustained serious bodily injury, increase by **2** levels.

(3) If a dangerous weapon was used, increase by **2** levels.

(4) (A) If the victim was not released before thirty days had elapsed, increase by **2** levels.

(B) If the victim was not released before seven days had elapsed, increase by **1** level.

(C) If the victim was released before twenty-four hours had elapsed, decrease by **1** level.

(5) If the victim was kidnapped, abducted, or unlawfully restrained to facilitate the commission of another offense: (A) increase by **4** levels; or (B) if the result of applying this guideline is less than that resulting from application of the guideline for such other offense, apply the guideline for such other offense.

### §2A4.2. Demanding or Receiving Ransom Money

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

*Commentary*

*§2A4.1 (18 U.S.C. §§ 115(b)(2), 351(b), (d), 1201, 1203, 1751(b)). Federal kidnapping cases generally encompass three categories of conduct: limited duration kidnapping where the victim*

*is released unharmed; kidnapping that occurs as part of or to facilitate the commission of another offense (often, sexual assault); and kidnapping for ransom or political demand.*

*The guideline contains an adjustment for the length of time that the victim was detained. The adjustment recognizes the increased suffering involved in lengthy kidnappings, and provides an incentive to release the victim. A victim who is freed should be deemed to have been released unless the defendant attempted to recapture the victim or the victim was rescued by law enforcement authorities whom the defendant resisted.*

*An enhancement is provided when the offense is committed for ransom or to facilitate the commission of another offense. Should the application of this guideline result in a penalty less than the result achieved by applying the guideline for the underlying offense, apply the guideline for the underlying offense (e.g., §2A3.1, Criminal Sexual Abuse).*

*§2A4.2 (18 U.S.C. §§ 876-877, 1202). This section specifically includes conduct prohibited by 18 U.S.C. § 1202, requiring that ransom money be received, possessed, or disposed of with knowledge of its criminal origins. The actual demand for ransom under these circumstances is reflected in §2A4.1. The statutory maximum for this offense is ten years. This section additionally includes extortionate demands through the use of the United States Postal Service, behavior proscribed by 18 U.S.C. §§ 876-877, where the statutory maximum penalty is twenty years.*

* * * * *

## 5. AIR PIRACY

49 U.S.C. § 1472(i), (j), (l), (n)

### §2A5.1. Aircraft Piracy or Attempted Aircraft Piracy

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

(b) Specific Offense Characteristic

(1) If death resulted, increase by **5** levels.

### §2A5.2. Interference with Flight Crew Member or Flight Attendant

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

(1) **30**, if the defendant intentionally endangered the safety of the aircraft and passengers; or

(2) **18**, if the defendant recklessly endangered the safety of the aircraft and passengers; or

(3) if an assault occurred, the offense level from the most analogous assault guideline, §§2A2.1-2A2.4; or

(4) **9.**

*Commentary*

*§2A5.1 (49 U.S.C. §§ 1472(i), (n)). This section covers aircraft piracy both within the special aircraft jurisdiction of the United States, 49 U.S.C. § 1472(i), and aircraft piracy outside that jurisdiction when the defendant is later found in the United States, 49 U.S.C. § 1472(n). Both of these offenses carry a mandatory minimum sentence of twenty years' imprisonment. Seizure of control of an aircraft may be by force or violence, or threat of force or violence, or by any other form of intimidation. The presence of a weapon is considered in the base offense level.*

*§2A5.2 (49 U.S.C. §§ 1472(c), (j)). Endangerment to the aircraft and passengers represents behavior deserving of greater penalty. If an assault occurs, the most analogous assault guideline applies. The statutory maximum of twenty years' imprisonment allows for a wide range of conduct.*

*Carrying a weapon or explosive aboard an aircraft is behavior proscribed by 49 U.S.C. § 1472(l). This offense is covered in §2K1.5 (Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft).*

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## 6. THREATENING COMMUNICATIONS

### §2A6.1. Threatening Communications

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

(b) Specific Offense Characteristics

(1) If the defendant engaged in any conduct evidencing an intent to carry out such threat, increase by **6** levels.

(2) If specific offense characteristic §2A6.1(b)(1) does not apply, and the defendant's conduct involved a single instance evidencing little or no deliberation, decrease by **4** levels.

*Commentary*

*§2A6.1 (18 U.S.C. § 871, 876, 877, 878(a), 879). These statutes cover a wide range of conduct from an offhand threat to injure the President made while under the influence of alcohol, to a deliberate effort to instill fear, to a threat associated with other conduct*

*evidencing an intent to carry out such threat. The specific offense characteristics are intended to distinguish the cases described above. The Commission recognizes that it is not possible to cover all of the characteristics associated with this offense. For example, the background and mental condition of the defendant, and the nature of any objective conduct associated with the threat is likely to be of particular significance. The Commission intends that such factors be considered by the court in determining whether a departure from the guidelines is warranted.*

## PART B - OFFENSES INVOLVING PROPERTY

### 1. THEFT, EMBEZZLEMENT, RECEIPT OF STOLEN PROPERTY, AND PROPERTY DESTRUCTION

18 U.S.C. § 553(a)(1)
18 U.S.C. § 641
18 U.S.C. §§ 656 - 657
18 U.S.C. § 659
18 U.S.C. § 661
18 U.S.C. §§ 1361 - 1363
18 U.S.C. § 1701
18 U.S.C. §§ 1703
18 U.S.C. §§ 1705 - 1708
18 U.S.C. § 2113(b)
18 U.S.C. §§ 2312 - 2317

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft

(a) Base Offense Level: 4

(b) Specific Offense Characteristics

(1) If the value of the property taken exceeded $100, increase the offense level as follows:

| | Loss | Increase in Level |
|---|---|---|
| (A) | $100 or less | no increase |
| (B) | $101 - $1,000 | add 1 |
| (C) | $1,001 - $2,000 | add 2 |
| (D) | $2,001 - $5,000 | add 3 |
| (E) | $5,001 - $10,000 | add 4 |
| (F) | $10,001 - $20,000 | add 5 |
| (G) | $20,001 - $50,000 | add 6 |
| (H) | $50,001 - $100,000 | add 7 |
| (I) | $100,001 - $200,000 | add 8 |
| (J) | $200,001 - $500,000 | add 9 |
| (K) | $500,001 - $1,000,000 | add 10 |
| (L) | $1,000,001 - $2,000,000 | add 11 |
| (M) | $2,000,001 - $5,000,000 | add 12 |
| (N) | over $5,000,000 | add 13 |

(2) If a firearm, destructive device, or controlled substance was taken, increase by 1 level; but if the resulting offense level is less than 7, increase to level 7.

(3) If the theft was from the person of another, increase by 2 levels.

(4) If the offense involved more than minimal planning, increase by 2 levels.

(5) If undelivered United States mail was taken, and the offense level as determined above is less than level 6, increase to level 6.

(6) If the offense involved organized criminal activity, and the offense level as determined above is less than level 14, increase to level 14.

§2B1.2. Receiving Stolen Property

(a) Base Offense Level: 4

(b) Specific Offense Characteristics

(1) If the value of the property taken exceeded $100, increase by the corresponding number of levels from the table in §2B1.1.

(2) (A) If the offense was committed by a person in the business of selling stolen property, increase by 4 levels; or

(B) If the offense involved more than minimal planning, increase by 2 levels.

(3) If the property included a firearm, destructive device, or controlled substance, increase by 1 level; but if the resulting offense level is less than 7, increase to 7.

(4) If the offense involved organized criminal activity, and the offense level as determined above is less than level 14, increase to level 14.

§2B1.3. Property Damage or Destruction (Other than by Arson or Explosives)

(a) Base Offense Level: 4

(b) Specific Offense Characteristics

(1) If the amount of the property damage or destruction, or the cost of restoration, exceeded $100, increase by the corresponding number of levels from the table in §2B1.1.

(2) If the offense involved more than minimal planning, increase by 2 levels.

(3) If undelivered United States mail was destroyed, and the offense level as determined above is less than level 6, increase to level 6.

*Commentary*

*These sections address the most basic forms of property offenses: theft, embezzlement, transactions in stolen goods, and simple property damage or destruction. (Arson is dealt with separately in Part K, Offenses Involving Public Order and Safety.) These guidelines apply to offenses prosecuted under a wide variety of federal statutes, as well as offenses that arise under the Assimilated Crimes Act.*

*§2B1.1. This section applies to theft and embezzlement offenses in violation of 18 U.S.C. §§ 641, 656, 657, 659, 1702, 1708, 2113(b), and 2312 through 2317. Larceny and embezzlement are both forms of theft and are often covered by the same statutes.*

*The value of property taken plays an important role in determining sentences for theft and embezzlement offenses, since it is an indicator of both the harm to the victim and the gain to the defendant. The property table provides an enhancement based on the loss from theft. Value is determined by the replacement cost to the victim, or the market value of the property, whichever is greater. The loss includes any unauthorized charges made with stolen credit cards, but in no event less than $100 per card. Controlled substances are to be valued at their street value. The loss need not be determined with precision, and may be inferred from any reliable information, available including the apparent scope of the operation.*

*Consistent with statutory distinctions, the minimum offense level is provided for the theft of undelivered mail. Theft of undelivered mail interferes with a governmental function, and the scope of the theft may be difficult to ascertain.*

*An enhancement is also included for planning. This denotes actions that distinguish an impulse crime from one that involves more than the minimal amount of planning that is usual for the type of offense committed. Any series of thefts that are part of a scheme or pattern is deemed to involve more than minimal planning. 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. This adjustment is not intended to apply to simple efforts to cover up or conceal commission of the offense.*

*Studies show that stolen firearms are used disproportionately in the commission of crimes. The guideline provides an enhancement for theft of a firearm to ensure that some amount of imprisonment is required. An enhancement is provided when controlled substances are taken. Such thefts may involve a greater risk of violence, as well as a likelihood that the substance will be abused.*

*Theft from the person of another (including thefts from the immediate presence of the victim), such as pickpocketing or non-forcible purse-snatching, receive an enhanced sentence because of the increased risk. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies.*

*A minimum offense level of 14 is provided for organized criminal activity. This is designed for operations such as organized car theft rings, or "chop shops," where the scope of the activity is clearly significant but difficult to estimate. Of course, if reliable information enables the court to estimate a volume of property loss that would result in a higher offense level, the court should employ the higher offense level.*

*§2B1.2. This guideline applies to 18 U.S.C. §§ 553(a)(1), 659, 662, 1708, and 2312 through 2317. Receiving stolen property is treated much like theft. Receiving stolen property for*

*resale receives an enhancement because the amount of property is likely to underrepresent the scope of the offense. If the defendant is convicted of transporting stolen property, either §2B1.1 or this guideline would apply, depending on whether the defendant actually stole the property.*

*§2B1.3. This section addresses violations of 18 U.S.C. §§ 1361 through 1363, 1702, and 1703, involving vandalism or malicious mischief, as well as destruction of mail. Arson is treated in Part K, Offenses Involving Public Order and Safety.*

*In some cases involving property damage, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused. For example, the destruction of a $500 telephone line may cause an interruption in service to thousands of people for several hours. In such instances, departure would be warranted.*

* * * * *

## 2. BURGLARY AND TRESPASS

18 U.S.C. § 1382
18 U.S.C. § 1854
18 U.S.C. § 2113(a)
18 U.S.C. § 2115
18 U.S.C. § 2117
18 U.S.C. § 2118(b)

### §2B2.1. Burglary of a Residence

(a) Base Offense Level: **17**

(b) Specific Offense Characteristics

(1) If the offense involved more than minimal planning, increase by **2** levels.

(2) If the value of the property taken or destroyed exceeded $2,500, increase the offense level as follows:

| | Loss | Increase in Level |
|---|---|---|
| (A) | $2,500 or less | no increase |
| (B) | $2,501 - $10,000 | add **1** |
| (C) | $10,001 - $50,000 | add **2** |
| (D) | $50,001 - $250,000 | add **3** |
| (E) | $250,001 - $1,000,000 | add **4** |
| (F) | $1,000,001 - $5,000,000 | add **5** |
| (G) | more than $5,000,000 | add **6** |

(3) If obtaining a firearm, destructive device, or controlled substance was an object of the offense, increase by **1** level.

(4) If a firearm or other dangerous weapon was possessed, increase by **2** levels.

§2B2.2. Burglary of Other Structures

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

(b) Specific Offense Characteristics

(1) If the offense involved more than minimal planning, increase by **2** levels.

(2) If the value of the property taken or destroyed exceeded $2,500, increase by the corresponding number of levels from the table in §2B2.1.

(3) If obtaining a firearm, destructive device, or controlled substance was an object of the offense, increase by **1** level.

(4) If a firearm or other dangerous weapon was possessed, increase by **2** levels.

§2B2.3. Trespass

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

(b) Specific Offense Characteristic

(1) If the trespass occurred at a secured government facility, a nuclear energy facility, or a residence, increase by **2** levels.

(2) If a firearm or other dangerous weapon was possessed, increase by **2** levels.

*Commentary*

*§§2B2.1 and 2B2.2. These sections apply to violations of 18 U.S.C. §§ 2113(a), 2115, 2117, and 2118(b). Burglary often occurs in connection with other offenses. The risk of other crimes is included in the base offense level for burglary. Section 2B2.1 applies to residential burglary, where the risk of physical and psychological injury is highest. Section 2B2.2 applies to bank burglary as well as burglaries of other structures. Obtaining a weapon or controlled substance is considered to be an object of the offense if such an item was taken.*

*§2B2.3. This section applies to violations of 18 U.S.C. §§ 1382 and 1854. Most trespasses punishable under federal law involve federal lands or property. The trespass section provides an enhancement for offenses involving trespass on secured government installations, such as nuclear facilities, to protect a significant federal interest. Additionally, an enhancement is provided for trespass at a residence.*

* * * * *

## 3. ROBBERY, EXTORTION, AND BLACKMAIL

18 U.S.C. § 873
18 U.S.C. §§ 875 - 877
18 U.S.C. § 1951
18 U.S.C. §§ 2113 - 2114
18 U.S.C. § 2118(a)

### §2B3.1. Robbery

(a) Base Offense Level: **18**

(b) Specific Offense Characteristics

(1) If the value of the property taken or destroyed exceeded $2,500, increase the offense level as follows:

| | Loss | Increase in Level |
|---|---|---|
| (A) | $2,500 or less | no increase |
| (B) | $2,501 - $10,000 | add **1** |
| (C) | $10,001 - $50,000 | add **2** |
| (D) | $50,001 - $250,000 | add **3** |
| (E) | $250,001 - $1,000,000 | add **4** |
| (F) | $1,000,001 - $5,000,000 | add **5** |
| (G) | more than $5,000,000 | add **6** |

Treat the loss for a financial institution or post office as at least $5,000.

(2) (A) If a firearm was discharged increase by **5** levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by **4** levels; (C) if a firearm or other dangerous weapon was brandished, displayed or possessed, increase by **3** levels.

(3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

| | Degree of Bodily Injury | Increase in Level |
|---|---|---|
| (A) | Bodily Injury | add **2** |
| (B) | Serious Bodily Injury | add **4** |
| (C) | Permanent or Life-Threatening Bodily Injury | add **6** |

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed **9** levels.

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

(5) If obtaining a firearm, destructive device, or controlled substance was the object of the offense, increase by **1** level.

*Commentary*

*§2B3.1. This section applies to violations of 18 U.S.C. §§ 1951, 2113, 2114, and 2118(a). Possession or use of a weapon, physical injury, and unlawful restraint sometimes occur during a robbery. The guideline provides for a range of enhancements where these factors are present. Banks and post offices carry a minimum 1 level enhancement for property loss because such institutions generally have more cash readily available, and whether the defendant obtains more or less than $2,500 is largely fortuitous.*

*Obtaining drugs or other controlled substances is often the motive for robberies of a Veterans Administration Hospital, a pharmacy on a military base, or a similar facility. A specific offense characteristic is added for robberies where drugs or weapons were the object of the offense to take account of the dangers and security problems involved when such items are taken.*

*Although in current practice the amount of money taken in robbery cases appears to affect sentence length, its importance is small compared to that of the other harm involved. Moreover, because of the relatively high base offense level for robbery, an increase of 1 or 2 levels brings about a considerable increase in sentence length in absolute terms. Accordingly, a separate property table, which increases more slowly than that used in theft offenses, is utilized.*

*The enhancements for physical injury are meant to be suggestive only. If the degree of injury lies between permanent and serious, or between serious and bodily injury, the sentencing judge may interpolate to find the appropriate enhancement amount. The guideline provides an enhancement for robberies where a victim (A) was forced to accompany the defendant to another location; or (B) was forcibly restrained by being tied, bound, or locked up.*

*If the defendant was convicted under 18 U.S.C. § 2113(e) and in committing the offense or attempting to flee or escape, a participant killed any person, apply §2A1.1 (First Degree Murder). Otherwise, if death results, see Chapter Five, Part K (Departures).*

*The adjustments for weapon use and injury assume that, as is typical in a robbery, the defendant did not actually intend to murder the victim. If there was such intent, see §2A2.1, (Assault With Intent to Commit Murder).*

## §2B3.2. Extortion by Force or Threat of Injury or Serious Damage

(a) Base Offense Level: **18**

(b) Specific Offense Characteristics

(1) If the greater of the amount obtained or demanded exceeded $2,500, increase by the corresponding number of levels from the table in §2B3.1.

(2) (A) If a firearm was discharged increase by **5** levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by **4** levels; (C) if a firearm or other dangerous weapon was brandished, displayed or possessed, increase by 3 levels.

(3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

| Degree of Bodily Injury | Increase in Level |
|---|---|
| (A) Bodily Injury | add **2** |
| (B) Serious Bodily Injury | add **4** |
| (C) Permanent or Life-Threatening Bodily Injury | add **6** |

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.

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

§2B3.3. **Blackmail and Similar Forms of Extortion**

(a) Base Offense Level: **9**

(b) Specific Offense Characteristics

(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.

*Commentary*

*§2B3.2. This section applies to extortion involving express or implied threats to kill, kidnap, or physically injure a person, or to seriously damage a property interest, in violation of 18 U.S.C. §§ 875(b), 876, 877, and 1951 (the Hobbs Act). The Hobbs Act prohibits extortion, attempted extortion, and conspiracy to extort, and provides for up to twenty years' imprisonment for violations.*

*This guideline applies if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat, such as to drive an enterprise out of business. Even if the threat does not in itself imply violence, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it. An ambiguous*

*threat, such as "pay up or else," or a threat to cause labor problems, ordinarily should be treated under this section.*

*Violations of 18 U.S.C. §§ 875-877 are distinguished only by the method of communication of the extortionate demand. The maximum penalty under each statute varies from two to twenty years. Violations of 18 U.S.C. § 875 involve threats or demands transmitted by interstate commerce. Violations of 18 U.S.C. § 876 involve the use of the United States mails to communicate threats, while violations of § 877 involve mailing threatening communications from foreign countries.*

*Guidelines for extortion and bribery involving public officials are found in Part C, Offenses Involving Public Officials. Extortion under color of official right is covered under §2C1.1 unless there is use of force or a threat that qualifies for treatment under this section. Certain other extortion offenses are covered under the provisions of Part E, Offenses Involving Criminal Enterprise.*

*§2B3.3. This section applies only to blackmail and similar forms of extortion where there clearly is no threat of violence to person or property. "Blackmail" is defined as a threat to disclose a violation of United States law unless money or some other item of value is given. It is proscribed by 18 U.S.C. § 873, which provides for a maximum one-year term of imprisonment. Extortionate threats to injure a reputation, or other threats that are less serious than those covered by §2B3.2, may also be prosecuted under 18 U.S.C. §§ 875-877.*

* * * * *

## 4. COMMERCIAL BRIBERY AND KICKBACKS

15 U.S.C. §§ 78dd-1, 78dd-2
15 U.S.C. § 78ff
18 U.S.C. § 215
18 U.S.C. § 224
26 U.S.C. § 9012(e)
26 U.S.C. § 9042(d)
41 U.S.C. § 51
41 U.S.C. §§ 53 - 54
42 U.S.C. §§ 1395nn(b)(1),(2)
42 U.S.C. §§ 1396h(b)(1),(2)
49 U.S.C. § 11904
49 U.S.C. §§ 11907(a),(b)

### §2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(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.

*Commentary*

*§2B4.1. This section applies to violations of 15 U.S.C. §§ 78dd-1, 78dd-2; 18 U.S.C. §§ 215 and 224; 26 U.S.C. §§ 9012(e), 9042(d); 41 U.S.C. §§ 51, 53-54; 42 U.S.C. §§ 1395nn(b)(1), (2), 1396h(b)(1), (2); 49 U.S.C. § 11904, and 49 U.S.C. §§ 11907(a), (b). This guideline covers commercial bribery offenses and kickbacks that do not involve officials of federal, state, or local government. See Part C, Offenses Involving Public Officials.*

*The guideline directs the use of the property table at §2F1.1 to aggravate the offense level. The amount to be used is the greater of the value of the bribe, or the improper benefit of the action to be taken or effected in return for the bribe, if the value can reasonably be ascertained. If the amount of the benefit cannot be ascertained, the court should apply at least the amount of the bribe. For example, if a bank officer agreed to the offer of a $25,000 bribe to approve a $250,000 loan under terms for which the applicant would not otherwise qualify, aggravation of the base offense level from the property table would provide for imposing a sentence based on the greater of the $25,000 bribe, or the savings in interest over the life of the loan compared with alternative loan terms. If, in another instance, a gambler paid a player $5,000 to shave points in a nationally televised basketball game, the value of the action to the gambler is the amount the gambler and the gambler's confederates won or stood to gain. If that amount cannot be estimated, the amount of the bribe is used to determine the appropriate increase in offense level from the property table.*

*Section 2B4.1 applies to violations of various federal bribery statutes, most of which authorize a maximum term of imprisonment of five years. 18 U.S.C. § 215 prohibits the offer or acceptance of a fee in connection with the procurement of a loan from a financial institution. The base offense level is to be enhanced by application of the property table, based upon the value of the unlawful payment or the value of the action to be taken or effected in return for the unlawful payment, whichever is greater.*

*Congress recently increased the maximum term of imprisonment for making prohibited payments to induce the award of subcontracts on federal projects from two to ten years. 41 U.S.C. §§ 51, 53-54. Violations of 42 U.S.C. §§ 1395nn(b)(1) and (b)(2), involve the offer or acceptance of a payment to refer an individual for services or items paid for under the Medicare program. Similar provisions in 42 U.S.C. §§ 1396h(b)(1) and (b)(2) cover the offer or acceptance of a payment for referral to the Medicaid program.*

*The guideline also relates to violations of law involving bribes and kickbacks in expenses incurred for a presidential nominating convention or presidential election campaign. These offenses are prohibited under 26 U.S.C. §§ 9012(e) and 9042(d), which apply to candidates for President and Vice President whose campaigns are eligible for federal matching funds.*

*This section also applies to violations of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 77d-1 and 77d-2, and to violations of 18 U.S.C. § 224, sports bribery, as well as certain violations of the Interstate Commerce Act that carry a maximum of two years' imprisonment.*

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## 5. COUNTERFEITING

17 U.S.C. § 506(a)
18 U.S.C. §§ 471 - 473
18 U.S.C. §§ 500 - 501
18 U.S.C. § 510
18 U.S.C. § 1003
18 U.S.C. §§ 2314 - 2315
18 U.S.C. §§ 2318 - 2320

**§2B5.1.** Offenses Involving Counterfeit Obligations of the United States

(a) Base Offense Level: **9**

(b) Specific Offense Characteristics

(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).

(2) If the defendant manufactured or produced any counterfeit obligation or security of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting, and the offense level as determined above is less than **15**, increase to **15**.

**§2B5.2.** Forgery; Offenses Involving Counterfeit Instruments Other than Obligations of the United States. Apply §2F1.1 (Fraud and Deceit).

**§2B5.3.** Criminal Infringement of Copyright

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

(b) Specific Offense Characteristic

(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).

**§2B5.4.** Criminal Infringement of Trademark

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

(b) Specific Offense Characteristic

(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).

*Commentary*

*§2B5.1. This section applies to violations of 18 U.S.C. §§ 471-473, 500, 501, 510, 1003, 2314, and 2315. These offenses involve counterfeiting or passing of counterfeit items. Federal law protects a variety of items from counterfeiting, including United States currency and coins, food stamps, postage stamps, foreign bank notes, labels for phonograph records, and military discharge papers.*

*Possession of counterfeiting devices to copy obligations and securities of the United States is treated as an aggravated form of counterfeiting because of the sophistication and planning involved in manufacturing counterfeit obligations or securities and the public policy interest in protecting the integrity of government obligations. Similarly, an enhancement is provided for a defendant who produces, rather than merely passes, the counterfeit items. The enhancement, however, is not intended to apply to someone who merely connects pieces of different notes.*

*§2B5.2. Forgery and fraudulent endorsement in violation of 18 U.S.C. § 495 is covered in §2F1.1 (Fraud and Deceit).*

*§2B5.3. This section applies to violations of 17 U.S.C. § 506(a) punished under 18 U.S.C. § 2319, as well as certain violations of 18 U.S.C. § 2511 as amended by the Electronic Communications Act of 1986. The amendments provide for a maximum term of imprisonment of five years for violations involving the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are essentially property offenses.*

*§2B5.4. This section applies to criminal infringement of trademarks in violation of 18 U.S.C. §§ 2318 and 2320.*

* * * * *

## 6. MOTOR VEHICLE IDENTIFICATION NUMBERS

18 U.S.C. § 511
18 U.S.C. § 553(a)(2)
18 U.S.C. § 2320

§2B6.1. **Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers.**

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(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).

(2) If the offense involved organized criminal activity, and the offense level as determined above is less than level **14**, increase to level **14**.

*Commentary*

*§2B6.1. This section applies to violations of 18 U.S.C. §§ 511, 553(a)(2), and 2320. The statutes prohibit altering or removing motor vehicle identification numbers, importing or exporting, or trafficking in motor vehicles or parts knowing that the identification numbers have been removed, altered, tampered with, or obliterated. Violations of 18 U.S.C. §§ 511 and 553(a)(2) carry a maximum of five years' imprisonment. Violations of 18 U.S.C. § 2320 carry a maximum of ten years' imprisonment.*

*See Commentary to §2B1.1 (Larceny, Embezzlement, and other Forms of Theft) regarding the adjustment for organized criminal activity, such as car theft rings and "chop shop" operations.*

## PART C - OFFENSES INVOLVING PUBLIC OFFICIALS

18 U.S.C. §§ 201(b), (c), (f), (g)
18 U.S.C. § 203
18 U.S.C. § 205
18 U.S.C. §§ 207-214
18 U.S.C. § 217
18 U.S.C. § 872
18 U.S.C. § 1909
18 U.S.C. § 1951

### §2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

Apply the greater:

(1) If the value of the bribe or the action received in return for the bribe exceeded $2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

(2) If the offense involved a bribe for the purpose of influencing an elected official or any official holding a high level decision-making or sensitive position, increase by 8 levels.

(c) Cross References

(1) If the bribe was for the purpose of concealing or facilitating another criminal offense, or for obstructing justice in respect to another criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to such other criminal offense if the resulting offense level is greater than that determined above.

(2) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

### §2C1.2. Offering, Giving, Soliciting, or Receiving a Gratuity

(a) Base Offense Level: 7

(b) Specific Offense Characteristics

Apply the greater:

(1) 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).

(2) If the gratuity was given, or to be given, to an elected official or any official holding a high level decision-making or sensitive position, increase by 8 levels.

§2C1.3. Conflict of Interest

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

(1) If the offense involved actual or planned harm to the government, increase by 4 levels.

§2C1.4. Payment or Receipt of Unauthorized Compensation

(a) Base Offense Level: 6

§2C1.5. Payments to Obtain Public Office

(a) Base Offense Level: 8

§2C1.6. Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper

(a) Base Offense Level: 7

(b) Specific Offense Characteristic

(1) 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).

*Commentary*

*The Commission believes that current sentencing practices do not adequately reflect the seriousness of public corruption offenses. Therefore, these guidelines provide for sentences that are considerably higher than average current practice.*

*The provisions of §3B1.3 (Abuse of Position of Trust or Special Skill) do not apply to offenses under this Part, except under §2C1.1(c)(1). This enhancement is incorporated into the base offense level. However, other sections of Chapter Three, Part B (Role in the Offense) may apply.*

*Although these guidelines incorporate the amount of the bribe or gratuity as a factor, that is not the primary consideration. Consequently, when multiple counts are involved, the dollar values are not to be aggregated. Instead, each is to be treated as a separate offense*

*subject to the rules for multiple counts in Chapter Three, Part D. Substantially higher offense levels will thus result when there is a pattern of repeated corruption.*

*A conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, may involve corrupt activities by a public official. Corrupt activities prosecuted under the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, may involve either federal or local officials in schemes to defraud the public of its right to honest government. When the offense of conviction is the general conspiracy statute, or the mail or wire fraud statute, the court shall apply the guideline that most accurately describes the underlying offense conduct.*

*§2C1.1 (18 U.S.C. § 201(b) and (c); 18 U.S.C. §§ 872, 1951). This section applies to a person who offers or gives a bribe for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence his official actions, in violation of 18 U.S.C. § 201(b), or to a public official who solicits or accepts such a bribe in violation of 18 U.S.C. § 201(c). These offenses carry a maximum penalty of fifteen years. Conspiracies, solicitations, and attempts carry the same fifteen-year maximum penalty.*

*The object of a bribe may vary widely from case to case. In some cases, the object may be commercial advantage (e.g., preferential treatment in the award of a government contract). In others, the object may be issuance of a license to which the recipient is not entitled. In still others, the object may be the obstruction of justice.*

*Under §2C1.1(b)(1)(A), the offense level is increased if the value of the bribe or the action received in return can be determined and is greater than $2,000. For example, if a person paid a customs official $2,000 to evade $10,000 in duties, the value of the action received is $10,000. The amount of the bribe is included not because it directly measures harm to society, but because it is improbable that a large bribe would be given for a favor of little consequence. Moreover, for deterrence purposes, the larger the gain, the larger the punishment must be.*

*Under §2C1.1(b)(1)(B), if the bribe is for the purpose of influencing an official act by certain officials, the offense level is increased by 8 levels if this increase is greater than that provided under §2C1.1(b)(1)(A). The term "other official holding a high level decision-making or sensitive position" includes, for example, judges, prosecuting attorneys, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility.*

*Under §2C1.1(c)(1), if the purpose of the bribe involved the facilitation of another criminal offense or the obstruction of justice in respect to another criminal offense, the guideline for §2X3.1 (Accessory After the Fact) in respect to that criminal offense will be applied, if the result is greater than that determined above. For example, if a bribe was given for the purpose of facilitating or covering up the offense of espionage, the guideline for accessory after the fact to espionage would be applied. Note that, when applying §2X3.1, adjustments from Chapter Three, Part B (Role in the Offense) must be applied. This normally will result in an increase of at least 2 levels.*

*Finally, under §2C1.1(c)(2), if the offense involved forcible extortion, the guideline from §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) will apply if the result is greater than that determined above.*

*The Commission recognizes that in many cases the monetary value of the bribe may not be known or may not adequately reflect the seriousness of the offense. For example, a small*

*payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes, the obstruction of justice in a major narcotics case, or a systematic or pervasive pattern of corruption of a governmental institution or office that may cause loss of public confidence in government. In part, this problem is dealt with under §2C1.1(b)(1)(B), and §§2C1.1(c)(1) and (2). Where the seriousness of the offense still is not adequately reflected, a departure from the guidelines is appropriate. Furthermore, where the court finds the defendant's conduct was part of a systematic or pervasive corruption of a government function, process or office, departure from the guidelines is appropriate.*

*Section 2C1.1 also applies to extortion by officers or employees of the United States in violation of 18 U.S.C. § 872, and Hobbs Act extortions, conspiracies, and attempts under color of official right, in violation of 18 U.S.C. § 1951. The Hobbs Act, 18 U.S.C. § 1951(b)(2), applies in part to any person who acts "under color of official right." This statute applies to extortionate conduct by, among others, officials and employees of state and local governments. The panoply of conduct that may be prosecuted under the Hobbs Act varies from a city building inspector who demands a small amount of money from the owner of an apartment building to ignore code violations, to a state court judge who extracts substantial interest-free loans from attorneys who have cases pending in his court. Violations of 18 U.S.C. § 872 carry a three-year statutory maximum, while violations of 18 U.S.C. § 1951 carry a statutory maximum of twenty years' imprisonment. The Hobbs Act treats extortion, conspiracies and attempts in the same manner. The reason these offenses are often not completed is that the victim complains to authorities or is acting in an undercover capacity. Lack of completion is not a measure of the defendant's culpability in attempting to use a public position for personal gain. The guidelines treat these offenses as equivalent to bribery.*

*§2C1.2 (18 U.S.C. § 201(f) and (g)). This section applies to a person who gives a gratuity to a public official for performing an official act, in violation of 18 U.S.C. § 201(f) or to a public official who accepts or solicits a gratuity in violation of 18 U.S.C. § 201(g). A corrupt purpose is not an element of these offenses, which carry a two-year maximum penalty. If the gratuity was given, or to be given, to an elected official or other official holding a high level decision-making or sensitive position, the offense level is increased. The term "official holding a high level decision-making or sensitive position" is defined in the Commentary to §2C1.1. In some cases the public official is the instigator. In others, the private citizen who is attempting to ingratiate himself or his business with the public official may be the initiator. These factors may be considered by the court in determining the sentence within the applicable guideline range.*

*§2C1.3 (18 U.S.C. §§ 203, 205, 207-208). This section applies to present and former federal officers and employees who act in the face of financial and non-financial conflicts of interest proscribed by 18 U.S.C. §§ 207 and 208. This section also applies to violations of 18 U.S.C. § 203, which prohibits the offer or receipt of unlawful compensation by an appointed or elected official, or official-elect of the federal government, and is intended to ensure that government officials do not exert undue influence on government matters in response to the receipt of unlawful compensation. The above statutes provide a two-year maximum penalty.*

*§2C1.4 (18 U.S.C. §§ 209, 1909). This section applies to violations of 18 U.S.C. §§ 209 and 1909. 18 U.S.C. § 209 provides a maximum term of imprisonment of one year for the receipt or payment of salary, or supplementation of salary of an officer or employee of the executive branch or an independent agency of the federal government, or an employee of the District of Columbia. 18 U.S.C. § 1909 prohibits bank examiners from performing any service for compensation, for banks or bank officials.*

*§2C1.5 (18 U.S.C. §§ 210-211). This section applies to offenses involving the offer or acceptance of payment in return for appointment to government office, in violation of 18 U.S.C. §§ 210 and 211. Under 18 U.S.C. § 210, it is illegal to pay, offer, or promise something of value to a person, firm, or corporation in consideration of procuring appointive office, while 18 U.S.C. § 211 applies to the solicitation or acceptance of something of value in consideration of a promise of the use of influence in obtaining appointive federal office. Both statutes carry a maximum of one year of imprisonment.*

*§2C1.6 (18 U.S.C. §§ 212-214, 217). This section applies to violations of 18 U.S.C. §§ 212-214, and 217 involving the offer or acceptance of payments and gratuities by federal banking officials. These statutes carry a maximum of one year of imprisonment. Violations of 18 U.S.C. §§ 212 and 213 involve the offer and acceptance of loans or gratuities to bank examiners. Violations of 18 U.S.C. § 214 entail the offer or receipt of something of value for procuring a loan, or discount of commercial paper from a Federal Reserve bank. 18 U.S.C. § 217 prohibits the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt.*

*Guidelines for offenses involving unlawful payments to bank officials in violation of 18 U.S.C. § 215 appear in Part B (Offenses Involving Property).*

## PART D - OFFENSES INVOLVING DRUGS

### 1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

21 U.S.C. § 841
21 U.S.C. § 843
21 U.S.C. § 845
21 U.S.C. §§ 845a, 845b
21 U.S.C. § 846
21 U.S.C. § 848
21 U.S.C. §§ 856 - 857
21 U.S.C. §§ 952 - 953
21 U.S.C. §§ 955
21 U.S.C. § 957
21 U.S.C. § 959
21 U.S.C. §§ 960 - 963
46 U.S.C. App. § 1903

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

(a) Base Offense Level:

(1) **43**, for an offense that results in death or serious bodily injury with a prior conviction for a similar drug offense; or

(2) **38**, for an offense that results in death or serious bodily injury and involved controlled substances (except Schedule III, IV, and V controlled substances and less than: (A) fifty kilograms of marihuana, (B) ten kilograms of hashish, and (C) one kilogram of hashish oil); or

(3) For any other offense, the base offense level is the level specified in the Drug Quantity Table below.

(b) Specific Offense Characteristic

(1) If a firearm or other dangerous weapon was possessed during commission of the offense, increase by **2** levels.

DRUG QUANTITY TABLE

| Controlled Substances and Quantity* | Base Offense Level |
|---|---|
| 10 KG Heroin or equivalent Schedule I or II Opiates, 50 KG Cocaine or equivalent Schedule I or II Stimulants, 500 G Cocaine Base, 10 KG PCP or 1 KG Pure PCP, 100 G LSD or equivalent Schedule I or II Hallucinogens, 4 KG Fentanyl or 1 KG Fentanyl Analogue, 10,000 KG Marihuana, 100,000 Marihuana Plants, 2000 KG Hashish, 200 KG Hashish Oil (or more of any of the above) | Level 36 |
| 3-9.9 KG Heroin or equivalent Schedule I or II Opiates, 15-49.9 KG Cocaine or equivalent Schedule I or II Stimulants, 150-499 G Cocaine Base, 3-9.9 KG PCP or 300-999 G Pure PCP, 30-99 G LSD or equivalent Schedule I or II Hallucinogens, 1.2-3.9 KG Fentanyl or 300-999 G Fentanyl Analogue, 3000-9999 KG Marihuana, 30,000-99,999 Marihuana Plants, 600-1999 KG Hashish, 60-199 KG Hashish Oil | Level 34 |
| 1-2.9 KG Heroin or equivalent Schedule I or II Opiates, 5-14.9 KG Cocaine or equivalent Schedule I or II Stimulants, 50-149 G Cocaine Base, 1-2.9 KG PCP or 100-299 G Pure PCP, 10-29 G LSD or equivalent Schedule I or II Hallucinogens, .4-1.1 KG Fentanyl or 100-299 G Fentanyl Analogue, 1000-2999 KG Marihuana, 10,000-29,999 Marihuana Plants, 200-599 KG Hashish, 20-59.9 KG Hashish Oil | Level 32** |
| 700-999 G Heroin or equivalent Schedule I or II Opiates, 3.5-4.9 KG Cocaine or equivalent Schedule I or II Stimulants, 35-49 G Cocaine Base, 700-999 G PCP or 70-99 G Pure PCP, 7-9.9 G LSD or equivalent Schedule I or II Hallucinogens, 280-399 G Fentanyl or 70-99 G Fentanyl Analogue, 700-999 KG Marihuana, 7000-9999 Marihuana Plants, 140-199 KG Hashish, 14-19.9 KG Hashish Oil | Level 30 |
| 400-699 G Heroin or equivalent Schedule I or II Opiates, 2-3.4 KG Cocaine or equivalent Schedule I or II Stimulants, 20-34.9 G Cocaine Base, 400-699 G PCP or 40-69 G Pure PCP, 4-6.9 G LSD or equivalent Schedule I or II Hallucinogens, 160-279 G Fentanyl or 40-69 G Fentanyl Analogue, 400-699 KG Marihuana, 4000-6999 Marihuana Plants, 80-139 KG Hashish, 8.0-13.9 KG Hashish Oil | Level 28 |
| 100-399 G Heroin or equivalent Schedule I or II Opiates, .5-1.9 KG Cocaine or equivalent Schedule I or II Stimulants, 5-19 G Cocaine Base, 100-399 G PCP or 10-39 G Pure PCP, 1-3.9 G LSD or equivalent Schedule I or II Hallucinogens, 40-159 G Fentanyl or 10-39 G Fentanyl Analogue, 100-399 KG Marihuana, 1000-3999 Marihuana Plants, 20-79 KG Hashish, 2.0-7.9 KG Hashish Oil | Level 26** |
| 80-99 G Heroin or equivalent Schedule I or II Opiates, 400-499 G Cocaine or equivalent Schedule I or II Stimulants, 4-4.9 G Cocaine Base, 80-99 G PCP or 8-9.9 G Pure PCP, 800-999 MG LSD or equivalent Schedule I or II Hallucinogens, 32-39 G Fentanyl or 8-9.9 G Fentanyl Analogue, 80-99 KG Marihuana, 800-999 Marihuana Plants, 16-19.9 KG Hashish, 1.6-1.9 KG Hashish Oil | Level 24 |
| 60-79 G Heroin or equivalent Schedule I or II Opiates, 300-399 G Cocaine or equivalent Schedule I or II Stimulants, 3-3.9 G Cocaine Base, 60-79 G PCP or 6-7.9 G Pure PCP, 600 -799 MG LSD or equivalent Schedule I or II Hallucinogens, 24-31.9 G Fentanyl or 6-7.9 G Fentanyl Analogue, 60-79 KG Marihuana, 600-799 Marihuana Plants, 12-15.9 KG Hashish, 1.2-1.5 KG Hashish Oil | Level 22 |
| 40-59 G Heroin or equivalent Schedule I or II Opiates, 200-299 G Cocaine or equivalent Schedule I or II Stimulants, 2-2.9 G Cocaine Base, 40-59 G PCP or 4-5.9 G Pure PCP, 400-599 MG LSD or equivalent Schedule I or II Hallucinogens, 16-23.9 G Fentanyl or 4-5.9 G Fentanyl Analogue, 40-59 KG Marihuana, 400-599 Marihuana Plants, 8-11.9 KG Hashish, .8-1.1 KG Hashish Oil, 20 KG+ Schedule III or other Schedule I or II controlled substances | Level 20 |

| | |
|---|---|
| 20-39 G Heroin or equivalent Schedule I or II Opiates, 100-199 G Cocaine or equivalent Schedule I or II Stimulants, 1-1.9 G Cocaine Base, 20-39 G PCP or 2-3.9 G Pure PCP, 200-399 MG LSD or equivalent Schedule I or II Hallucinogens, 8-15.9 G Fentanyl or 2-3.9 G Fentanyl Analogue, 20-39 KG Marihuana, 200-399 Marihuana Plants, 5-7.9 KG Hashish, 500-799 G Hashish Oil, 10-19 KG Schedule III or other Schedule I or II controlled substances | Level 18 |
| 10-19 G Heroin or equivalent Schedule I or II Opiates, 50-99 G Cocaine or equivalent Schedule I or II Stimulants, 500-999 MG Cocaine Base, 10-19.9 G PCP or 1-1.9 G Pure PCP, 100-199 MG LSD or equivalent Schedule I or II Hallucinogens, 4-7.9 G Fentanyl or 1-1.9 G Fentanyl Analogue, 10-19 KG Marihuana, 100-199 Marihuana Plants, 2-4.9 KG Hashish, 200-499 G Hashish Oil, 5-9.9 KG Schedule III or other Schedule I or II controlled substances | Level 16 |
| 5-9.9 G Heroin or equivalent Schedule I or II Opiates, 25-49 G Cocaine or equivalent Schedule I or II Stimulants, 250-499 MG Cocaine Base, 5-9.9 G PCP or 500-999 MG Pure PCP, 50-99 MG LSD or equivalent Schedule I or II Hallucinogens, 2-3.9 G Fentanyl or .5-.9 G Fentanyl Analogue, 5-9.9 KG Marihuana, 50-99 Marihuana Plants, 1-1.9 KG Hashish, 100-199 G Hashish Oil, 2.5-4.9 KG Schedule III or other Schedule I or II controlled substances | Level 14 |
| Less than the following: 5 G Heroin or equivalent Schedule I or II Opiates, 25 G Cocaine or equivalent Schedule I or II Stimulants, 250 MG Cocaine Base, 5 G PCP or 500 MG Pure PCP, 50 MG LSD or equivalent Schedule I or II Hallucinogens, 2 G Fentanyl or 500 MG Fentanyl Analogue; 2.5-4.9 KG Marihuana, 25-49 Marihuana Plants, 500-999 G Hashish, 50-99 G Hashish Oil, 1.25-2.4 KG Schedule III or other Schedule I or II controlled substances, 20 KG+ Schedule IV | Level 12 |
| 1-2.4 KG Marihuana, 10-24 Marihuana Plants, 200-499 G Hashish, 20-49 G Hashish Oil, .50-1.24 KG Schedule III or other Schedule I or II controlled substances, 8-19 KG Schedule IV | Level 10 |
| 250-999 G Marihuana, 3-9 Marihuana Plants, 50-199 G Hashish, 10-19 G Hashish Oil, 125-449 G Schedule III or other Schedule I or II controlled substances, 2-7.9 KG Schedule IV, 20 KG+ Schedule V | Level 8 |
| Less than the following: 250 G Marihuana, 3 Marihuana Plants, 50 G Hashish, 10 G Hashish Oil, 125 G Schedule III or other Schedule I or II controlled substances, 2 KG Schedule IV, 20 KG Schedule V | Level 6 |

* The scale amounts for all controlled substances refer to the total weight of the controlled substance. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity. If a mixture or compound contains a detectable amount of more than one controlled substance, the most serious controlled substance shall determine the categorization of the entire quantity.

** Statute specifies a mandatory minimum sentence.

*Commentary*

*§2D1.1 (21 U.S.C. §§ 841, 960). Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense. Although the statutes require minimum penalties at certain weights for prior convictions, the enhanced penalty is reflected in the criminal history adjustment in Chapter Four (Criminal History and Criminal Livelihood). In determining criminal history, use of the phrase, "similar drug offense," in §2D1.1(a)(1) refers to a prior conviction as described in 21 U.S.C. §§ 841(b) or 962(b).*

*When there are multiple offenses, or multiple drug types, the quantities are to be added. Tables for making the necessary conversions are provided later in the Commentary.*

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

*The base offense levels with two asterisks represent mandatory minimum sentences established by the Anti-Drug Abuse Act of 1986. These levels reflect sentences with a lower limit as close to the statutory requirement as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months. If it is uncertain whether the quantity of drugs involved falls into one category in the table or an adjacent category, the court may use the intermediate level for sentencing purposes. For example, sale of 700-999 grams of heroin is at level 30, while sale of 400-699 grams is at level 28. If the exact quantity is uncertain, but near 700 grams (or is an amount that would be between the two levels), use of level 29 would be permissible.*

*For each offense level in the Drug Quantity Table, a term of supervised release to follow imprisonment is required. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, §§5D3.1-5D3.3.*

*While the new legislation provides mandatory minimum sentences for many offenses, it also provides the means by which sentences lower than the statutory minimum may be imposed. 28 U.S.C. § 994(n). A lower sentence may be imposed by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." See §5K1.1 (Substantial Assistance to Authorities).*

*Trafficking in controlled substances, compounds, or mixtures of unusually high purity constitutes a basis to increase a sentence above the applicable guideline range. The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs.*

*Congress provides an exception to purity considerations in the case of phencyclidine (PCP). 21 U.S.C. § 841(b)(1)(A). The legislation designates amounts of pure PCP and mixtures in establishing mandatory sentences. Row 1 of the table illustrates this distinction as one kilogram of PCP or 100 grams of pure PCP. Allowance for higher sentences based on purity is not appropriate for PCP.*

*Any reference to a particular controlled substance in these guidelines is also meant to include all salts, isomers, and all salts of isomers. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed.*

*The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, LSD and marihuana. The Drug Equivalency Tables set forth below provide conversion factors for other substances, which the Drug Quantity Table refers to as "equivalents" of these drugs. For example, 1 gram of a substance containing methamphetamine, a Schedule I stimulant, is to be treated as the equivalent of 2 grams of a substance containing cocaine in applying the Drug Quantity Table.*

*The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. If all the drugs are "equivalents" of the same drug, e.g., stimulants that are grouped with cocaine, covert them to that drug. In other cases, convert each of the drugs to either the heroin or marihuana equivalents, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level. Use the marihuana equivalents when the only substances involved are "Schedule I Marihuana," "Schedule III Substances," "Schedule IV Substances," "Schedule V Substances" or "Other Schedule I or II Substances".*

*Note: Because of the statutory equivalences, the entries in the Drug Equivalency Tables do not necessarily correspond to the relative dosages of the drugs involved.*

*Examples:*

*1. The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). Both PCP and LSD are grouped together in the Drug Equivalency Tables under the heading "LSD, PCP and Other Schedule I and II Hallucinogens," which provides PCP equivalencies. The 250 milligrams of LSD is equivalent to 25 grams of PCP. The total is therefore 95 grams of PCP, for which the Drug Quantity Table provides an offense level of 24.*

*2. The defendant is convicted of selling 500 grams of marihuana (Level 8) and 5 kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 10 in the Drug Quantity Table.*

*3. The defendant is convicted of selling 80 grams of cocaine (Level 16) and 5 kilograms of marihuana (Level 14). The cocaine is equivalent to 16 grams of heroin; the marihuana, to 5 grams of heroin. The total equivalent is 21 grams of heroin, which has an offense level of 18 in the Drug Quantity Table.*

## *DRUG EQUIVALENCY TABLES*

Schedule I or II Opiates

| | |
|---|---|
| 1 gm of Alpha-Methylfentanyl = | 100 gm of heroin |
| 1 gm of Dextromoramide = | 0.67 gm of heroin |
| 1 gm of Dipipanone = | 0.25 gm of heroin |
| 1 gm of 3-Methylfentanyl = | 125 gm of heroin |
| 1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP = | 0.7 gm of heroin |
| 1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP = | 0.7 gm of heroin |
| 1 gm of Alphaprodine = | 0.1 gm of heroin |

| | |
|---|---|
| 1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) = | 31.25 gm of heroin |
| 1 gm of Hydromorphone/Dihydromorphinone = | 2.5 gm of heroin |
| 1 gm of Levorphanol = | 2.5 gm of heroin |
| 1 gm of Meperidine/Pethidine = | 0.05 gm of heroin |
| 1 gm of Methadone = | 0.5 gm of heroin |
| 1 gm of 6-Monoacetylmorphine = | 1 gm of heroin |
| 1 gm of Morphine = | 0.5 gm of heroin |
| 1 gm of Oxycodone = | 0.5 gm of heroin |
| 1 gm of Oxymorphone = | 5 gm of heroin |
| 1 gm of Racemorphan = | 0.8 gm of heroin |
| 1 gm of Codeine = | 0.08 gm of heroin |
| 1 gm of Dextropropoxyphene/Propoxyphene-Bulk = | 0.05 gm of heroin |
| 1 gm of Ethylmorphine = | 0.165 gm of heroin |
| 1 gm of Hydrocodone/Dihydrocodeinone = | 0.5 gm of heroin |
| 1 gm of Mixed Alkaloids of Opium/Papaveretum = | 0.25 gm of heroin |
| 1 gm of Opium = | 0.05 gm of heroin |

Cocaine and Other Schedule I and II Stimulants

| | |
|---|---|
| 1 gm of Cocaine = | 0.2 gm of heroin |
| 1 gm of N-Ethylamphetamine = | 0.4 gm of cocaine/0.08 gm of heroin |
| 1 gm of Fenethylline = | 0.2 gm of cocaine/0.04 gm of heroin |
| 1 gm of Amphetamine = | 1.0 gm of cocaine/0.2 gm of heroin |
| 1 gm of Dextroamphetamine = | 1.0 gm of cocaine/0.2 gm of heroin |
| 1 gm of Methamphetamine = | 2.0 gm of cocaine/0.4 gm of heroin |
| 1 gm of L-Methamphetamine/Levo-methamphetamine/L-Desoxyephedrine = | 0.2 gm of cocaine/0.04 gm of heroin |
| 1 gm of Phenmetrazine = | 0.4 gm of cocaine/0.08 gm of heroin |
| 1 gm of Phenylacetone/$P_2P$ (amphetamine precursor) = | 0.375 gm of cocaine/0.075 gm of heroin |
| 1 gm of Phenylacebone/$P_2P$ (methamphetamine precursor) = | 0.833 gm of cocaine/0.167 gm of heroin |

LSD, PCP, and Other Schedule I and II Hallucinogens

| | |
|---|---|
| 1 gm of Bufotenine = | 0.07 gm of heroin or PCP |
| 1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD = | 100 gm of heroin or PCP |
| 1 gm of Diethyltryptamine/DET = | 0.08 gm of heroin or PCP |
| 1 gm of Dimethyltryptamine/DMT = | 0.1 gm of heroin or PCP |
| 1 gm of Mescaline = | 0.01 gm of heroin or PCP |
| 1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) = | 0.001 gm of heroin or PCP |
| 1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) = | 0.0001 gm of heroin or PCP |
| 1 gm of Peyote (Dry) = | 0.0005 gm of heroin or PCP |
| 1 gm of Peyote (Wet) = | 0.00005 gm of heroin or PCP |
| 1 gm of Phencyclidine/PCP = | 1 gm of heroin |
| 1 gm of Phencyclidine (Pure PCP) = | 10 gm of heroin or PCP |
| 1 gm of Liquid Phencyclidine = | 0.1 gm of heroin or PCP |
| 1 gm of Psilocin = | 0.5 gm of heroin or PCP |
| 1 gm of Psilocybin = | 0.5 gm of heroin or PCP |
| 1 gm of Pyrrolidine Analog of Phencyclidine/PHP = | 1 gm of heroin or PCP |
| 1 gm of Thiophene Analog of Phencyclidine/TCP = | 1 gm of heroin or PCP |
| 1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB = | 2.5 gm of heroin or PCP |
| 1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM = | 1.67 gm of heroin or PCP |
| 1 gm of 3,4-Methylenedioxyamphetamine/MDA = | 0.05 gm of heroin or PCP |

| | |
|---|---|
| 1 gm of 3,4-Methylenedioxymethamphetamine/MDMA = | 0.035 gm of heroin or PCP |
| 1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC = | 0.68 gm of heroin or PCP |

Schedule I Marihuana

| | |
|---|---|
| 1 gm of Marihuana/Cannabis = | 1 mg of heroin |
| 1 Marihuana/Cannabis Plant = | 0.1 gm of heroin/100 gm of marihuana |
| 1 gm of Marihuana/Cannabis, granulated, powdered, etc. = | 1 mg of heroin/1 gm of marihuana |
| 1 gm of Hashish Oil = | 0.05 gm of heroin/50 gm of marihuana |
| 1 gm of Cannabis Resin or Hashish = | 5 mg of heroin/5 gm of marihuana |
| 1 gm of Tetrahydrocannabinol, Organic = | 0.167 gm of heroin/167 gm of marihuana |
| 1 gm of Tetrahydrocannabinol, Synthetic = | 0.167 gm of heroin/167 gm of marihuana |

Other Schedule I or II Substances

| | |
|---|---|
| 1 gm of Methaqualone = | 0.7 mg of heroin/700 mg of marihuana |
| 1 gm of Amobarbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Pentobarbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Secobarbital = | 2 mg of heroin/2 gm of marihuana |

Schedule III Substances

| | |
|---|---|
| 1 gm of Allobarbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Aprobarbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Barbiturate = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Butabarbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Butalbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Butobarbital/butethal = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Cyclobarbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Cyclopentobarbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Glutethimide = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Heptabarbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Hexethal = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Hexobarbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Metharbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Talbutal = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Thialbarbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Thiamylal = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Thiobarbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Thiohexethal = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Thiopental = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Vinbarbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Vinylbital = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Phendimetrazine = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Paregoric = | 2 mg of heroin/2 gm of marihuana |
| 1 gm of Hydrocodone Cough Syrups = | 2 mg of heroin/2gm mg of marihuana |

Schedule IV Substances

| | |
|---|---|
| 1 gm of Phentermine = | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Pentazocine = | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Barbital = | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Diazepam = | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Phenobarbital = | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Mephobarbital = | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Methohexital = | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Methylphenobarbital/Mephobarbital = | 0.125 mg of heroin/0.125 gm of marihuana |
| 1 gm of Nitrazepam = | 0.125 mg of heroin/0.125 gm of marihuana |

Schedule V Substances

| | |
|---|---|
| 1 gm of codeine cough syrup = | 0.0125 mg of heroin/12.5 mg of marihuana |

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

*DRUG CONVERSION TABLE*

*1 oz = 28.35 gm*
*1 lb = 453.6 gm*
*1 lb = .45 kg*
*1 kg = 2.2 lbs*
*1 gal = 3.8 liters*
*1 qt = .95 liters*
*1 gm = 1 ml (liquid)*
*1 liter = 1,000 ml*
*1 kg = 1,000 gm*
*1 gm = 1,000 mg*
*1 grain = 64.8 mg*

*Sentences under the Anti-Drug Abuse Act are guided by standardized amounts of drugs involved in the offense. The following dosage equivalents for certain common drugs are provided by the Drug Enforcement Administration to facilitate the application of §2D1.1 of the guidelines.*

*DOSAGE EQUIVALENCY TABLE*

*Hallucinogens*

| | |
|---|---|
| *Anhalamine* | *300 mg* |
| *Anhalonide* | *300 mg* |
| *Anhalonine* | *300 mg* |
| *Bufotenine* | *1 mg* |
| *Diethyltryptamine* | *60 mg* |
| *Dimethyltryptamine* | *50 mg* |
| *Lophophorine* | *300 mg* |
| *LSD (Lysergic acid diethylamide)* | *.1 mg* |
| *LSD tartrate* | *.05 mg* |
| *MDA* | *100 mg* |
| *Mescaline* | *500 mg* |
| *PCP* | *5 mg* |

| | |
|---|---|
| *Pellotine* | *300 mg* |
| *Peyote* | *12 mg* |
| *Psilocin* | *10 mg* |
| *Psilocybin* | *10 mg* |
| *STP (DOM) Dimethoxyamphetamine* | *3 mg* |

*Depressants*

| | |
|---|---|
| *Barbiturates* | *100 mg* |
| *Brallobarbital* | *30 mg* |
| *Eldoral* | *100 mg* |
| *Eunarcon* | *100 mg* |
| *Hexethel* | *100 mg* |
| *Methaqualone* | *300 mg* |
| *Thiobarbital* | *50 mg* |
| *Thiohexethal* | *60 mg* |

*Stimulants*

| | |
|---|---|
| *Amphetamines* | *10 mg* |
| *Ethylamphetamine HCl* | *12 mg* |
| *Ethylamphetamine $SO_4$* | *12 mg* |
| *Methoamphetamine combinations* | *5 mg* |
| *Methamphetamines* | *5 mg* |
| *Preludin* | *25 mg* |

*The dosage equivalents provided in these tables reflect the amount of the pure drug contained in an average dose.*

*A defendant who used special skills in the commission of the offense may be subject to an enhancement for role in the offense. See §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense.*

*The statutory maximum penalty for trafficking in less than fifty kilograms of marihuana, ten kilograms of hashish, one kilogram of hashish oil, or any amount of Schedule III, IV, or V controlled substances is five years' imprisonment. With a prior conviction for similar drug related offenses the statutory maximum penalty is ten years. It should be noted that although the Drug Quantity Table applies to trafficking in small amounts of marihuana, under 21 U.S.C. § 841(b)(4), distribution of "a small amount of marihuana for no remuneration" is treated as simple possession, to which §2D2.1 applies.*

*The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that reference §2D1.1, i.e., §§2D1.2-2D1.4. The adjustment is to be applied even if several counts are involved and the weapon was present in any of them.*

§2D1.2. Involving Juveniles in the Trafficking of Controlled Substances

(a) Base Offense Level:

(1) Level from §2D1.1, corresponding to triple the drug amount involved, but in no event less than level 13, for involving an individual less than fourteen years of age; or

(2) Level from §2D1.1, corresponding to double the drug amount involved, for involving an individual at least fourteen years of age and less than eighteen years of age.

§2D1.3. Distributing Controlled Substances to Individuals Younger than Twenty-One Years, To Pregnant Women, or Within 1000 Feet of a School or College

(a) Base Offense Level:

(1) Level from §2D1.1, corresponding to double the drug amount involved, but in no event less than level 13, for distributing a controlled substance to a pregnant woman;

(2) (A) Level from §2D1.1, corresponding to double the drug amount involved, but in no event less than level 13, for distributing a controlled substance other than five grams or less of marihuana to an individual under the age of twenty-one years; or

(B) Level from §2D1.1, corresponding to double the drug amount involved, but in no event less than level 13, for distributing or manufacturing a controlled substance other than five grams or less of marihuana within 1000 feet of a schoolyard.

§2D1.4. Attempts and Conspiracies

(a) Base Offense Level: If a defendant is convicted of participating in an incomplete conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.

§2D1.5. Continuing Criminal Enterprise

(a) Base Offense Level:

(1) 32, for the first conviction of engaging in a continuing criminal enterprise; or

(2) 38, for the second or any subsequent conviction of engaging in a continuing criminal enterprise; or

(3) 43, for engaging in a continuing criminal enterprise as the principal administrator, leader, or organizer, if either the amount of drugs involved was 30 times the minimum in the first paragraph (i.e., the text corresponding to Level 36) of the Drug Quantity Table or 300 times the minimum in the third paragraph (i.e., the text corresponding to Level 32), or the principal received $10 millon in gross receipts for any twelve-month period.

**§2D1.6. Use of Communication Facility in Committing Drug Offense**

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

**§2D1.7. Unlawful Interstate Sale and Transporting of Drug Paraphernalia**

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

**§2D1.8. Renting or Managing a Drug Establishment**

(a) Base Offense Level: **16**

(b) Specific Offense Characteristic

(1) If a firearm or other dangerous weapon was possessed during commission of the offense, increase by 2 levels.

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

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

*Commentary*

*§2D1.2 (21 U.S.C. § 845b). The statute addressed by this section punishes any person eighteen years of age or older who knowingly employs or uses any person younger than eighteen to violate or to conceal any violation of any provision of Title 21. Section 845b provides a minimum mandatory period of imprisonment of one year (provided for by the minimum base offense level of 13) in addition to the punishment imposed for the applicable crime in which the defendant involved a juvenile. An increased penalty for the employment or use of persons under age fourteen is statutorily directed by 21 U.S.C. § 845b(d).*

*If multiple drugs or offenses occur and the entire amount does not involve juveniles, double or triple the drug amounts for those offenses involving juveniles before totalling the amounts. For example, if there are three drug offenses of conviction and only one involves juveniles in trafficking, add the amount from the first and second offense, double the amount for the offense involving juveniles, and total. Use that total to determine the base offense level.*

*The reference to the level from §2D1.1 includes the base offense level plus the specific offense characteristic dealing with a weapon. Under §2D1.1(b)(1) there is a two level increase for possession of a firearm or other dangerous weapon during commission of the offense.*

*§2D1.3 (21 U.S.C. §§ 845, 845a). The provisions addressed by this section contain a mandatory minimum period of imprisonment of one year. The base offense level is determined as in §2D1.2. If more than one enhancement provision is applicable in a particular case, the punishment imposed under the separate enhancement provisions should be added together in calculating the appropriate guideline sentence. However, only one of the enhancements in §2D1.3(a)(2) shall apply in a given case.*

*The guideline sentences for distribution of controlled substances to individuals under twenty-one years of age or within 1000 feet of a school or college treat the distribution of less than five grams of marihuana less harshly than other controlled substances. This distinction is based on the statutory provisions that specifically exempt convictions for the distribution of less than five grams of marihuana from the mandatory minimum one-year imprisonment requirement.*

*If multiple drugs or offenses occur, determine the offense level as described in the Commentary to §2D1.2.*

*The reference to the level from §2D1.1 includes the base offense level plus the specific offense characteristic dealing with a weapon. Under §2D1.1(b)(1) there is a 2 level increase for possession of a firearm, or other dangerous weapon during the commission of the offense.*

*§2D1.4 (21 U.S.C. §§ 846, 963). Although attempts and conspiracies are not subject to the mandatory minimums under the Anti-Drug Abuse Act, the Commission has elected to treat them the same as the underlying offense. If the defendant is convicted of a conspiracy that includes transactions in controlled substances in addition to those that are the subject of substantive counts of conviction, each conspiracy transaction shall be included with those of the substantive counts of conviction to determine scale. If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. Where the defendant was not reasonably capable of producing the negotiated amount the court may depart and impose a sentence lower than the sentence that would otherwise result. If the defendant is convicted of conspiracy, the sentence should be imposed only on the basis of the defendant's conduct or the conduct of co-conspirators that was reasonably foreseeable and in furtherance of the conspiracy.*

*Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.*

*See Commentary to §2D1.1 regarding weapon possession.*

*§2D1.5 (21 U.S.C. § 848). The base offense levels for continuing criminal enterprise are mandatory minimum sentences provided by the statute that mandate imprisonment for leaders of large scale drug enterprises. When sentencing for convictions under 21 U.S.C. § 848, §2D1.5 reflects the defendant's role in the enterprise. A conviction establishes that the defendant controlled and exercised decision-making authority over one of the most serious forms of*

*ongoing criminal activity. Therefore, an adjustment for role in the offense in Chapter Three, Part B, is not applicable to convictions under 21 U.S.C. § 848.*

*§2D1.6 (21 U.S.C. § 843(b)). A communication facility includes any public or private instrument used in the transmission of writing, signs, signals, pictures, and sound; e.g., telephone, wire, radio. The statutory maximum penalty is four years' imprisonment except where a prior conviction provides for a maximum sentence of eight years.*

*§2D1.7 (21 U.S.C. § 857). Subtitle O of the Anti-Drug Abuse Act creates the new offense of interstate sale or transportation of drug paraphernalia. The statutory maximum penalty is three years' imprisonment.*

*§2D1.8 (21 U.S.C. § 856). Subtitle P of the Anti-Drug Abuse Act adds a new category to the drug-related offenses set out at 21 U.S.C. § 856. This provision makes it unlawful to knowingly open or maintain, manage, or control any building, room, or enclosure for the purpose of manufacturing, distributing, storing, or using a controlled substance contrary to law (e.g., "crackhouses"). A maximum period of twenty years' imprisonment may be imposed for violation of this statute.*

*Under §2D1.8(b)(1) there is a 2-level increase for possession of a firearm or other dangerous weapon during commission of the offense.*

*§2D1.9 (21 U.S.C. § 841(e)(1)). This provision refers to offenses under 21 U.S.C. § 841(e)(1), making it unlawful to assemble, place or cause to be placed, or to maintain a "booby-trap" on federal property where a controlled substance is being manufactured or distributed. A maximum period of ten years' imprisonment may be imposed under this statute, except where a prior conviction provides for a maximum sentence of twenty years.*

* * * * *

## 2. UNLAWFUL POSSESSION

18 U.S.C. § 342
21 U.S.C. § 843(a)(3)
21 U.S.C. § 844

### §2D2.1. Unlawful Possession

(a) Base Offense Level:

(1) **8**, if the substance is heroin or any Schedule I-II opiate, or LSD, or an analogue of these; or

(2) **6**, if the substance is cocaine or PCP; or

(3) **4**, if the substance is any other controlled substance.

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

(a) Base Offense Level: 8

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

(a) Base Offense Level: 8

*Commentary*

*§2D2.1 (21 U.S.C. § 844(a)). The statutory maximum penalty for simple possession is one year imprisonment. With a single prior drug related conviction, a minimum fifteen days and maximum two years' imprisonment is authorized. For two or more convictions, a minimum ninety days and maximum three years' imprisonment is authorized.*

*§2D2.2 (21 U.S.C. § 843(a)(3)). The maximum penalty for this offense is four years' imprisonment. With a prior drug related felony offense, a maximum eight-year prison term is permitted.*

*§2D2.3 (18 U.S.C. § 342). The statutory maximum for this offense is five years' imprisonment.*

* * * * *

3. REGULATORY VIOLATIONS

21 U.S.C. § 842
21 U.S.C. § 843(a)
21 U.S.C. § 954
21 U.S.C. § 961(2)

§2D3.1. Illegal Use of Registration Number to Manufacture, Distribute, Acquire, or Dispense a Controlled Substance

(a) Base Offense Level: 6

§2D3.2. Manufacture of Controlled Substance in Excess of or Unauthorized by Registration Quota

(a) Base Offense Level: 4

§2D3.3. **Illegal Use of Registration Number to Distribute or Dispense a Controlled Substance to Another Registrant or Authorized Person**

(a) Base Offense Level: 4

§2D3.4. **Illegal Transfer or Transshipment of a Controlled Substance**

(a) Base Offense Level: 4

*Commentary*

*§2D3.1 (21 U.S.C. § 843(a)). The statutory maximum penalty is four years' imprisonment. With a prior drug related felony offense, a maximum eight years' imprisonment is authorized.*

*§§2D3.2 and 2D3.3 (21 U.S.C. § 842). The statutory maximum for these offenses is one year imprisonment.*

*§2D3.4 (21 U.S.C. § 954). The statutory maximum penalty for this offense is one year imprisonment.*

## PART E - OFFENSES INVOLVING CRIMINAL ENTERPRISES AND RACKETEERING

### 1. RACKETEERING

18 U.S.C. §§ 1951-1952
18 U.S.C. §§ 1952A-1952B
18 U.S.C. § 1962-1963

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

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

(1) **19**; or

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

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

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

(1) **6**; or

(2) the offense level applicable to the underlying crime of violence or other unlawful activity in respect to which the travel or transportation was undertaken.

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

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

(1) **12**; or

(2) the offense level applicable to the underlying crime or racketeering activity.

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

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

(1) **23**; or

(2) the offense level applicable to the underlying unlawful conduct.

**§2E1.5. Hobbs Act Extortion or Robbery**

Apply the guideline provision for extortion or robbery, as applicable.

*Commentary*

*When sentencing for racketeering offenses, it is especially important that the sentence reflect the defendant's role in the racketeering scheme. Attention is specifically directed to Chapter Three, Part B (Role in the Offense) for the appropriate adjustment to the offense level.*

*Because of the jurisdictional nature of the offenses included in this section, a variety of criminal offenses fall under these provisions. As the primary concern rests with the underlying conduct, the offense level usually will be determined by the offense level of the underlying conduct. However, because of the seriousness of these offenses, alternative minimum offense levels are provided in order to ensure adequate sentences.*

*§2E1.1 (18 U.S.C. §§ 1962-1963). This section applies to conduct proscribed by the Racketeer Influenced and Corrupt Organizations Act (RICO). To determine the base offense level, the offense level for each underlying offense should first be determined. The underlying offense with the highest offense level will be considered the primary RICO offense. The primary RICO offense is then adjusted according to the guidelines for multiple counts, treating each underlying offense as a separate count.*

*If the underlying racketeering activity involves violations of state law, the offense level should be computed by using the offense level applicable to the corresponding or most analogous federal statute. If a base offense level cannot be determined in this manner or is less than 19, the alternative level of 19 will apply.*

*§2E1.2 (18 U.S.C. § 1952). This jurisdictional statute is directed to a variety of unlawful conduct. The base level is 6, or the offense level for the underlying crime of violence or other unlawful activity, whichever is greater.*

*§2E1.3 (18 U.S.C. § 1952B). The base offense level is 12, or the offense level for the underlying conduct, whichever is greater. The proscribed activities range from threats to murder, with the statutory maximum sentences ranging from three years to life imprisonment.*

*§2E1.4 (18 U.S.C. § 1952A). This statute is jurisdictional, reaching the underlying conduct of murder or intended murder committed for pecuniary gain, with the requisite nexus provided by interstate or foreign travel, or the use of facilities in interstate commerce. The maximum authorized imprisonment sentence under this statute is five years if no personal injury resulted, twenty years if personal injury resulted, and life imprisonment if death resulted.*

*§2E1.5 (18 U.S.C. § 1951). This section covers two different aspects of the Hobbs Act, which proscribes interference with interstate commerce by robbery or extortion. The guidelines at §2B3.1 (Robbery) or §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) normally will apply. In some cases, §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or §2B3.3 (Blackmail and Similar Forms of Extortion) may apply. See Commentary to §2B3.2.*

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## 2. EXTORTIONATE EXTENSION OF CREDIT

18 U.S.C. §§ 892-894

### §2E2.1. Making, Financing, or Collecting an Extortionate Extension of Credit

(a) Base Offense Level: 20

(b) Specific Offense Characteristics

(1) (A) If a firearm was discharged increase by 5 levels; or

(B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; or

(C) if a firearm or other dangerous weapon was brandished, displayed or possessed, increase by 3 levels.

(2) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

| Degree of Bodily Injury | Increase in Level |
|---|---|
| (A) Bodily Injury | add 2 |
| (B) Serious Bodily Injury | add 4 |
| (C) Permanent or Life-Threatening Bodily Injury | add 6 |

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

(3) (A) If any person was abducted to facilitate the commission of the offense or an escape from the scene of the crime, increase by 4 levels;

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

*Commentary*

*§2E2.1 (18 U.S.C. §§ 892-894). This section refers to offenses involving the making or financing of extortionate extensions of credit, or the collection of loans by extortionate means. These "loan-sharking" offenses typically involve threats of violence and provide economic support for organized crime. The base offense level for these offenses is higher than the offense level for extortion because loan sharking is in most cases a continuing activity. In addition, the guideline does not include the amount of money involved because the amount of money in such cases is often difficult to compute. Other enhancements parallel those in §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).*

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## 3. GAMBLING

15 U.S.C. §§ 1172-1176
18 U.S.C. § 1082
18 U.S.C. § 1084
18 U.S.C. §§ 1301-1304
18 U.S.C. § 1306
18 U.S.C. § 1511
18 U.S.C. § 1953
18 U.S.C. § 1955

### §2E3.1. Engaging in a Gambling Business

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

### §2E3.2. Transmission of Wagering Information

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

### §2E3.3. Other Gambling Offenses

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

(b) Specific Offense Characteristic

(1) If the offense is committed as part of, or to facilitate, a commercial gambling operation, increase by **6** levels.

*Commentary*

*§2E3.1 (18 U.S.C. § 1955). See Chapter Three, Part B (Role in the Offense) for adjustments to the offense level based on the scope of the defendant's participation.*

*§2E3.2 (18 U.S.C. § 1084). See Chapter Three, Part B (Role in the Offense) for adjustments to the offense level based on the scope of the defendant's participation.*

*§2E3.3 (15 U.S.C. §§ 1172-1175, 18 U.S.C. §§ 1082, 1301-1304, 1306, 1511, 1953). This section includes conduct proscribed by various statutes. A specific offense characteristic has been included to distinguish commercial from non-commercial gambling offenses. See Chapter Three, Part B (Role in the Offense) for adjustments to the offense level based on the scope of the defendant's participation.*

* * * * *

## 4. TRAFFICKING IN CONTRABAND CIGARETTES

18 U.S.C. § 2342(a)
18 U.S.C. § 2344(a)

### §2E4.1. Unlawful Conduct Relating to Contraband Cigarettes

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

(1) **9**; or

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

*Commentary*

*§2E4.1 (18 U.S.C. § 2342(a)). The offense covered by this section generally involves evasion of state excise taxes and becomes a federal matter only upon the establishment of minimum quantities transported in interstate commerce or by use of interstate communications. Because this offense is basically a tax matter, the tax table under §2T4.1 (Tax Table) is used to determine the appropriate offense level.*

* * * * *

## 5. LABOR RACKETEERING

18 U.S.C. § 664
18 U.S.C. § 1027
18 U.S.C. § 1954
29 U.S.C. § 186
29 U.S.C. §§ 431 - 433
29 U.S.C. § 439
29 U.S.C. § 461
29 U.S.C. § 501(c)

### §2E5.1. Bribery or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan

(a) Base Offense Level:

(1) **10**, if a bribe; or

(2) **6**, if a gratuity.

(b) Specific Offense Characteristics

(1) If the defendant was a fiduciary of the benefit plan, increase by **2** levels.

(2) Increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.

§2E5.2. **Theft or Embezzlement from Employee Pension and Welfare Benefit Plans**

(a) Base Offense Level: 4

(b) Specific Offense Characteristics

(1) If the offense involved more than minimal planning, increase by 2 levels.

(2) If the defendant had a fiduciary obligation under the Employee Retirement Income Security Act, increase by 2 levels.

(3) Increase by corresponding number of levels from the table in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) according to the value of the property stolen.

§2E5.3. **False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act**

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

(1) 6; or

(2) If false records were used for criminal conversion of plan funds or a scheme involving a bribe or a gratuity relating to the operation of an employee benefit plan, apply §2E5.2 or §2E5.1, as applicable.

§2E5.4. **Embezzlement or Theft from Labor Unions in the Private Sector**

(a) Base Offense Level: 4

(b) Specific Offense Characteristics

(1) If the offense involved more than minimal planning, increase by 2 levels.

(2) If 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), increase by 2 levels.

(3) Increase by the number of levels from the table in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) corresponding to the value of the property stolen.

§2E5.5. **Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act**

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

(1) 6; or

(2) If false records were used for criminal conversion of funds or a scheme involving a bribe or gratuity, apply §2E5.4 or §2E5.6, as applicable.

§2E5.6. **Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations**

(a) Base Offense Level:

(1) **10**, if a bribe; or

(2) **6**, if a gratuity.

(b) Specific Offense Characteristic

(1) Increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.

*Commentary*

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

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

*§2E5.1 (18 U.S.C. § 1954). This section covers the giving or receipt of bribes and other illegal gratuities involving employee welfare or pension benefit plans. This offense may involve persons who have a fiduciary duty to the benefit plan. If the enhancement for a fiduciary duty is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill). The seriousness of the offense is determined by several factors, including the value of the gratuity and the magnitude of the loss resulting from the transaction. A more severe penalty is warranted in a bribery where the payment is the primary motivation for an action to be taken, as opposed to graft, where the prohibited payment is given because of a person's actions, duties, or decisions without a prior understanding that the recipient's performance will be directly influenced by the gift.*

*§2E5.2 (18 U.S.C. § 664). This section covers theft or conversion from employee benefit plans by fiduciaries, or by any person, including borrowers to whom loans are disbursed based upon materially defective loan applications, service providers who are paid on inflated billings, and beneficiaries paid as the result of fraudulent claims. The base offense level corresponds to the base offense level for other forms of theft. Specific offense characteristics address whether a defendant has a fiduciary relationship to the benefit plan, the sophistication of the offense, and the scale of the offense. If the enhancement for a fiduciary relationship is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skills).*

*§2E5.3 (18 U.S.C. § 1027). This section covers the falsification of documents or records relating to a benefit plan covered by ERISA. Such violations sometimes occur in connection with the criminal conversion of plan funds or schemes involving bribery or graft. Where a violation of this section occurs in connection with another offense, the defendant should be sentenced according to the guideline for the offense that was facilitated by the false statements or documents.*

*§2E5.4 (29 U.S.C. § 501(c)). This section includes embezzlement or theft from a labor organization. It is directed at union officers and persons employed by a union. The seriousness of this offense is determined by the amount of money taken, the sophistication of the offense, and the nature of the defendant's position in the union. If the enhancement for the nature of the defendant's position in the union is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

*§2E5.5 (29 U.S.C. §§ 439 and 461). This section covers failure to maintain proper documents required by the LMRDA or falsification of such documents. This offense is a misdemeanor.*

*§2E5.6 (29 U.S.C. § 186). This section covers bribery and other prohibited transactions by employers, labor relations consultants, and their agents, with respect to labor officials in industries governed by the Taft-Hartley Act. The statute contains misdemeanor and felony provisions, depending upon whether the prohibited payment exceeds $100. Where the prohibited payment is made with an intent to influence the actions, duties, or decisions of the employee representative or union official, or is received with knowledge of such an intent, a more severe penalty is warranted.*

## PART F - OFFENSES INVOLVING FRAUD OR DECEIT

7 U.S.C. §§ 6, 6b, 6c, 6h, 6o
7 U.S.C. § 13
7 U.S.C. § 23
15 U.S.C. § 50
15 U.S.C. § 77e
15 U.S.C. § 77q
15 U.S.C. § 77x
15 U.S.C. § 78d
15 U.S.C. § 78j
15 U.S.C. § 78ff
15 U.S.C. § 80b-6
15 U.S.C. § 1644
18 U.S.C. §§ 285 - 291
18 U.S.C. § 659
18 U.S.C. §§ 1001-1008
18 U.S.C. §§ 1010-1014
18 U.S.C. §§ 1016-1022
18 U.S.C. §§ 1025-1026
18 U.S.C. §§ 1028-1029
18 U.S.C. §§ 1341 - 1344

### §2F1.1. Fraud and Deceit

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

(b) Specific Offense Characteristics

(1) If the estimated, probable or intended loss exceeded $2,000, increase the offense level as follows:

| | Loss | Increase in Level |
|---|---|---|
| (A) | $2,000 or less | no increase |
| (B) | $2,001 - $5,000 | add 1 |
| (C) | $5,001 - $10,000 | add 2 |
| (D) | $10,001 - $20,000 | add 3 |
| (E) | $20,001 - $50,000 | add 4 |
| (F) | $50,001 - $100,000 | add 5 |
| (G) | $100,001 - $200,000 | add 6 |
| (H) | $200,001 - $500,000 | add 7 |
| (I) | $500,001 - $1,000,000 | add 8 |
| (J) | $1,000,001 - $2,000,000 | add 9 |
| (K) | $2,000,001 - $5,000,000 | add 10 |
| (L) | over $5,000,000 | add 11 |

(2) If the offense involved (A) more than minimal planning; (B) a scheme to defraud more than one victim; (C) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or (D) violation of any judicial or

administrative order, injunction, decree or process; increase by **2** levels, but if the result is less than level **10**, increase to level **10**.

(3) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level **12**, increase to level **12**.

**§2F1.2. Insider Trading**

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

(b) Specific Offense Characteristic

(1) Increase by the number of levels from the table in §2F1.1 corresponding to the gain resulting from the offense.

*Commentary*

*§2F1.1. This guideline is designed to apply to a wide variety of fraud cases. The statutory maximum term of imprisonment for most such offenses is five years.*

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

*Empirical analyses of current practices show that the most important factors that determine sentence length are the amount of loss and whether the offense is an isolated crime of opportunity or is sophisticated or compound. Those are the primary factors upon which the guideline has been based.*

*The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud is indicative of an intention and potential to do considerable harm. In current practice, this factor has a significant impact, especially in frauds involving small losses. Accordingly, the guideline not only specifies a 2 3level enhancement when this factor is present, but also specifies that the minimum offense level in such cases shall be 10. A number of special cases are specifically broken out under subdivision (b)(2) to ensure that defendants in such cases are adequately punished.*

*False pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by mail solicitations to church members in*

*which the defendant falsely claims to be a fundraiser for the school, or a defendant who poses as a federal debt collection agent in order to fraudulently collect a delinquent student loan.*

*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. 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.*

*Ongoing frauds usually result in multiple-count indictments. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level.*

*Albeit imperfect, dollar loss is a direct, objective measure of harm; it is therefore the primary factor appearing in the guideline. In keeping with the Commission's policy on attempts, if a probable or intended loss that the defendant was attempting to inflict can be determined, that larger figure would be used as the loss. For example, if the fraud consisted of attempting to sell $40,000 in worthless securities, or representing that a forged check for $40,000 was genuine, the "loss" would be treated as $40,000 for purposes of this guideline.*

*The amount of loss need not be precise. The court is not expected to identify each victim and total his loss to arrive at a precise figure. It need only make an estimate of the range of loss that is reasonable given the available information. The estimate may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. Estimates based upon aggregate "market loss" (e.g., the aggregate decline in market value of a stock resulting from disclosure of information that was wrongfully withheld or misrepresented) are especially appropriate for securities cases. The offender's gross gain from committing the fraud is an alternative minimum estimate of the loss.*

*Dollar loss often does not fully capture the harmfulness and seriousness of the conduct. In such instances, departure may be appropriate. Examples may include the following:*

*(a) the primary objective of the fraud was non-monetary;*

*(b) false statements were made for the purpose of facilitating some other crime;*

*(c) the offense caused or risked physical or psychological harm;*

*(d) the offense endangered national security or military readiness;*

*(e) the offense caused a loss of confidence in an important institution;*

*(f) completion of the offense was prevented, or the offense was interrupted before it caused serious harm.*

*The adjustments for loss do not distinguish frauds involving losses greater than $5,000,000. Departure above the applicable guideline may be appropriate in these unusual cases.*

*In a few instances, the total dollar loss that results from the offense may overstate its seriousness. Such situations occur most frequently when a misrepresentation is of limited materiality or is not the sole cause of the loss. Examples would include making a minor misrepresentation of fact in order to obtain a loan which the defendant expected, but was unable, to repay; attempting to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it; and making a misrepresentation in a securities offering that enabled the securities to be sold at inflated prices where the value of the securities subsequently declined in substantial part for other reasons. In such instances, the court may consider downward departure.*

*If the fraud exploited vulnerable victims, an enhancement will apply. See §3A1.1 (Vulnerable Victim).*

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

*Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. The statutes provide for increased maximum terms of imprisonment for the use or possession of device-making equipment and the production or transfer of more than five identification documents or fifteen access devices. The court may wish to enhance the sentence for violations of these statutes in a manner similar to the treatment of analogous counterfeiting offenses under Part B.*

*§2F1.2. 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 the victims' losses are difficult if not impossible to identify, the gain, i.e., the total increase in value realized through trading in securities based upon such information, by the defendant and persons acting in concert with him or to whom he provided inside information, is employed instead of the victims' losses.*

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

### 1. PROSTITUTION

8 U.S.C. § 1328
18 U.S.C. §§ 2421 - 2423

**§2G1.1. Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct**

(a) Base Offense Level: **14**

(b) Specific Offense Characteristic

(1) If the defendant used physical force, or coercion by drugs or otherwise, increase by **4** levels.

**§2G1.2. Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct**

(a) Base Offense Level: **16**

(b) Specific Offense Characteristics

(1) If the offense involved the use of physical force, or coercion by drugs or otherwise, increase by **4** levels.

(2) If the conduct involved the transportation of a minor under the age of twelve years, increase by **4** levels.

(3) If the conduct involved the transportation of a minor at least twelve years of age but under the age of sixteen years, increase by **2** levels.

*Commentary*

*§2G1.1 (8 U.S.C. § 1328, 18 U.S.C. §§ 2421-2422). This section applies to offenses listed under the white slave traffic statutes. Transportation for the purpose of prostitution or any other immoral purpose carries a statutory maximum penalty of five years' imprisonment. The enhancement for physical force or coercion anticipates no injury. In the infrequent case where the defendant did not commit the offense for commercial advantage and the offense did not involve physical force or coercion, the court may depart. The Commission recommends a downward departure of 8 levels.*

*§2G1.2 (8 U.S.C. § 1328, 18 U.S.C. § 2423). This section applies to conduct that involves the transportation of minors for immoral purposes. The statutory maximum penalty is ten years' imprisonment.*

* * * * *

## 2. SEXUAL EXPLOITATION OF A MINOR

8 U.S.C. § 1328
18 U.S.C. §§ 2251-2252

**§2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material**

(a) Base Offense Level: **25**

(b) Specific Offense Characteristic

(1) If the minor was under the age of twelve years, increase by **2** levels.

**§2G2.2. Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor**

(a) Base Offense Level: **13**

(b) Specific Offense Characteristics

(1) If the material involved a minor under the age of twelve years, increase by **2** levels.

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

*Commentary*

*§2G2.1 (8 U.S.C. § 1328, 18 U.S.C. § 2251). This offense commonly involves the production source of a child pornography enterprise. Because the offense directly involves the exploitation of minors, the base offense level is higher than for the distribution of the sexually explicit material after production. An enhancement is provided when the conduct involves the exploitation of a minor under age twelve to reflect the more serious nature of exploiting young children. Each minor child exploited shall be considered a separate offense.*

*§2G2.2 (18 U.S.C. § 2252). This section refers to the distribution of materials that visually depict a minor or minors engaging in sexually explicit conduct. Distribution, here, is included within the broader term of "trafficking." The base offense level is substantially higher than that applicable to the distribution of obscene materials not involving minors (§2G3.1).*

*An enhancement is provided if the material depicted minors under age twelve. The enhancement for distribution provides significant punishment for defendants involved in large-scale operations.*

* * * * *

## 3. OBSCENITY

18 U.S.C. §§ 1461 - 1465
47 U.S.C. § 223

### §2G3.1. Importing, Mailing, or Transporting Obscene Matter

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

(b) Specific Offense Characteristics

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

(2) If the offense involved material that portrays sadomasochistic conduct or other depictions of violence, increase by **4** levels.

(c) Cross Reference

(1) If the offense involved a criminal enterprise, apply the appropriate guideline from Chapter Two, Part E (Offenses Involving Criminal Enterprises and Racketeering) if the resulting offense level is greater than that determined above.

### §2G3.2. Obscene or Indecent Telephone Communications

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

*Commentary*

*§2G3.1 (18 U.S.C. §§ 1461-1465). This section applies to offenses involving the mailing, importation, and interstate transportation for sale or distribution of obscene materials. Because most federal prosecution is directed to acts related to distribution, the base offense level should usually be 11. The maximum penalty for these offenses is five years. When the obscenity distribution offense is part of a for-profit enterprise, the penalty is enhanced according to the retail value of the material involved, or by 5 levels, whichever is larger. As used in this guideline, the term "an act related to distribution" is to be broadly construed and includes production, transportation or possession for the purpose of distribution.*

*§2G3.2 (47 U.S.C. § 223). The maximum statutory penalty is six months.*

## PART H - OFFENSES INVOLVING INDIVIDUAL RIGHTS

### 1. CIVIL RIGHTS

18 U.S.C. §§ 241-242
18 U.S.C. §§ 245-246
42 U.S.C. § 3631

**§2H1.1. Going in Disguise to Deprive of Rights**

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

(1) **15**; or

(2) **2** plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristic

(1) If the defendant was a public official at the time of the offense, increase by **4** levels.

**§2H1.2. Conspiracy to Interfere with Civil Rights**

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

(1) **13**; or

(2) **2** plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristic

(1) If the defendant was a public official at the time of the offense, increase by **4** levels.

**§2H1.3. Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination**

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

(1) **10**, if no injury occurred; or

(2) **15**, if injury occurred; or

(3) **2** plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristic

(1) If the defendant was a public official at the time of the offense, increase by 4 levels.

§2H1.4. Interference with Civil Rights Under Color of Law

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

(1) 10; or

(2) 2 plus the offense level applicable to any underlying offense.

§2H1.5. Other Deprivations of Rights or Benefits in Furtherance of Discrimination

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

(1) 6; or

(2) 2 plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristic

(1) If the defendant was a public official at the time of the offense, increase by 4 levels.

*Commentary*

*Guidelines in Part H refer to violations of civil rights statutes that typically penalize conduct involving force or violence more heavily than discriminatory or intimidating conduct not involving force or bodily injury.*

*§§2H1.1, 2H1.2. Section 2H1.1 applies to intimidating activity by formally and informally organized groups as well as hate groups. Section 2H1.2 applies to conspiracies. These activities are proscribed by 18 U.S.C. § 241. The statutory maximum for violations of this statute is ten year's imprisonment unless death results. In each instance, the base offense level assumes threatening or otherwise serious conduct. The alternative offense level in §2H1.1(a)(2) and §2H1.2(a)(2) refers to the offense level for any underlying criminal conduct. For example, if the underlying offense involved a homicide, the alternative offense level would be the offense level from the guideline for the most comparable homicide offense in §§2A1.1-2A1.4 (Homicide) plus 2 levels. If the offense involved assault, criminal sexual conduct, kidnapping, abduction or unlawful restraint, the alternative offense level would be the offense level from the guideline for the most comparable offense in §§2A2.1-2A4.2 (Assault, Criminal Sexual Abuse, and Kidnapping, Abduction, or Unlawful Restraint) plus 2 levels, or if the offense involved attempt, conspiracy, or solicitation to commit such offenses, the offense level for such offense plus 2 levels. If the offense involved destruction of, or damage to property by means of arson or an explosive device, the alternative offense level would be the offense level from §2K1.4 (Arson; Property Damage By Use of Explosives) plus 2 levels. If the offense involved property damage by other means, the alternative offense level would be the offense level from*

*§2B1.3 (Property Damage or Destruction (Other than by Arson or Explosives)) plus 2 levels. The addition of two levels reflects the fact that the harm involved both the underlying criminal conduct and activity intended to deprive a person of his civil rights. An added penalty is imposed on an offender who is a public official to reflect the likely damage to public confidence in the integrity and fairness of government, and the added likely force of the threat because of the official's involvement. Because it is included as a specific offense characteristic, the adjustment for abuse of position under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. Other adjustments for role in the offense may be applicable, however.*

*§2H1.3. This section applies to violations of 18 U.S.C. § 245, and to violations of 42 U.S.C. § 3631 involving the threat or use of force. The maximum term of imprisonment for violations of these statutes is one year if no bodily injury occurs, ten years if bodily injury occurs, and life imprisonment if death results. The statutes provide federal protection for the exercise of civil rights in a variety of contexts (e.g., voting, employment, public accommodations, etc.). The base offense level reflects that force or threat of force is likely to be involved. It is established by analogy to similar crimes against the political process. An alternative offense level is provided in §2H1.3(a)(3). See Commentary to §2H1.1. Because it is included as a specific offense characteristic, the adjustment for abuse of position under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. Other adjustments for role in the offense may be applicable.*

*§2H1.4. This section applies to violations of 18 U.S.C. § 242, which carries a statutory maximum of one year unless death results, in which case a sentence of life imprisonment is authorized. Given this one-year statutory maximum a base offense level of 10 is prescribed; however, the Commission intends to recommend that the maximum authorized penalty for offenses other than those where death results be increased. A guideline sentence near the statutory maximum is provided for cases not resulting in death because of the compelling public interest in deterring and adequately punishing those who violate civil rights under color of law. An alternative offense level is provided in §2H1.4(a)(2). See Commentary to §2H1.1. Being a public official is an element of this offense; an enhancement for public position under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) therefore does not apply. Other adjustments for role in the offense may be applicable.*

*§2H1.5. This section applies to violations of 18 U.S.C. § 246 and 42 U.S.C. § 3631. Violations of these statutes need not involve the use or threat of force and can vary in the harm caused. Accordingly, the guideline contains an alternative offense level in §2H1.5(a)(2). See Commentary to §2H1.1. Because it is included as a specific offense characteristic, the adjustment for abuse of position under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. Other adjustments for role in the offense may be applicable.*

* * * * *

## 2. POLITICAL RIGHTS

18 U.S.C. §§ 241 -242
18 U.S.C. § 245(b)(1)(A)
18 U.S.C. §§ 592 - 594
18 U.S.C. § 597
42 U.S.C. §§ 1973i, j

### §2H2.1. Obstructing an Election or Registration

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

(1) **18**, if the obstruction occurred by use of force or threat of force against persons or property; or

(2) **12**, if the obstruction occurred by forgery, fraud, theft, bribery, deceit, or other means, except as provided in (3) below; or

(3) **6**, if the defendant (A) solicited, demanded, accepted, or agreed to accept anything of value to vote, refrain from voting, vote for or against a particular candidate, or register to vote, (B) gave false information to establish eligibility to vote, or (C) voted more than once in a federal election.

*Commentary*

*§2H2.1. This section applies to violations of political rights, under 18 U.S.C. §§ 241, 242, 245(b)(1)(A), 592, 593, 594, 597, and 42 U.S.C. §§ 1973i and 1973j. Aggravating factors are provided for three major ways of obstructing an election distinguished in the various statutes: by force, by deceptive or dishonest conduct, or by bribery. If the use of force results in personal injury or property damage, or if the scheme to obstruct an election or registration involves corrupting a public official, e.g., a poll official, the sentence may be enhanced by applying the relevant provisions of Chapter Five, Part K (Departures). A defendant who is a public official or who directs others to engage in criminal conduct may have a sentence enhanced by reference to the provisions in Chapter Three, Part B (Role in the Offense).*

* * * * *

## 3. PRIVACY AND EAVESDROPPING

18 U.S.C. § 1702
18 U.S.C. § 1905
18 U.S.C. § 2511-2512
47 U.S.C. § 605

§2H3.1. Interception of Communications or Eavesdropping

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

(1) 9; or

(2) If the purpose of the conduct was to facilitate another offense, apply the guideline applicable to an attempt to commit that offense.

(b) Specific Offense Characteristic

(1) If the purpose of the conduct was to obtain direct or indirect commercial advantage or economic gain not covered by §2H3.1(a)(2) above, increase by 3 levels.

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

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

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

§2H3.3. Obstructing Correspondence

(a) Base Offense Level:

(1) 6; or

(2) if the conduct was theft of mail, apply §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft);

(3) if the conduct was destruction of mail, apply §2B1.3 (Property Damage or Destruction (Other than by Arson or Explosives))

*Commentary*

*§2H3.1. This section refers to conduct proscribed by 47 U.S.C. § 605, and the Electronic Communications Privacy Act of 1986, which amends 18 U.S.C. § 2511 and other sections of Title 18 dealing with unlawful interception and disclosure of communications. These statutes proscribe the interception and divulging of wire, oral, radio, and electronic communications. The Electronic Communications Privacy Act of 1986 provides for a maximum term of imprisonment of five years for violations involving most types of communication. The interception of oral communications is punishable by a maximum of five years' imprisonment, while the interception of radio communications carries a maximum term of imprisonment of one year for the first conviction and a max num term of imprisonment of two years for any subsequent conviction. The base offense level is 9, or if the offense was to facilitate the commission of another offense, the offense level that resulted from applying the guideline relevant to the underlying offense, whichever is greater. The base offense level of 9 is*

*increased if the purpose of the conduct is commercial or economic gain. Offenses involving the interception of satellite cable transmissions for purposes of direct or indirect commercial advantage or private financial gain are covered under §2B5.3 (Criminal Infringement of Copyright).*

*§2H3.2. This section applies to conduct proscribed by 18 U.S.C. § 2512 covering eavesdropping devices. The offense level is enhanced if the conduct was engaged in for pecuniary gain.*

*§2H3.3. This section applies to violations of 18 U.S.C. § 1702 involving the unlawful interception of correspondence. The same statute is sometimes used to prosecute cases more accurately described as theft or destruction of mail. In such cases, apply §§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or 2B1.3 (Property Damage or Destruction Other than by Arson or Explosives), respectively.*

* * * * *

## 4. PEONAGE, INVOLUNTARY SERVITUDE, AND SLAVE TRADE

18 U.S.C. §§ 1581-1588

### §2H4.1. Peonage, Involuntary Servitude, and Slave Trade

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

(1) **15**; or

(2) **2** plus the offense level applicable to any underlying offense.

*Commentary*

*This section applies to conduct proscribed by 18 U.S.C. §§ 1581 through 1588. These statutes prohibit peonage, involuntary servitude, and slave trade. For purposes of deterrence and just punishment, the base offense level for these offenses is sufficiently high to ensure that a term of imprisonment will be imposed. However, these offenses frequently involve other serious offenses, in which event the offense level will be increased. See Commentary to §2H1.1.*

## PART J - OFFENSES INVOLVING THE ADMINISTRATION OF JUSTICE

18 U.S.C. § 201
18 U.S.C. §§ 401 - 402
18 U.S.C. §§ 912 - 913
18 U.S.C. §§ 1503 - 1513
18 U.S.C. §§ 1621 - 1623
18 U.S.C. §§ 3146 - 3147

### §2J1.1. Contempt

If the defendant was adjudged guilty of contempt, the court shall impose a sentence based on stated reasons and the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

### §2J1.2. Obstruction of Justice

(a) Base Offense Level: 12

(b) Specific Offense Characteristics

(1) If the defendant obstructed or attempted to obstruct the administration of justice by causing or threatening to cause physical injury to a person or property, increase by 8 levels.

(2) If the defendant substantially interfered with the administration of justice, increase by 3 levels.

(c) Cross Reference

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

### §2J1.3. Perjury

(a) Base Offense Level: 12

(b) Specific Offense Characteristics

(1) If the defendant suborned perjury by causing or threatening to cause physical injury to a person or property, increase by 8 levels.

(2) If the defendant's perjury or subornation of perjury substantially interfered with the administration of justice, increase by 3 levels.

(c) Cross Reference

(1) If the conduct was perjury in respect to a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to such criminal offense, if the resulting offense level is greater than that determined above.

§2J1.4. Impersonation

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

(1) If the defendant falsely represented himself as a federal officer, agent or employee to demand or obtain any money, paper, document, or other thing of value or to conduct an unlawful arrest or search, increase by 6 levels.

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

(a) Base Offense Level:

(1) 6, if in respect to a felony; or

(2) 4, if in respect to a misdemeanor.

(b) Specific Offense Characteristic

(1) If the offense substantially interfered with the administration of justice, increase by 3 levels.

§2J1.6. Failure to Appear by Defendant

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the underlying offense is punishable by death or imprisonment for a term of fifteen years or more, increase by 9 levels.

(2) If the underlying offense is punishable by a term of imprisonment of five or more years, but less than fifteen years, increase by 6 levels.

(3) If the underlying offense is a felony punishable by a maximum term of less than five years, increase by 3 levels.

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

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense committed while on release is punishable by death or imprisonment for a term of fifteen years or more, increase by 6 levels.

(2) If the offense committed while on release is punishable by a term of imprisonment of five or more years, but less than fifteen years, increase by 4 levels.

(3) If the offense committed while on release is a felony punishable by a maximum term of less than five years, increase by 2 levels.

§2J1.8. Bribery of Witness

(a) Base Offense Level: 12

(b) Specific Offense Characteristic

(1) If the offense substantially interfered with the administration of justice, increase by 3 levels.

(c) Cross Reference

(1) If the conduct was perjury in respect to a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to such criminal offense, if the resulting offense level is greater than that determined above.

§2J1.9. Payment to Witness

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

(1) If the payment was for refusing to testify, increase by 4 levels.

*Commentary*

*§2J1.1 (18 U.S.C. §§ 401, 402). Misconduct constituting contempt varies significantly. The nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are context specific variables. Because the seriousness of a contempt violation can only be determined within the context of the often unique circumstances of the offense, the Commission leaves punishment to the discretion of the sentencing judge. Explicit factual findings must be made if the contempt occurred in the presence of the court and is summarily punished. Rule 42(a), Fed.R.Crim.P.*

*§2J1.2 (18 U.S.C. §§ 1503-1513). This section addresses offenses involving obstruction of justice generally prosecuted under the referenced statutes. This guideline only applies to independent prosecutions and convictions for obstruction offenses. However, conduct*

*constituting obstruction in connection with the investigation or prosecution of another offense may be a relevant sentencing consideration as post-offense conduct. See Chapter Three, Part C (Obstruction).*

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

*The specific offense characteristics reflect the more serious forms of obstruction. Substantial interference with the administration of justice results when there is a premature or improper termination of a felony investigation or where an indictment or a verdict is based upon perjury or false testimony or other false evidence, or where substantial governmental or court resources are unnecessarily expended as a result of the offense. Because the conduct covered by this guideline is frequently part of an effort to assist another person to escape punishment for a crime he has committed, an alternative reference to the guideline for accessory after the fact is made.*

*If a weapon was used or physical or psychological injury or property damage resulted from the commission of the offense, a departure may be called for. See Chapter Five, Part K (Departures).*

*§2J1.3 (18 U.S.C. §§ 1621-1623). This section applies to perjury and subornation of perjury, generally prosecuted under the referenced statutes. Under these provisions, the maximum statutory punishment is five years. This guideline only applies to independent prosecutions and convictions for perjury. Perjury and suborning perjury may be considered as an aggravating factor in sentencing for other offenses. See Chapter Three, Part C (Obstruction). The guidelines provide a higher penalty for perjury than the current practice estimate of ten-months imprisonment. The Commission believes that perjury should be treated similarly to obstruction of justice. Therefore, the same considerations for enhancing a sentence are applied in the specific offense characteristics, and an alternative reference to the guideline for accessory after the fact is made.*

*§2J1.4 (18 U.S.C. §§ 912, 913). This section applies to impersonation of a federal officer, agent, or employee; and impersonation to unlawfully conduct a search or arrest. The statutory maximum for both offenses is three years.*

*§2J1.5 (18 U.S.C. § 3146(b)(2)). This section applies to a failure to appear by a material witness. A term of imprisonment imposed for this offense runs consecutively to any other term of imprisonment imposed. The statutory maximum for a material witness failing to appear is one year. Substantial interference with the administration of justice is defined in the commentary to §2J1.2.*

*§2J1.6 (18 U.S.C. § 3146(b)(1)). This section applies to a failure to appear by a defendant who was released pending trial, sentencing, appeal, or surrender for service. The*

*statutory maximum for the violation increases in relation to the statutory maximum punishment for the underlying offense. A sentence imposed for failure to appear runs consecutively to a sentence of imprisonment for any other offense. Id.*

*§2J1.7 (18 U.S.C. § 3147). The statute specifies that "any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment." Because a defendant convicted under this section necessarily will have a prior criminal record, the guideline sentences are higher than otherwise might appear. This guideline presumes, however, that the sentence imposed for the offense committed while on release, which may have been imposed by a state court, is reasonably consistent in effective length with the sentence that these guidelines require for a similar federal offense. If not, departure may be warranted.*

*§§2J1.8 and 2J1.9 (18 U.S.C. § 201(d),(e),(h),(i)). These sections apply to bribes and gratuities involving witnesses in federal proceedings. The offense levels correspond to those for bribing federal officials and approximate current practice estimates. Substantial interference with the administration of justice is defined in the commentary to §2J1.2.*

## PART K - OFFENSES INVOLVING PUBLIC SAFETY

18 U.S.C. §§ 32-33
18 U.S.C. § 81
18 U.S.C. § 842(a), (h), (i), (j), (k)
18 U.S.C. § 844(a), (b), (d), (f), (h), (i)
18 U.S.C. § 1153
18 U.S.C. § 1855
18 U.S.C. § 2275
26 U.S.C. § 5685
49 U.S.C. § 1472(*l*)

### 1. EXPLOSIVES AND ARSON

**§2K1.1. Failure to Report Theft of Explosives**

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

**§2K1.2. Improper Storage of Explosives**

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

**§2K1.3. Unlawfully Trafficking In, Receiving, or Transporting Explosives**

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

(b) Specific Offense Characteristics

If any of the following applies, use the greatest:

(1) If the defendant's conduct involved any written or oral false or fictitious statement, false record, or misrepresented identification, increase by **4** levels.

(2) If the offense involved explosives that the defendant knew or had reason to believe were stolen, increase by **6** levels.

(3) If the defendant knowingly distributed explosives to a person under twenty-one years of age, to a person prohibited by state law or ordinance from receiving such explosives at the place of distribution, or to a person the defendant had reason to believe intended to transport such materials into a state in violation of the law of that state, increase by **4** levels.

(4) If the defendant was a person prohibited from receiving explosives under 18 U.S.C. § 842(i), or if the defendant knowingly distributed explosives to a person prohibited from receiving explosives under 18 U.S.C. § 842(i), increase by **10** levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive firearm offense, apply the guideline for the substantive offense.

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

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

If any of the following applies, use the greatest:

(1) If the defendant knowingly created a substantial risk of death or serious bodily injury, increase by 18 levels.

(2) If the defendant recklessly endangered the safety of another, increase by 14 levels.

(3) If the offense involved destruction or attempted destruction of a residence, increase by 12 levels.

(4) If the defendant used fire or an explosive to commit another offense that is a felony under federal law, or carried explosives during the commission of any offense that is a felony under federal law (i.e., the defendant is convicted under 18 U.S.C. § 844(h)), increase by 7 levels.

(5) If the defendant endangered the safety of another person, increase by 4 levels.

(6) If a destructive device was used, increase by 2 levels.

(c) Cross References

(1) If the defendant caused death, or intended to cause bodily injury, apply the most analogous guideline from Chapter Two, Part A, Offenses Against the Person, if the resulting offense level is higher than that determined above.

(2) Apply §2B1.3 (Property Damage or Destruction), if the resulting offense level is higher than that determined above.

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

(a) Base Offense Level: 9

(b) Specific Offense Characteristics

If any of the following applies, use the greatest:

(1) If the defendant acted willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life (i.e.,

the defendant is convicted under 49 U.S.C. § 1472(*l*)(2)), increase by **15** levels.

(2) If the defendant was prohibited by another federal law from possessing the weapon or material, increase by **2** levels.

(3) If the defendant's possession of the weapon or material would have been lawful but for 49 U.S.C. § 1472(*l*) and he acted with mere negligence, decrease by **3** levels.

(c) Cross Reference

(1) If the defendant used the weapon or material in committing or attempting another offense, apply the guideline for such other offense, or §2X1.1 (Attempt or Conspiracy) if the resulting offense level is higher than that determined above.

§2K1.6. **Shipping, Transporting, or Receiving Explosives with Felonious Intent or Knowledge; Using or Carrying Explosives in Certain Crimes**

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

(1) **18**; or

(2) If the defendant committed the offense with intent to commit another offense against a person or property, apply §2X1.1 (Attempt or Conspiracy) in respect to such other offense.

*Commentary*

*§§2K1.1 and 2K1.2 (18 U.S.C. §§ 842(k),(j), 844(b)). The conduct covered is generally a regulatory violation, punishable by a maximum term of one year imprisonment. A review of current sentencing practices under 18 U.S.C. § 842(j) indicates that the majority of defendants receive probation.*

*§2K1.3 (18 U.S.C. §§ 842(a),(h),(i), 844(b)). This section applies to various forms of conduct proscribed by 18 U.S.C. § 842, ranging from violations of a regulatory nature pertaining to licensees or persons otherwise lawfully involved in explosives commerce, to more serious violations that involve substantial danger to public safety. The majority of prosecutions are under 18 U.S.C. § 842(a) and 18 U.S.C. § 842(h).*

*§2K1.4 (18 U.S.C. §§ 32, 33, 81, 844(f),(h),(i), 1153, 1855, 2275). Review of arson presentence investigation reports indicates that many arson cases involve "malicious mischief," i.e., minor property damage under circumstances that do not present an appreciable danger. Many of these defendants receive probationary sentences. A low base offense level is therefore provided for these cases. Aggravating factors are provided where a defendant knowingly or recklessly endangered others, destroyed or attempted to destroy a residence, used fire or an explosive in the commission of a felony, used a destructive device, or otherwise endangered others.*

*§2K1.5 (49 U.S.C. § 1472(l)). The applicable statute is a misdemeanor, except in the circumstances specified in 49 U.S.C. § 1472(l)(2). An enhancement to ensure a maximum sentence is provided where the defendant was a person prohibited by federal law from possession of the weapon or material. A decrease is provided for simple negligence where the defendant was otherwise authorized to possess the weapon or material.*

*§2K1.6 (18 U.S.C. § 844(d); 26 U.S.C. § 5685). The base offense level is consistent with the time specified in the current parole guidelines.*

* * * * *

## 2. FIREARMS

18 U.S.C. § 922
18 U.S.C. § 924
18 U.S.C. § 929
26 U.S.C. § 5861

§2K2.1. **Receipt, Possession, or Transportation of Firearms and Other Weapons by Prohibited Persons**

(a) Base Offense Level: **9**

(b) Specific Offense Characteristics

(1) If the firearm was stolen or had an altered or obliterated serial number, increase by **1** level.

(2) If the defendant obtained or possessed the firearm solely for sport or recreation, decrease by **4** levels.

(c) Cross Reference

(1) If the defendant used the firearm in committing or attempting another offense, apply the guideline in respect to such other offense, or §2X1.1 (Attempt or Conspiracy) if the resulting offense level is higher than that determined above.

§2K2.2. **Receipt, Possession, or Transportation of Firearms and Other Weapons in Violation of National Firearms Act**

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

(b) Specific Offense Characteristics

(1) If the firearm was stolen or had an altered or obliterated serial number, increase by **1** level.

(2) If the firearm was a silencer, increase by 4 levels.

(3) If the defendant obtained or possessed the firearm solely for sport, recreation or collection, decrease by 6 levels.

(c) Cross Reference

(1) If the defendant used the firearm in committing or attempting another offense, apply the guideline for such other offense or §2X1.1 (Attempt or Conspiracy), if the resulting offense level is higher than that determined above.

## §2K2.3. Prohibited Transactions in or Shipment of Firearms and Other Weapons

(a) Base Offense Level:

(1) 12, if convicted under 26 U.S.C. § 5861; or

(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the number of firearms unlawfully dealt in exceeded 5, increase as follows:

| | Number of Firearms | Increase in Level |
|---|---|---|
| (A) | 6 - 10 | add 1 |
| (B) | 11 - 20 | add 2 |
| (C) | 21 - 50 | add 3 |
| (D) | 51 - 100 | add 4 |
| (E) | 101 - 200 | add 5 |
| (F) | more than 200 | add 6 |

(2) If any of the following applies, use the greatest:

(A) If the defendant knew or had reason to believe that a purchaser was a person prohibited by federal law from owning the firearm, increase by 2 levels.

(B) If the defendant knew or had reason to believe that a purchaser resided in another state in which he was prohibited from owning the firearm, increase by 1 level.

(C) If the defendant knew or had reason to believe that a firearm was stolen or had an altered or obliterated serial number, increase by 1 level.

(c) Cross Reference

(1) If the defendant provided the firearm to another for the purpose of committing another offense, or knowing that he planned to use it in committing another offense, apply §2X1.1 (Attempt or Conspiracy) in respect to such other offense, if the resulting offense level is higher.

**§2K2.4. Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes**

If the defendant, whether or not convicted of another crime, was convicted under 18 U.S.C. § 924(c) or § 929(a), the penalties are those required by statute.

*Commentary*

*§2K2.1 (18 U.S.C. § 922(a)(6),(g),(h)). 18 U.S.C. §§ 922(g) and 922(h) prohibit certain persons from receiving or possessing firearms and certain other weapons; 18 U.S.C. § 922(a)(6), prohibits false statements concerning disqualification of the defendant from possessing them.*

*Under current sentencing practices, there is substantial sentencing variation for these crimes. From the Commission's investigations, it appears that the variation is attributable primarily to the wide variety of circumstances under which these offenses occur. Apart from the nature of the defendant's criminal history, his actual or intended use of the firearm is probably the most important factor in determining the sentence.*

*Statistics show that sentences average two to three months lower if the firearm involved is a rifle or an unaltered shotgun. This may reflect the fact that these weapons tend to be more suitable than others for recreational activities. However, some rifles or shotguns may be possessed for criminal purposes, while some handguns may be suitable primarily for recreation. Therefore, the guideline is not based upon the type of firearm.*

*Intended lawful use, as determined by the surrounding circumstances, is a mitigating factor. These circumstances include, among others, the number and type of firearms (sawed-off shotguns, for example, have few legitimate uses) and ammunition, the location and circumstances of possession, the defendant's criminal history (e.g., violent or non-violent), and the extent to which possession is limited by local law.*

*Available data are not sufficient to determine the effect a stolen firearm has on the average sentence. However, reviews of actual cases suggest that this is a factor that tends to result in more severe sentences. Independent studies show that stolen firearms are used disproportionately in the commission of crimes.*

*The firearm statutes often are used as a device to enable the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law. For example, a convicted felon may be prosecuted for possessing a firearm if he used the firearm to rob a gasoline station. Such prosecutions result in high sentences because of the true nature of the underlying conduct. The cross reference deals with such cases.*

*§2K2.2 (26 U.S.C. § 5861(b)-(l)). 26 U.S.C. § 5861 prohibits the unlicensed receipt, possession, transportation, or manufacture of certain firearms, such as machine guns, silencers, rifles and shotguns with shortened barrels, and destructive devices. The offense is a felony with a maximum prison sentence of ten years. For violations of 26 U.S.C. § 5861(a), involving sales of such weapons, refer to §2K2.3.*

*As with §2K2.1, there is considerable variation in the sentences currently given for this offense. Some violations may be relatively technical. Sentences frequently are probationary. The most important consideration appears to be the defendant's intended use of or reason for possessing the firearm.*

*§2K2.3 (18 U.S.C. § 922(a)(1),(a)(5),(b)(2),(b)(3),(d),(i),(j),(k),(l); 26 U.S.C. § 5861(a)). This applies to a variety of offenses involving prohibited transactions in or transportation of firearms and certain other weapons. Considerable variation in sentencing for these offenses currently exists. Current practices identify the specific offense characteristics as likely sources of that variation.*

*§2K2.4. If the defendant was convicted under 18 U.S.C. § 924(c) or § 929(a), the penalties are mandatory and shall be imposed pursuant to the statute. Note, however, that many of the offense guidelines (e.g., §2B3.1, Robbery) contain enhancements applicable solely to weapon use. If the defendant is sentenced under 18 U.S.C. § 924(c), such enhancements should not be applied.*

* * * * *

## 3. TRANSPORTATION OF HAZARDOUS MATERIALS

49 U.S.C. § 1809(b)

### §2K3.1. Unlawfully Transporting Hazardous Materials in Commerce

Apply the guideline provision for §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification).

*Commentary*

*§2K3.1 (49 U.S.C. § 1809(b)). The conduct covered under this section is punishable by imprisonment for up to five years. It involves the same risks as the conduct covered under §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification). Accordingly, that guideline applies.*

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

### 1. IMMIGRATION

8 U.S.C. § 1182(a)
8 U.S.C. §§ 1324 - 1328

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

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

(b) Specific Offense Characteristics

(1) If the defendant committed the offense for profit or with knowledge that the alien was excludable under 8 U.S.C. §§ 1182(a)(27), (28), (29), increase by **3** levels.

(2) If the defendant previously has been convicted of bringing illegal aliens into the United States, increase by **2** levels.

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

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

(b) Specific Offense Characteristic

(1) If the defendant previously has unlawfully entered or remained in the United States, increase by **2** levels.

**§2L1.3. Engaging in a Pattern of Unlawful Employment of Aliens**

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

*Commentary*

*§2L1.1 (8 U.S.C. §§ 1324(a)(1), (2), (4), 1327, and 1328, Section 112 of The Immigration Reform and Control Act of 1986). This section concerns the most serious immigration offenses covered under The Immigration Reform and Control Act of 1986. By statute, a five-year maximum term of imprisonment is provided for smuggling or harboring illegal aliens in the case of a second or subsequent offense, an offense committed for commercial advantage, or any offense in which the alien is not presented to an immigration officer immediately upon arrival. In all other cases, the maximum term is one year. 8 U.S.C. § 1324.*

*The offense level is increased if the defendant committed the offense for profit. This enhancement does not apply to defendants who are themselves being unlawfully transported and*

*receive transportation costs in lieu of payment. Defendants assisting entry of aliens who intend to engage in unlawful activities or who are otherwise specifically excludable under 8 U.S.C. §§ 1182(a)(27), (28), or (29), receive an enhanced penalty.*

*The enhancement for a prior conviction is in addition to any adjustment made for criminal history in Chapter Four (Criminal History and Criminal Livelihood).*

*If the alien was smuggled, transported, or harbored for immoral purposes (8 U.S.C. § 1328), apply §2G1.1, §2G1.2, §2G2.2, or §2G2.2 as applicable. See Statutory Index.*

*§2L1.2 (8 U.S.C. §§ 1325 and 1326). Repeated instances of deportation without criminal conviction may warrant a sentence at or near the maximum for the applicable guideline range.*

*§2L1.3 (Section 101 of The Immigration Reform and Control Act of 1986). This offense is specifically directed at defendants who engage in a pattern of unlawful employment of aliens. The statutory maximum penalty is six months' imprisonment.*

* * * * *

## 2. NATURALIZATION AND PASSPORTS

18 U.S.C. § 1423 - 1428
18 U.S.C. § 1542 - 1544
18 U.S.C. § 1546

### §2L2.1. Trafficking in Evidence of Citizenship or Documents Authorizing Entry

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

(1) If the defendant committed the offense for profit, increase by 3 levels.

### §2L2.2. Fraudulently Acquiring Evidence of Citizenship or Documents Authorizing Entry for Own Use

(a) Base Offense Level: 6

### §2L2.3. Trafficking in a United States Passport

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

(1) If the defendant committed the offense for profit, increase by 3 levels.

§2L2.4. **Fraudulently Acquiring or Improperly Using a United States Passport**

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

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

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

*Commentary*

*§2L2.1 (18 U.S.C. §§ 1425-1427, 1546, and Section 103 of The Immigration Reform and Control Act of 1986). The statutory maximum penalty is five years.*

*§2L2.2 (18 U.S.C. §§ 1423, 1425, and 1546). The statutory maximum penalty is five years.*

*§2L2.3 (18 U.S.C. §§ 1542, 1544). The statutory maximum penalty is five years.*

*§2L2.4 (18 U.S.C. §§ 1543 and 1544). The statutory maximum penalty is five years.*

*§2L2.5 (18 U.S.C. § 1428). The statutory maximum penalty is five years.*

## PART M - OFFENSES INVOLVING NATIONAL DEFENSE

### 1. TREASON

18 U.S.C. § 2381

**§2M1.1. Treason**

(a) Base Offense Level

(1) **43**, if the conduct is tantamount to waging war against the United States;

(2) the offense level applicable to the most analogous offense, otherwise.

*Commentary*

*§2M1.1. This section sets forth the punishment for violations of 18 U.S.C. § 2381. Treason carries a statutorily-mandated minimum sentence of five years' imprisonment; the maximum is death. Treason is a rarely-prosecuted offense that could encompass a relatively broad range of conduct, including many of the more specific offenses in this Part. The guideline contemplates imposition of the maximum penalty in the most serious cases, with reference made to the most analogous guideline in lesser cases.*

* * * * *

### 2. SABOTAGE

18 U.S.C. §§ 2153-2156
42 U.S.C. § 2284

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

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

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

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

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

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

§2M2.4. Production of Defective National Defense Material, Premises, or Utilities

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

*Commentary*

*Sections 2M2.1 and 2M2.2 apply to violations of 18 U.S.C. §§ 2153 and 2154, respectively. These offenses represent extreme conduct. Both the high statutory maximum (thirty years) and the base offense level reflect this. Violations of these statutes are treated as the substantial equivalent of second degree murder.*

*Sections 2M2.3 and 2M2.4 apply to violations of 18 U.S.C. §§ 2155 and 2156, respectively. The statutes carry a maximum term of imprisonment of ten years. The guidelines treat these offenses equally because they pose the same danger.*

*The guidelines for sabotage also apply to conduct prohibited under 42 U.S.C. § 2284, i.e., sabotage of a nuclear production or utilization facility, nuclear waste storage facility, or nuclear fuel. While the statute does not make a wartime/peacetime distinction, it includes a provision for increasing the maximum term of imprisonment from five to ten years when the offense involves the intent to injure the United States or aid a foreign nation. Thus, these provisions are consistent with the wartime/peacetime distinctions that apply to war material, premises, and utilities.*

* * * * *

## 3. ESPIONAGE AND RELATED OFFENSES

18 U.S.C. §§ 793-794
42 U.S.C. § 2274(a), (b)
42 U.S.C. §§ 2275-2276

§2M3.1. Gathering or Transmitting National Defense Information to Aid a Foreign Government

(a) Base Offense Level:

(1) **42**, if top secret information was gathered or transmitted; or

(2) **37**, otherwise.

§2M3.2. Gathering National Defense Information

(a) Base Offense Level:

(1) **35**, if top secret information was gathered; or

(2) **30**, otherwise.

§2M3.3. Transmitting National Defense Information

(a) Base Offense Level:

(1) **29**, if top secret information was transmitted; or

(2) **24**, otherwise.

§2M3.4. Losing National Defense Information

(a) Base Offense Level:

(1) **18**, if top secret information was lost; or

(2) **13**, otherwise.

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

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

§2M3.6. Disclosure of Classified Cryptographic Information

(a) Base Offense Level:

(1) **29**, if top secret information was disclosed; or

(2) **24**, otherwise.

§2M3.7. Unauthorized Disclosure to Foreign Government or a Communist Organization of Classified Information by Government Employee

(a) Base Offense Level:

(1) **29**, if top secret information was disclosed; or

(2) **24**, otherwise.

§2M3.8. Receipt of Classified Information

(a) Base Offense Level:

(1) **29**, if top secret information was received; or

(2) **24**, otherwise.

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

(a) Base Offense Level:

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

(2) **25**, if the information was disclosed by a person with authorized access only to other classified information.

*Commentary*

*The Commission has set base offense levels in this section on the assumption that the information at issue bears a significant relation to the nation's security, and that the revelation will significantly and adversely affect security interests. When revelation is likely to cause little or no harm, the court may impose a sentence below the applicable guideline range.*

*The court may depart from the guidelines upon representation by the President or his duly authorized designee that the imposition of a sanction other than that authorized under the guidelines for espionage and related offenses is necessary to protect national security or further the objectives of the nation's foreign policy.*

*§2M3.1. This section applies to violations of 18 U.S.C. § 794, the general espionage statute, and 42 U.S.C. §§ 2274(a), 2274(b), and 2275 (that address communication of restricted data pertaining to nuclear material, weapons production, and use with reason to believe or intent that the data will be used to injure the United States or aid a foreign nation). Although life imprisonment may be imposed under any of these statutes, the death penalty also may be imposed for violations of 18 U.S.C. § 794. Attempts and conspiracies to violate 18 U.S.C. § 794 and 42 U.S.C. §§ 2274(a), (b) and 2275 are subject to the same punishment as the completed offenses proscribed by those sections.*

*Offense level distinctions in this section are based on the classification of the information gathered or transmitted. The classifications in turn reflect the importance of the information to national security. Pursuant to Executive Order 12356, "Top Secret" information is information that, if disclosed, "reasonably could be expected to cause exceptionally grave damage to the national security." "Secret" information is information that, if disclosed, "reasonably could be expected to cause serious damage to the national security." "Confidential" information is information that, if disclosed, could reasonably be expected to cause damage to the national security.*

*§2M3.2. This section applies to violations of 18 U.S.C. § 793(a), (b), (c), and (g), which proscribe diverse forms of obtaining and transmitting national defense information with intent or reason to believe the information would injure the United States or be used to the advantage of a foreign government. Violations are subject to a maximum term of ten years' imprisonment.*

*§2M3.3. This section applies to violations of 18 U.S.C. § 793(d), (e), and (g). An offense is committed under those subsections whenever a "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense" is willfully transmitted or communicated to a person not entitled to receive it. It need not be proven that the item was communicated with reason to*

*believe that it could be used to the injury of the United States or the advantage of a foreign nation. The statute only requires such intent when intangible information is communicated under subsections (d) and (e).*

*The base offense level for §2M3.3 is substantially lower than the base offense level for §2M3.2 primarily because prosecutions under subsections (d) and (e) often do not involve defendants who have the intent or reason to believe the information could be used to injure the United States or aid a foreign nation. When such intent or reason to believe is present in a violation of subsection (d) or (e), §2M3.2 applies.*

*§2M3.4. This section applies to violations of 18 U.S.C. § 793(f). Offenses generally prosecuted under this statute do not involve subversive conduct on behalf of a foreign power, but rather the loss of classified information by a grossly negligent employee of the federal government or a federal contractor. The base offense level is higher if the information was classified top secret to reflect the likely importance of such information to national security.*

*§2M3.5. This section applies to violations of 42 U.S.C. § 2276.*

*§2M3.6. This section applies to violations of 18 U.S.C. § 798, which proscribes the disclosure of classified information concerning cryptographic or communication intelligence to the detriment of the United States or for the benefit of a foreign government. The statutory maximum for violations of 18 U.S.C. § 798 is ten years.*

*§2M3.7. This section applies to violations of 50 U.S.C. § 783(b).*

*§2M3.8. This section applies to violations of 50 U.S.C. § 783(c).*

*§2M3.9. This section applies to violations of 50 U.S.C. § 421. The offense level distinctions in §2M3.9 are based on distinctions in the underlying statute. Subsections (a) and (b) carry maximum terms of imprisonment of ten years and five years, respectively. Violations of subsection (c) carry a statutory maximum of three years imprisonment. The statute provides higher maximum punishments for those persons with higher security classifications and correspondingly higher obligations to maintain confidentiality. Accordingly, the guideline establishes the highest penalties for officials with authorized access to classified information identifying covert agents, and a lower penalty for officials with authorized access to classified information generally. Following the statutory language, the highest base offense level applies to persons who have access to classified information identifying a covert agent, as well as to those who previously had access. The guideline does not apply to violations of 50 U.S.C. § 421 by defendants who disclosed such information without having or having had authorized access to classified information, including journalists; it only applies to violations by persons who have or previously had authorized access. Such disclosures may vary in the degree of harm they inflict, and the court should impose a sentence that reflects the harm.*

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## 4. EVASION OF MILITARY SERVICE

50 U.S.C. App. § 462

### §2M4.1. Failure to Register and Evasion of Military Service

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

(b) Specific Offense Characteristic

(1) If the offense occurred while persons were being inducted into the armed services, other than in time of war or armed conflict, increase by **6** levels.

*Commentary*

*§2M4.1. The Commission has not considered the appropriate sanction for this offense when persons are being inducted during time of war or armed conflict.*

* * * * *

## 5. PROHIBITED FINANCIAL TRANSACTIONS AND EXPORTS

22 U.S.C. § 2778
50 U.S.C. App. § 2410

### §2M5.1. Evasion of Export Controls

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

(1) **22**, if national security or nuclear proliferation controls were evaded; or

(2) **14**.

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

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

(1) **22**, if sophisticated weaponry was involved; or

(2) **14**.

*Commentary*

*In determining whether to depart from the base offense levels for export violations, the court may consider: whether the violation occurred during wartime; the degree to which the violation threatened a security interest; the volume of commerce involved; the extent of planning and sophistication; and whether there were multiple occurrences or transactions.*

*§2M5.1. This section applies to knowing or willful evasion of export controls in violation of 50 U.S.C. App. §§ 2401-2420, the Export Administration Act. The statute provides for up to ten years imprisonment for willfully violating or conspiring to or attempting to violate the act with respect to controls as to the country of destination, and five years otherwise. 50 U.S.C. App. §§ 2410(a) and (b).*

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

*§2M5.2. This section applies to exports and imports of military arms, equipment, and services in violation of 22 U.S.C. § 2778, the Arms Export Control Act. The statute requires that exports of military goods, equipment, and services be licensed by the Department of State's Office of Munitions Control.*

* * * * *

## 6. ATOMIC ENERGY

42 U.S.C. § 2077
42 U.S.C. § 2122
42 U.S.C. § 2131
42 U.S.C. § 2273

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

(a) Base Offense Level: 30

(b) Specific Offense Characteristic

(1) If the offense was committed with intent to injure the United States or to aid a foreign nation, increase by 12 levels.

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

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

(1) **30**, if the offense was committed with intent to injure the United States or to aid a foreign nation; or

(2) **6**.

*Commentary*

*While relatively few prosecutions occur for offenses under this section, the conduct covered often involves potential threats to the nation's public health, safety, and security. Most of the prosecutions that occur under this section are for trespass on federal installations, and often involve protest or civil disobedience.*

*§2M6.1. This section deals with the acquisition of nuclear weapons and materials prohibited by 42 U.S.C. §§ 2077(b), 2122, and 2131. It also applies to those violations of 18 U.S.C. § 831 that involve similar conduct. These statutes make it unlawful to manufacture, obtain, transfer, deal in, or possess nuclear materials, devices, or facilities, or to conspire to or attempt to do so. The statutes provide a maximum life sentence for offenses intended to injure the United States or aid a foreign nation, and a maximum ten year sentence otherwise.*

*§2M6.2. This section applies to offenses related to nuclear energy not specifically addressed elsewhere. This provision covers violations of statutes as well as rules and regulations, license conditions, and orders of the Nuclear Regulatory Commission and the Department of Energy, including accidental discharge of radioactive materials. The maximum term of imprisonment for violations of some of these provisions may be up to twenty years if the offense was intended to injure the United States or aid a foreign government.*

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

### 1. TAMPERING WITH CONSUMER PRODUCTS

18 U.S.C. § 1365

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

(a) Base Offense Level: **25**

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

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

(1) **16**;

(2) If the offense involved extortion, apply §2B3.2.

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

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

*Commentary*

*The term "consumer product" means any food, drug, device, or cosmetic as defined in 21 U.S.C. § 321 or any article, product, or commodity produced or distributed for consumption by individuals. If death or physical or psychological injury results from product tampering, or if the target of a tampering suffers property damage or monetary losses, a departure may be appropriate. See Chapter Five, Part K (Departures).*

*§2N1.1. This section applies to 18 U.S.C. §§ 1365(a) and (e). The base offense level under this section reflects the risk of death or serious injury posed to significant numbers of people by this type of product tampering. It is slightly lower than, but consistent with, attempted murder, which may pose a danger to only a single person.*

*§2N1.2. This section applies to 18 U.S.C. §§ 1365(c) and (d). The base offense level assumes extortion was not involved. If the offense involves extortion, apply the guideline for extortion, §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).*

*§2N1.3. This section covers 18 U.S.C. §1365(b).*

* * * * *

## 2. FOOD, DRUGS, AND AGRICULTURAL PRODUCTS

7 U.S.C. §§ 150bb, 150gg
21 U.S.C. § 115
21 U.S.C. § 117
21 U.S.C. § 122
21 U.S.C. §§ 134-134e
21 U.S.C. §§ 151-158
21 U.S.C. § 331
21 U.S.C. § 333
21 U.S.C. §§ 458-461
21 U.S.C. § 463
21 U.S.C. § 466
21 U.S.C. §§ 610-611
21 U.S.C. § 614
21 U.S.C. § 617
21 U.S.C. §§ 619-620
21 U.S.C. §§ 642-644
21 U.S.C. § 676
42 U.S.C. § 262

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

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

*Commentary*

*§2N2.1. This section applies to most regulatory crimes involving food, drugs, biological products, devices, cosmetics, and agricultural products. The guideline assumes a typical regulatory offense involving knowing conduct. Where only negligence is involved, a less serious penalty is appropriate. Regulatory violations that amount to fraud, bribery, revealing trade secrets, theft, and destruction of property are more appropriately treated under other guidelines, such as fraud.*

*If there was a serious risk of death, serious injury, property damage, or other significant harm, the court should sentence at or near the statutory maximum.*

* * * * *

## 3. ODOMETER LAWS AND REGULATIONS

15 U.S.C. §§ 1983-1988
15 U.S.C. § 1990c

### §2N3.1. Odometer Laws and Regulations

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

(b) If more than one vehicle was involved, apply §2F1.1 (Offenses Involving Fraud or Deceit).

*Commentary*

*§2N3.1. This section applies to 15 U.S.C. §§ 1983-1988 and 1990c as amended by Pub. L. 99-579, Oct. 28, 1986. The base offense level takes into account the deceptive aspect of the offense assuming only a single vehicle was involved. If the defendant's conduct reflected a pattern or practice, apply the guideline for fraud and deception, §2F1.1.*

## PART P - OFFENSES INVOLVING PRISONS AND CORRECTIONAL FACILITIES

18 U.S.C. §§ 751 - 752
18 U.S.C. § 755
18 U.S.C. §§ 1791 - 1793
28 U.S.C. § 1826

### §2P1.1. Escape, Instigating or Assisting Escape

(a) Base Offense Level:

(1) **13**, if from lawful custody resulting from a conviction or as a result of a lawful arrest for a felony;

(2) **8**, if from lawful custody awaiting extradition, pursuant to designation as a recalcitrant witness or as a result of a lawful arrest for a misdemeanor.

(b) Specific Offense Characteristics

(1) If the use or the threat of force against any person was involved, increase by **5** levels.

(2) If the defendant escaped from non-secure custody and returned voluntarily within ninety-six hours, decrease the offense level under §2P1.1(a)(1) by **7** levels or the offense level under §2P1.1(a)(2) by **4** levels.

(3) If the defendant committed the offense while a correctional officer or other employee of the Department of Justice, increase by **2** levels.

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

(a) Base Offense Level:

(1) **23**, if the object was a firearm or destructive device.

(2) **13**, if the object was a weapon (other than a firearm or a destructive device), any object that might be used as a weapon or as a means of facilitating escape, ammunition, LSD, PCP, or a narcotic drug.

(3) **6**, if the object was an alcoholic beverage, United States or foreign currency, or a controlled substance (other than LSD, PCP, or a narcotic drug).

(4) **4**, if the object was any other object that threatened the order, discipline, or security of the institution or the life, health, or safety of an individual.

(b) Specific Offense Characteristic

(1) If the defendant committed the offense while a correctional officer or other employee of the Department of Justice, increase by **2** levels.

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

(a) Base Offense Level:

(1) **22**, if the offense was committed under circumstances creating a substantial risk of death or serious bodily injury to any person.

(2) **16**, if the offense involved a major disruption to the operation of an institution.

(3) **10**, otherwise.

**§2P1.4. Trespass on Bureau of Prisons Facilities**

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

*Commentary*

*§2P1.1. This section applies to conduct proscribed by 18 U.S.C. §§ 751 and 752 and 28 U.S.C. § 1826. If actual injury occurred during an escape, see Chapter Five, Part K (Departures). Non-secure custody refers to custody with no significant physical restraint (e.g., where a defendant walked away from a work detail outside the security perimeter of an institution; where a defendant failed to return to any institution from a pass or unescorted furlough; or where a defendant escaped from an institution with no physical perimeter barrier). Voluntary return is defined as returning voluntarily to the facility or voluntarily turning one's self in to a law enforcement authority as an escapee (not in connection with an arrest on other charges). §2P1.1(b)(3) applies to conduct proscribed by 18 U.S.C. § 755. If this subsection is used, no adjustment is made for §3B1.3, Role in the Offense (Abuse of Position of Trust or Use of Special Skill).*

*§2P1.2. This section applies to conduct proscribed by 18 U.S.C. § 1791. If §2P1.2(b)(1) applies, no adjustment is made for §3B1.3, Role In the Offense (Abuse of Position of Trust or Use of Special Skill).*

*§2P1.3. This section applies to conduct proscribed by 18 U.S.C. § 1792. Three reference base offense levels are provided. If death or bodily injury resulted, see Chapter Five, Part K (Departures). In circumstances falling between the three offense level reference points, intermediate offense levels may be used depending upon the amount of injury or property damage, and the extent of disruption to the corrections facility that resulted.*

*§2P1.4. This section applies to conduct proscribed by 18 U.S.C. § 1793.*

## PART Q - OFFENSES INVOLVING THE ENVIRONMENT

### 1. ENVIRONMENT

7 U.S.C. §§ 136j, 136l
15 U.S.C. §§ 2614-2615
33 U.S.C. § 403
33 U.S.C. §§ 406-407
33 U.S.C. § 411
33 U.S.C. § 1319
33 U.S.C. § 1321
33 U.S.C. § 1342
33 U.S.C. § 1415
33 U.S.C. § 1517(b)
33 U.S.C. §§ 1907-1908
42 U.S.C. §§ 300h-2, 300i-l
42 U.S.C. § 4912
42 U.S.C. §§ 6928(d), (e)
42 U.S.C. § 7413
42 U.S.C. § 9603
43 U.S.C. § 1816(a)
43 U.S.C. § 1822(b)

§2Q1.1. **Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants**

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

*Commentary*

*§2Q1.1. (33 U.S.C. § 1319(c)(3) and 42 U.S.C. § 6928(e)). This section applies to offenses committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury. If death or serious bodily injury results, a departure may be appropriate. See Chapter Five, Part K (Departures).*

§2Q1.2. **Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification**

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

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by **6** levels; or

(B) if the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(6) If the offense involved a simple recordkeeping or reporting violation only, decrease by 2 levels.

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

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment, increase by 6 levels; or

(B) if the offense otherwise involved a discharge, release, or emission of a pollutant, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 11 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

*Commentary*

*§2Q1.2. This section applies both to substantive violations of the statutes and regulations governing the handling of pesticides and toxic and hazardous substances and to recordkeeping*

*offenses. 7 U.S.C. §§ 136j-136l; 15 U.S.C. §§ 2614, 2615; 33 U.S.C. § 1319(c)(1) and (c)(2); 42 U.S.C. §§ 300h-2, 6928(d), 7413 and 9603(c) and (d); and 43 U.S.C. § 1350. The first four specific offense characteristics provide augmentations applicable when the offense involved a substantive violation. The last two specific offense characteristics pertain to recordkeeping offenses. The term "recordkeeping offense" as used in this guideline, and in §2Q1.3, covers both recordkeeping and reporting offenses. It is to be broadly construed as including, without limitation, failure to report discharges, releases or emissions where required (e.g., 33 U.S.C. §§ 1517(b), 1321(b)(5), 42 U.S.C. § 9603(b), and 43 U.S.C. § 1816(a) and § 1822(b)), the giving of false information, failure to file other required reports or provide necessary information as well as failure to prepare, maintain or provide records as prescribed. Although recordkeeping or "regulatory" offenses throughout the remainder of the guidelines have a base offense level of 6, §2Q1.2 prescribes a base offense level of 8 because of the inherently dangerous nature of hazardous and toxic substances and pesticides. A decrease in the base offense level, however, is provided by §2Q1.2(b)(6) for a "simple recordkeeping or reporting violation" to cover those situations where there was no reason to believe that the recordkeeping offense would result in substantive environmental or related harm. This offense characteristic is applicable only where, although the defendant knew of the recordkeeping offense, he neither knew nor had reason to believe that any environmental or other substantive harm was likely.*

*A listing of hazardous and toxic substances in the guidelines would be impractical. Several federal statutes (or regulations promulgated thereunder) list toxics, hazardous wastes and substances, and pesticides. These lists, such as those of toxic pollutants for which effluent standards are published under the Federal Water Pollution Control Act (e.g., 33 U.S.C. § 1317) as well as the designation of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (e.g., 42 U.S.C. § 9601(14)), are revised from time to time. "Toxic" and "hazardous" are defined differently in various statutes, but the common dictionary meanings of the words are not significantly different. Section 2Q1.2 applies to pesticides and to substances designated toxic or hazardous at the time of the offense.*

*§2Q1.3. This section parallels §2Q1.2 but applies to offenses concerning substances which are not pesticides and are not designated hazardous or toxic, usually punished under 33 U.S.C. §§ 403, 406, 407, 411, 1319(c)(1) and (c)(2), 1415(b), 1907, and 1908; and 42 U.S.C. §§ 4912 and 7413. Section 2Q1.2 has a higher base offense level than §2Q1.3 because of the more dangerous nature of the substances involved. The term "recordkeeping offense" has the same broad meaning discussed in the commentary to §2Q1.2, above. If the offense involved a pesticide or a hazardous or toxic substance, §2Q1.2 applies.*

*The base offense levels for §§2Q1.2 and 2Q1.3 assume violations resulting from knowing conduct. If the violation resulted from mere negligence, a departure may be warranted. The specific offense characteristics in §2Q1.3 are similar to those in §2Q1.2 because similar environmental results can occur even if the contaminants are not specifically designated as hazardous. Therefore, the relevant factors in selecting the offense level are basically those described under §2Q1.2.*

*These two sections of the guidelines apply to a wide range of conduct. The offense may involve large quantities of extremely hazardous or toxic materials or small quantities of far less dangerous pollutants. Therefore, depending upon the circumstances of the particular offense in question, the Commission recognizes that a departure from the prescribed guideline, as outlined in the applicable commentary, may be appropriate.*

*Subsections 2Q1.2(b)(1) and 2Q1.3(b)(1) assume a discharge or emission into the environment resulting in actual environmental contamination and attach higher penalties to violations. Because of the wide range of potential conduct arising out of the handling of different quantities of materials with widely differing propensities, a departure either upward or downward may be warranted. Depending upon the resulting harm from the emission, release or discharge, the quality and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these offense characteristics may be appropriate.*

*Subsections 2Q1.2(b)(2) and 2Q1.3(b)(2) apply to offenses where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be appropriate. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Part K (Departures).*

*Subsections 2Q1.2(b)(3) and 2Q1.3(b)(3) provide an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels either up or down could be necessary.*

*Subsections 2Q1.2(b)(4) and 2Q1.3(b)(4) apply where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. (33 U.S.C. 1342; and 42 U.S.C. § 6928(d)(1) and (2)). Where a violation of a permit has occurred or where the violation involved a failure to obtain a required permit, depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels up or down from the base offense level prescribed may be appropriate.*

*In order to deter such conduct, §§2Q1.2(b)(5) and 2Q1.3(b)(5) set the offense level for a recordkeeping offense reflecting an effort to conceal a substantive environmental offense at the same level as the substantive offense.*

*Section 2Q1.2(b)(6) provides for a decrease in the base offense level prescribed by §2Q1.2 for a "simple recordkeeping or reporting violation" as discussed above.*

*If the offense involved mishandling of nuclear material, apply §2M6.2 (Violation of Other Federal Atomic Energy Statutes, Rules, and Regulations).*

*Where a defendant in an action involving an environmental offense has previously engaged in similar misconduct as established by a civil adjudication, or has failed to comply with an administrative order, and his criminal history category does not adequately reflect the seriousness of his past criminal conduct or the likelihood that he will commit further crimes, the court may consider such misconduct in imposing a sentence that departs from the applicable guideline range for the offense. Chapter Four, §4A1.3 (Adequacy of Criminal History Category (Policy Statement)).*

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

(a) Base Offense Level: **18**

(b) Specific Offense Characteristics

(1) If a risk of death or serious injury was created, increase by **6** levels.

(2) If the offense resulted in disruption of a public water system or evacuation of a community, or if cleanup required a substantial expenditure, increase by **4** levels.

(3) If the offense resulted in an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time, increase by **2** levels.

(4) If the purpose of the offense was to influence government action or to extort money, increase by **6** levels.

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

(a) Base Offense Level: **10**

(b) Specific Offense Characteristics

(1) If the threat or attempt resulted in disruption of a public water system or evacuation of a community or a substantial public expenditure, increase by **4** levels.

(2) If the purpose of the offense was to influence government action or to extort money, increase by **8** levels.

*Commentary*

*§§2Q1.4, 2Q1.5. These sections apply to the new 1986 tampering section codified at 42 U.S.C. § 300i-1. Since intent to harm persons is an element of the tampering and attempted tampering offenses, it is included in the base offense levels. The statutory maximum sentence for tampering is five years, while the maximum sentence for attempted tampering is three years. Tampering or interference with a public water supply system has the potential for widespread and serious public health effects, justifying substantial base offense levels. Given the similarity between tampering and the offenses covered by §2Q1.2, the specific offense characteristics and the factors to be taken into account in choosing among offense levels are similar.*

*Sections 2Q1.4(b)(4) and 2Q1.5(b)(2) take into account the fact that public water supplies are vulnerable targets for terrorists and extortionists.*

* * * * *

## 2. CONSERVATION AND WILDLIFE

16 U.S.C. § 668(a)
16 U.S.C. § 707
16 U.S.C. § 1029
16 U.S.C. § 1030(b)
16 U.S.C. § 1174(a)
16 U.S.C. § 1338(a)
16 U.S.C. § 1375(b)
16 U.S.C. § 1540(b)
16 U.S.C. § 2435
16 U.S.C. § 2438
16 U.S.C. § 3373(d)
18 U.S.C. § 545

### §2Q2.1. Specially Protected Fish, Wildlife, and Plants

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

(b) Specific Offense Characteristics

(1) If the offense involved a commercial purpose, increase by **2** levels.

(2) If the offense involved fish, wildlife, or plants that were not quarantined as required by law, increase by **2** levels.

(3) Apply the greater:

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

(B) If the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation, increase by **4** levels.

### §2Q2.2. Lacey Act; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants

(a) Base Offense Level:

(1) **6**, if the defendant knowingly imported or exported fish, wildlife, or plants, or knowingly engaged in conduct involving the sale or purchase of fish, wildlife, or plants with a market value greater than $350; or

(2) **4**.

(b) Specific Offense Characteristics

(1) If the offense involved a commercial purpose, increase by **2** levels.

(2) If the offense involved fish, wildlife, or plants that were not quarantined as required by law, increase by **2** levels.

(3) Apply the greater:

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

(B) If the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation, increase by 4 levels.

*Commentary*

*§2Q2.1. This section applies to violations of the Endangered Species Act, 16 U.S.C. § 1540(b); the Bald Eagle Protection Act, 16 U.S.C. § 668(a); the Migratory Bird Treaty Act, 16 U.S.C. § 707; the Marine Mammal Protection Act, 16 U.S.C. § 1375(b); the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1338(a); and the Fur Seal Act, 16 U.S.C. § 1174(a). These statutes provide special protection to particular species of fish, wildlife, or plants. The base offense level for these statutes is low. However, enhanced punishment is warranted where the offense involved a commercial purpose, the species were not quarantined as required by law, or the market value of the protected species was substantial. The Commission recognizes that an offense may have a serious impact upon protected species, even though the market value is negligible. In such circumstances if the species is either endangered or threatened, the greater enhancement of §§2Q2.1(3)(A) and (3)(B) should be applied.*

*§2Q2.2. This section applies to violations of the Lacey Act Amendments of 1981, 16 U.S.C. § 3373(d), and to violations of 18 U.S.C. § 545 where the smuggling activity involved fish, wildlife, or plants. These are the principal enforcement statutes utilized to combat interstate and foreign commerce in illegally taken fish, wildlife, and plants. The Lacey Act distinguishes between knowing violations and those where the offender "should have known;" the guidelines retain that distinction. The offense level for violations is enhanced if the market value of the fish, wildlife, or plants exceeds $2,000 or if the species is either endangered or threatened.*

## PART R - ANTITRUST OFFENSES

15 U.S.C. § 1

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

(a) Base Offense Level: **9**

(b) Specific Offense Characteristics

(1) If the conduct involved participation in an agreement to submit non-competitive bids, increase by **1** level.

(2) If the volume of commerce attributable to the defendant was less than $1,000,000 or more than $4,000,000, adjust the offense level as follows:

| Volume of Commerce | Adjustment to Offense Level |
|---|---|
| (A) less than $1,000,000 | substract **1** |
| (B) $1,000,000 - $4,000,000 | no adjustment |
| (C) $4,000,001 - $15,000,000 | add **1** |
| (D) $15,000,001 - $50,000,000 | add **2** |
| (E) over $50,000,000 | add **3** |

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

(c) Fines

A fine shall be imposed in addition to any term of imprisonment. The guideline fine range for an individual conspirator is from 4 to 10 percent of the volume of commerce, but not less than $20,000. The fine range for an organization is from 20 to 50 percent of the volume of commerce, but not less than $100,000.

*Commentary*

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

*§2R1.1 (15 U.S.C. § 1). The agreements among competitors covered by this section--such as horizontal price-fixing and bid-rigging--are almost invariably covert conspiracies that are*

*intended to and serve no purpose other than to restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal per se, i.e., without any inquiry in individual cases as to their actual competitive effect. The Commission believes that the most effective method to deter individuals from committing this crime is through imposing short prison sentences coupled with large fines. The guideline is designed with that purpose in mind.*

*Under the guidelines prison terms should be much more common, and usually longer, than is currently typical. Absent adjustments, the guidelines require confinement of four months or longer in the great majority of cases that are prosecuted, including all bid-rigging cases. The court will have the discretion to impose considerably longer sentences within the guideline ranges. It is the intent of the Commission that alternatives to imprisonment such as community confinement and home confinement not be available for antitrust offenders. Adjustments from Chapter Three, Part E (Acceptance of Responsibility) and, in rare instances, Chapter Three, Part B (Role in the Offense), may decrease these minimum sentences; nonetheless, in very few cases will the guidelines not require that some confinement be imposed. Adjustments will not affect the level of fines.*

*The guideline imprisonment terms represent a substantial change from present practice. Currently, approximately 39 percent of all individuals convicted of antitrust violations are imprisoned. Considering all defendants sentenced, the average time served is only forty-five days. The guideline prison terms are, however, consistent with the parole guidelines. The fines specified in the guideline represent substantial increases over existing practice. The current average fine for individuals is only approximately $27,000; for corporations, it is approximately $160,000.*

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

*The Commission believes that the volume of commerce is liable to be an understated measure of seriousness in some bid-rigging cases. For this reason, and consistent with current practice, the Commission has specified a 1 level increase for bid-rigging. Understatement of seriousness is especially likely in cases involving complementary bids. If, for example, the defendant participated in an agreement not to submit a bid, or to submit an unreasonably high bid, on one occasion, in exchange for his being allowed to win a subsequent bid that he did not in fact win, his volume of commerce would be zero, although he would have contributed to harm that possibly was quite substantial. The court should consider sentences near the top of the guideline range in such cases.*

*Substantial fines are an essential part of the sanction. It is estimated that the average additional profit attributable to price fixing is 10 percent of the selling price. The Commission has specified that a fine from two to five times that amount be imposed on organizational defendants as a deterrent because of the difficulty in identifying violators. Additional monetary penalties can be provided through private treble damage actions. A lower fine is specified for individuals. The statutory maximum fine is $250,000 for individuals and $1,000,000 for organizations, but is increased when there are convictions on multiple counts.*

*In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, his role, and the degree to which he personally profited from the offense (including salary, bonuses, and career enhancement). The Commission believes that most antitrust defendants have the resources and earning capacity to pay these fines, at least over time, and will monitor the level of fines that are imposed and actually paid. If the court concludes that the defendant lacks the ability to pay the guideline fine, it should impose community service in lieu of a portion of the fine. The community service should be equally burdensome as a fine.*

*In setting the fine for an organization, the court should consider whether the organization encouraged or took steps to prevent the violation, whether high-level management was aware of the violation, and whether the organization previously engaged in antitrust violations. In addition, the court should consider that the average level of mark-up due to price-fixing may tend to decline with the volume of commerce involved.*

*Because the guideline sentences depend on the volume of commerce done by each firm, role in the offense is implicitly taken into account. Thus, an increase for role under §3B1.1 might be appropriate only where a defendant coerced others into participating in a conspiracy from which his firm did not profit significantly--an unlikely circumstance. Conversely, a decrease for role under §3B1.2 would not be appropriate merely because a defendant's firm did not profit substantially. An individual should be considered for a downward adjustment for a mitigating role in the offense only if he was responsible merely for a small portion of his firm's participation in the conspiracy. For example, a complementary bidder who did not win a bid would not qualify for a downward adjustment.*

*Sentences at or even above the guideline maximum may be appropriate for individuals with previous antitrust convictions.*

## PART S - MONEY LAUNDERING AND MONETARY TRANSACTION REPORTING

18 U.S.C. §§ 1005-1008, 1014
18 U.S.C. §§ 1956, 1957
31 U.S.C. §§ 5313, 5314, 5316, 5322, 5324

### §2S1.1. Laundering of Monetary Instruments

(a) Base Offense Level:

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

(2) **20**, otherwise.

(b) Specific Offense Characteristics

(1) If the defendant knew that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 3 levels.

(2) If the value of the funds exceeded $100,000, increase the offense level as follows:

| | Value | Increase in Level |
|---|---|---|
| (A) | $100,000 or less | no increase |
| (B) | $100,001 - $200,000 | add **1** |
| (C) | $200,001 - $350,000 | add **2** |
| (D) | $350,001 - $600,000 | add **3** |
| (E) | $600,001 - $1,000,000 | add **4** |
| (F) | $1,000,001 - $2,000,000 | add **5** |
| (G) | $2,000,001 - $3,500,000 | add **6** |
| (H) | $3,500,001 - $6,000,000 | add **7** |
| (I) | $6,000,001 - $10,000,000 | add **8** |
| (J) | $10,000,001 - $20,000,000 | add **9** |
| (K) | $20,000,001 - $35,000,000 | add **10** |
| (L) | $35,000,001 - $60,000,000 | add **11** |
| (M) | $60,000,001 - $100,000,000 | add **12** |
| (N) | more than $100,000,000 | add **13** |

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

(a) Base Offense Level: **17**

(b) Specific Offense Characteristics

(1) If the defendant knew that the funds were the proceeds of:

(A) an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by **5** levels;

(B) any other specified unlawful activity (see 18 U.S.C. § 1956(c)(7)), increase by **2** levels.

(2) If the value of the funds exceeded $100,000, increase the offense level as specified in §2S1.1(b)(2).

§2S1.3. **Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements**

(a) Base Offense Level:

(1) **13**, if the defendant:

(A) structured transactions to evade reporting requirements;

(B) made false statements to conceal or disguise the activity; or

(C) reasonably should have believed that the funds were the proceeds of criminal activity;

(2) **5**, otherwise.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that the funds were criminally derived, increase by **5** levels.

(2) If the base offense level is from (a)(1) above and the value of the funds exceeded $100,000, increase the offense level as specified in §2S1.1(b)(2).

*Commentary*

*Money laundering activities are essential to the operation of organized crime. Congress, has recently increased the maximum penalties for these offenses. The guidelines provide substantial punishments for these offenses. In fiscal year 1985, the time served by defendants convicted of felonies involving monetary transaction reporting under 31 U.S.C. §§ 5313, 5316, and 5322 averaged about ten months, and only a few defendants served as much as four to five years. However, courts have been imposing higher sentences as they come to appreciate the seriousness of this activity, and sentences as long as thirty-five years have been reported. Congress has demonstrated its intent to increase the sanctions for money laundering offenses by making all reporting violations felonies in 1984, and by enacting the Money Laundering Control Act of 1986 (18 U.S.C. §§ 1956, 1957), which creates new offenses and provides higher maximum sentences for similar conduct when knowledge, facilitation or concealment of serious criminal activity is proved.*

*§2S1.1. This section applies to violations of 18 U.S.C. § 1956. That statute is a part of the Anti-Drug Abuse Act of 1986 that prohibits financial transactions involving funds that are the proceeds of "specified unlawful activity," if such transactions are intended to facilitate that activity, or conceal the nature of the proceeds or avoid a transaction reporting requirement. The maximum term of imprisonment specified is twenty years.*

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

*A higher base offense level is specified if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A) or (a)(2)(A) because those subsections apply to defendants who did not merely conceal a serious crime that had already taken place, but encouraged or facilitated the commission of further crimes.*

*The amount of money involved is included as a factor because it is an indicator of the scope of the criminal enterprise as well as the degree of the defendant's involvement. Narcotics trafficking is included as a factor because of the clearly expressed Congressional intent to adequately punish persons involved in that activity.*

*§2S1.2. This section applies to violations of 18 U.S.C. § 1957. That statute is a part of the Anti-Drug Abuse Act of 1986 prohibiting monetary transactions that exceed $10,000 and involve the proceeds of "specified unlawful activity" (as defined in 18 U.S.C. § 1956), knowing that the funds were "criminally derived property." The maximum term of imprisonment specified is ten years.*

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

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

*§2S1.3. This section applies to violations of 31 U.S.C. §§ 5313, 5314, 5316, 5322, and 5324, which relate to records and reports of certain transactions involving currency and monetary instruments. The maximum prison sentence for these offenses is ten years if there is any pattern of unlawful activity. These offenses sometimes are prosecuted as conspiracies, frauds, or false statements under 18 U.S.C. §§ 371, 1001, 1005-1008, or 1014.*

*The base offense level is set at 13 for the great majority of cases. However, the base offense level is set at 5 for those cases in which these offenses may be committed with innocent motives and the defendant reasonably believed that the funds were from legitimate sources. The higher base offense level applies in all other cases. The offense level is increased by 5 levels if the defendant knew that the funds were criminally derived.*

*The dollar value of the transactions not reported is an important sentencing factor, except in rare cases. It is an indicator of several factors that are pertinent to the sentence, including the size of the criminal enterprise, and the extent to which the defendant aided the enterprise.*

## PART T - OFFENSES INVOLVING TAXATION

### 1. INCOME TAXES

26 U.S.C. §§ 7201 - 7207
26 U.S.C. § 7215

**§2T1.1. Tax Evasion**

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

For purposes of this guideline, the "tax loss" is the greater of: (A) the total amount of tax that the taxpayer evaded or attempted to evade, including interest to the date of filing of an indictment or information; and (B) the "tax loss" defined in §2T1.3. When more than one year is involved, the tax losses are to be added.

(b) Specific Offense Characteristics

(1) If (A) the defendant failed to report income exceeding $10,000 per year from criminal activity, or (B) the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his income, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

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

**§2T1.2. Willful Failure To File Return, Supply Information, or Pay Tax**

(a) Base Offense Level:

(1) **1** level less than the level from §2T4.1 (Tax Table) corresponding to the tax loss; or

(2) **5**, if there is no tax loss.

For purposes of this guideline, "tax loss" means the total amount of tax that the taxpayer owed and did not pay, but, in the event of a failure to file in any year, not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded $20,000.

(b) Specific Offense Characteristics

(1) If (A) the defendant failed to report income exceeding $10,000 per year from criminal activity, or (B) the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his

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

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

§2T1.3. **Fraud and False Statements Under Penalty of Perjury**

(a) Base Offense Level:

(1) Level from §2T4.1 (Tax Table) corresponding to the tax loss, if the offense was committed in order to facilitate evasion of a tax; or

(2) 6, otherwise.

For purposes of this guideline, the "tax loss" is 28 percent of the amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax. If the taxpayer is a corporation, use 34 percent in lieu of 28 percent.

(b) Specific Offense Characteristics

(1) If (A) the defendant failed to report income exceeding $10,000 per year from criminal activity, or (B) the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his income, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

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

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

(a) Base Offense Level:

(1) Level from §2T4.1 (Tax Table) corresponding to the resulting tax loss, if any; or

(2) 6, otherwise.

For purposes of this guideline, the "tax loss" is the tax loss, as defined in §2T1.3, resulting from the defendant's aid, assistance, procurance or advice.

(b) Specific Offense Characteristics

(1) If the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income, increase by 2 levels.

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

(3) If the defendant was in the business of preparing or assisting in the preparation of tax returns, increase by 2 levels.

§2T1.5. Fraudulent Returns, Statements, or Other Documents

(a) Base Offense Level: 6

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

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

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

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

(1) 4; or

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

§2T1.8. Offenses Relating to Withholding Statements

(a) Base Offense Level: 4

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

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

(1) Offense level determined from §2T1.1 or §2T1.3, as applicable; or

(2) 10.

(b) Specific Offense Characteristics

If either of the following adjustments applies, use the greater:

(1) If the offense involved the planned or threatened use of violence, increase by 4 levels.

(2) If the conduct was intended to encourage persons other than or in addition to co-conspirators to violate the internal revenue laws or impede or impair the Internal Revenue Service in the assessment and collection of revenue, increase by 2 levels.

* * * * *

## 2. ALCOHOL AND TOBACCO TAXES

26 U.S.C. §§ 5601 - 5605, 5607, 5608
26 U.S.C. §§ 5661, 5671, 5691, 5762

### §2T2.1. Non-Payment of Taxes

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

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

### §2T2.2. Regulatory Offenses

(a) Base Offense Level: 4

* * * * *

## 3. CUSTOMS TAXES

18 U.S.C. §§ 496
18 U.S.C. §§ 541 - 545, 547, 548, 550, 551
18 U.S.C. § 1915
19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b)

### §2T3.1. Evading Import Duties or Restrictions (Smuggling)

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

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

### §2T3.2. Receiving or Trafficking in Smuggled Property

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

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

* * * * *

## 4. TAX TABLE

### §2T4.1. Tax Table

| | Tax Loss | Offense Level |
|---|---|---|
| (A) | less than $2,000 | 6 |
| (B) | $2,000 - $5,000 | 7 |
| (C) | $5,001 - $10,000 | 8 |
| (D) | $10,001 - $20,000 | 9 |
| (E) | $20,001 - $40,000 | 10 |
| (F) | $40,001 - $80,000 | 11 |
| (G) | $80,001 - $150,000 | 12 |
| (H) | $150,001 - $300,000 | 13 |
| (I) | $300,001 - $500,000 | 14 |
| (J) | $500,001 - $1,000,000 | 15 |
| (K) | $1,000,001 - $2,000,000 | 16 |
| (L) | $2,000,001 - $5,000,000 | 17 |
| (M) | more than $5,000,000 | 18 |

*Commentary*

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

*1. Offenses Involving Income Taxes*

*This part deals with criminal violations of the internal revenue laws. The offense levels have been set independently of those for offenses such as fraud or theft because the collection of taxes involves a unique governmental interest and estimates of the level of evasion are extremely high.*

*§2T1.1. This section applies to convictions under 26 U.S.C. § 7201. False statements in furtherance of the evasion (see §§2T1.3, 2T1.5, and 2T1.8) are considered part of the offense for purposes of this guideline.*

*This guideline relies most heavily on the amount of tax evaded because the chief interest protected by the statute is the collection of taxes. A greater evasion is obviously more harmful to the treasury, and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from tax evasion increases, the sanction necessary to deter also increases.*

*For purposes of the guideline, the tax loss is the amount of tax that the taxpayer evaded or attempted to evade, plus interest to the date of the filing of an indictment or information. The tax loss does not include penalties. The court is to determine this amount as it would any*

*other guideline factor. In some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.*

*While the definition of tax loss corresponds to the "criminal deficiency," its amount is to be determined by the same rules applicable in determining any other sentencing factor. In accordance with the "relevant conduct" approach adopted by the guidelines, tax losses resulting from more than one year are to be added regardless of whether the defendant is convicted of multiple counts.*

*By reference to §2T1.3, the guideline adopts as an alternative minimum standard a tax loss based on a percentage of the dollar amounts of certain misstatements made in returns filed by the taxpayer. The purpose of this alternative standard is to limit disputes, especially those regarding whether the taxpayer was entitled to offset adjustments that he failed to claim.*

*The overlapping imprisonment ranges in the Tax Table should also result in minimizing the significance of disputes. The consequence of an inexact estimate of the tax loss is never severe, even when the tax loss is near the boundary of a range. For example, although the difference between $39,999 and $40,001 results in a change from level 10 to level 11, any sentence of eight to twelve months would be within the guidelines regardless of the offense level determination made by the court. Indeed, any sentence between ten and twelve months would be within the guidelines for a tax loss ranging from $20,000 to $150,000. As a consequence, for all dollar amounts, the Tax Table affords the court considerable latitude in evaluating other factors, even when the amount of the tax loss is uncertain.*

*Roughly half of all tax evaders are now sentenced to probation without imprisonment, while the other half receives sentences that require them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax evasion and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax evasion are inconsequential in relation to the potential increase in revenue. Current estimates are that income taxes are underpaid by approximately $90 billion annually.*

*Although currently some large-scale evaders serve as much as five years in prison, in practice the average sentence length for defendants sentenced to a term of imprisonment does not increase rapidly with the amount of tax evaded. Thus, the average time served by those sentenced to a term of imprisonment for evading less than $10,000 in taxes is about nine months, while the corresponding figure for those evading over $100,000 in taxes is about sixteen months. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than $100,000 in tax evaded. The increase is expected to be somewhat larger for cases involving more taxes.*

*Failure to report criminally-derived income is included as a factor for deterrence purposes. This factor is intended to apply to all racketeering activities as defined in 18 U.S.C. § 1961. Criminally-derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated. An enhancement for offenders who violate the tax laws as part of a pattern of criminal activity from which they derive a substantial portion of their income also serves to implement the mandate of 28 U.S.C. § 994(n). Current-practice estimates are that, on average, the presence of this factor increases time served by the equivalent of 2 levels.*

*Although tax evasion always involves some planning, unusually sophisticated efforts to conceal the evasion decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells. Analyses of data for other frauds and property crimes show that careful planning or sophistication generally results in an average increase of at least 2 levels.*

*The Commission has not made a less severe distinction for an employee who prepares fraudulent returns on behalf of his employer. The adjustments in Chapter Three, Part B (Role in the Offense) should suffice for this purpose.*

*§2T1.2. This section applies to violations of 26 U.S.C. § 7203. Such violations are usually serious misdemeanors that are similar to tax evasion, except that there need be no affirmative act in support of the offense. They are rarely prosecuted unless the defendant also owed taxes that he failed to pay.*

*Because the conduct generally is tantamount to tax evasion, the guideline is similar to §2T1.1. Because the offense is a misdemeanor, the offense level has been set at one below the level corresponding to evasion of the same amount of taxes. The commentary to §2T1.1 regarding aggravating and mitigating factors also applies to this offense.*

*An alternative measure of the tax loss, 10 percent of gross income in excess of $20,000, has been provided because of the difficulty of computing the tax loss, which may become the subject of protracted civil litigation. It is expected that the measure used will generally understate the tax due, and will not call for a sentence approaching the maximum unless very large incomes are involved. Thus, the burden will remain on the prosecution to provide a more accurate estimate of the tax loss if it seeks enhanced punishment.*

*The intended impact of this guideline is to increase the average time served for this offense, and to increase significantly the number of violators who receive a term of imprisonment. Currently, the average time served for this offense is approximately 2.5 months, including those who are not sentenced to prison. Considering only those who do serve a term of imprisonment, the average term is about six to seven months.*

*§§2T1.3 and 2T1.4. §2T1.3 applies to violations of 26 U.S.C. §§ 7206(1), and 7206(3)-(5). §2T1.4 applies to violations of 26 U.S.C. § 7206(2). Together, these guidelines cover a wide variety of conduct that is usually equivalent to actual or attempted tax evasion (subsection 1), or aiding or abetting tax evasion (subsection 2). Accordingly, the guidelines treat the offenses much like tax evasion.*

*Existence of a tax loss is not an element of these offenses. Furthermore, in instances where the defendant is setting the groundwork for evasion of a tax that is expected to become due in the future, he may make false statements that underreport income that as of the time of conviction, may not yet have resulted in a tax loss. In order to gauge the seriousness of these offenses, the guidelines establish a rule for determining a "tax loss" based on the nature and magnitude of the false statements made. Use of this approach also avoids complex problems of proof and invasion of privacy when returns of persons other than the defendant and co-defendants are involved.*

*In certain instances, such as promotion of a tax shelter scheme, the defendant may advise other persons to violate their tax obligations through filing returns that find no support in the tax laws. If this type of conduct can be shown to have resulted in the filing of false returns*

*(regardless of whether the principals were aware of their falsity), the misstatements in all such returns will contribute to one aggregate "tax loss."*

*The first specific offense characteristic in §2T1.3 is the same as that in §2T1.1. The first specific offense characteristic in §2T1.4, however, applies to persons who derive substantial income through fraudulent tax schemes, rather than through other forms of crime. It serves, for example, to enhance the sentence for promoters of fraudulent tax shelters.*

*An increased offense level is specified for tax preparers and advisers because their misconduct poses a greater risk of revenue loss and is more clearly willful. Do not also employ §3B1.3 (Abuse of Position of Trust or Special Skill) if this adjustment applies. If the defendant earns his living through promoting fraudulent tax schemes, §2T1.4(b)(1) will increase the offense level further.*

*§2T1.5. This section applies to conduct proscribed by 26 U.S.C. § 7207, which is a misdemeanor. It is to be distinguished from 26 U.S.C. § 7206(1) (§2T1.3), which is a felony that requires a false statement under penalty of perjury. The offense level has been set at 6 in order to give the sentencing judge considerable latitude because the conduct may be similar to tax evasion.*

*§2T1.6. This section applies to conduct proscribed by 26 U.S.C. § 7202, a felony that is infrequently prosecuted. The failure to collect or truthfully account for the tax must be willful, as must the failure to pay. Where no effort is made to defraud the employee, the offense is a form of tax evasion, and is treated as such in the guidelines. In the event that the employer not only failed to account to the Internal Revenue Service and pay over the tax, but also collected the tax from employees and did not account to them for it, it is both tax evasion and a form of embezzlement. In such instances, the court may wish to consider whether a sentence above the guideline is warranted.*

*§2T1.7. This section applies to conduct proscribed by 26 U.S.C. § 7215 and 7512(b). This offense is a misdemeanor that does not require any intent to evade taxes, nor even that taxes have not been paid. The more serious offense is 26 U.S.C. § 7202 (see §2T1.6).*

*This offense should be relatively easy to detect and fines may be feasible. Accordingly, it has been graded considerably lower than tax evasion, although some effort has been made to tie the offense level to the level of taxes that were not deposited. The tax loss is the amount of tax that was not deposited. If funds are deposited and withdrawn without being paid to the Internal Revenue Service, they should be treated as never having been deposited. Basing the fine on the total amount of funds not deposited is suggested.*

*§2T1.8. This section applies to violations of 26 U.S.C. §§ 7204 and 7205, misdemeanors that rarely result in substantial terms of imprisonment. If the defendant was attempting to evade, rather than merely delay, payment of taxes, a sentence above the guidelines may be warranted.*

*§2T1.9. This section applies to conspiracies to "defraud the United States by impeding, impairing, obstructing and defeating . . . the collection of revenue." United States v. Carruth, 699 F.2d 1017, 1021 (9th Cir. 1983), cert. denied, 104 S. Ct. 698 (1984). See also United States v. Browning, 723 F.2d 1544 (11th Cir. 1984); United States v. Klein, 247 F.2d 908, 915 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958). It does not apply to taxpayers, such as a husband and wife, who merely evade taxes jointly or file a fraudulent return.*

*This type of conspiracy generally involves substantial sums of income. It also typically is complex and may be far-reaching, making it quite difficult to evaluate the extent of the revenue loss caused. Accordingly, a minimum base offense level of 10 has been specified. If, given the nature of the underlying conduct, a larger resulting tax loss can be established using either the definition in §2T1.1, or §2T1.3 such loss would determine the base offense level.*

*The specific offense characteristics are in addition to those specified in §2T1.1 and §2T1.3. These are included because of the potential for such conspiracies to subvert the revenue system, and the danger to law enforcement agents and the public that some of these conspiracies involve. Since the offense is a conspiracy, adjustments from Chapter Three, Part B (Role in the Offense) usually will apply.*

2. *Offenses Involving Alcohol and Tobacco Taxes*

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

*§2T2.1. The most frequently prosecuted conduct violating this section is operating an illegal still. 26 U.S.C. § 5601(a)(1). Offenses in this subsection are treated as equivalent to income tax evasion offenses. The tax loss is the total amount of unpaid taxes that were due on the alcohol and/or tobacco.*

*Offense conduct directed at more than tax evasion (e.g., theft or fraud) may warrant departure above the guideline.*

*§2T2.2. For offenses where there is no effort to evade taxes, such as recordkeeping violations, the offense level is set at 4. Prosecution of these offenses is rare.*

3. *Offenses Involving Customs*

*This part deals with violations of 18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915 and 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b). These guidelines are primarily aimed at revenue collection or trade regulation. They are not intended to deal with the importation of contraband, such as drugs, or other items such as obscene material, firearms or pelts of endangered species, the importation of which is prohibited or restricted for non-economic reasons. Other, more specific legislation generally applies to most of these offenses. Importation of contraband or stolen goods would be a reason for referring to another, more specific guideline, or for imposing a sentence above that specified in these guidelines.*

*§2T3.1. This offense is treated as equivalent to tax evasion. A lower offense level, or a point near the minimum of the range, might be appropriate for cases involving tourists who bring in items for their own use. Such conduct generally poses a lesser threat to revenue collection.*

*Particular attention should be given to those items for which entry is prohibited, limited, or restricted. Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, the court should impose a*

*sentence above the guideline. A sentence based upon an alternative measure of the "duty" evaded, such as the increase in market value due to importation, or 25 percent of the items' fair market value in the United States, might be considered.*

*§2T3.2. This offense, encompassed by 18 U.S.C. § 545, is treated as equivalent to smuggling without payment of any duty.*

## PART X - OTHER OFFENSES

### 1. CONSPIRACIES, ATTEMPTS, SOLICITATIONS

18 U.S.C. §§ 371-373
18 U.S.C. § 2271

**§2X1.1. Attempt, Solicitation, or Conspiracy Not Covered by a Specific Guideline**

(a) Base Offense Level: The base offense level from the guideline for the object offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty.

(b) Specific Offense Characteristics

(1) If an attempt or solicitation, decrease by 3 levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.

(2) If a conspiracy, decrease by 3 levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.

(3) If a solicitation, and the statute treats solicitation identically with the object of the offense, do not apply §2X1.1(b)(1), if the offense level for solicitation is the same as that for the object offense.

*Commentary*

*§2X1.1 (18 U.S.C. §§ 371-372, 2271). Many types of attempts or conspiracies are covered by specific guidelines, e.g., §2A2.1 (Attempt or Conspiracy to Commit Murder); §2A3.1 (Attempted Criminal Sexual Abuse). This section applies only in the absence of a more specific guideline.*

*Under the principle adopted in this section, in many cases the offense level will be the same as that for the substantive offense which the defendant conspired or attempted to commit. However, speculative specific offense characteristics will not be applied. Specific offense characteristics apply only to the conduct that the government demonstrates was specifically intended or actually occurred. For example, if two defendants are arrested during the conspiratorial stage of planning an armed bank robbery, the offense level ordinarily would not include speculative aggravating factors such as possible injury to others, hostage taking, discharge of a weapon, or obtaining a large sum of money. The offense level would simply reflect the level applicable to robbery of a financial institution with a weapon. On the other*

*hand in an attempt, if it could be established that the defendants actually intended to physically restrain the tellers, that factor would be considered. In an attempted theft, the value of the items that the defendant intended to steal would be considered.*

*In most prosecutions for conspiracies or attempts, the object offense was substantially completed, or the offense was interrupted or prevented on the verge of completion by the intercession of law enforcement authorities or the victim. In such cases, no reduction of the offense level is warranted. Sometimes, however, the arrest occurs well before the defendant or any co-conspirator has completed the necessary acts of the substantive offense. Because it appears likely that a defendant would commit the substantive offense if not apprehended, a substantial sentence is warranted, but punishment should take account of the dangerousness and culpability of the conduct that has actually occurred, not solely the conduct which is predicted. Under such circumstances, a reduction of 3 levels is appropriate.*

*If the object offense is not covered by a specific guideline, see §2X5.1 (Other Offenses).*

*If the defendant was convicted of conspiracy or solicitation and also for the completed offense, the sentence for the conspiracy or solicitation shall be imposed to run concurrently with the sentence for the object offense, except in cases where it is otherwise specifically provided for by the guidelines or by law. 28 U.S.C. § 994(l)(2).*

* * * * *

## 2. AIDING AND ABETTING

### §2X2.1. Aiding and Abetting

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

*Commentary*

*§2X2.1 (18 U.S.C. §§ 2, 755-757). A defendant convicted of aiding and abetting is punishable as a principal. 18 U.S.C. § 2. This section provides that aiding and abetting the commission of an offense has the same offense level as that for the underlying offense, i.e., the offense that the defendant aided or abetted. Adjustments for role in the offense may apply, however. See Chapter Three, Part B.*

* * * * *

## 3. ACCESSORY AFTER THE FACT

### §2X3.1. Accessory After the Fact

(a) Base Offense Level: 6 levels lower than the offense level for the underlying offense, but in no event less than 4, or more than 30.

*Commentary*

*§2X3.1 (18 U.S.C. §§ 3, 757, 1071-1072). An accessory after the fact may receive up to one-half the punishment prescribed for the principal offender, or if the principal is punishable by death, not more than ten years. 18 U.S.C. § 3. The underlying offense is the offense as to which the defendant was an accessory.*

* * * * *

## 4. MISPRISION OF FELONY

### §2X4.1. Misprision of Felony

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

*Commentary*

*§2X4.1 (18 U.S.C. § 4). The maximum penalty for misprision of felony (18 U.S.C. § 4) is three years' imprisonment. The underlying offense is the offense as to which the misprision was committed.*

* * * * *

## 5. ALL OTHER OFFENSES

### §2X5.1. Other Offenses (Policy Statement)

If the offense was one for which no specific guideline is written, apply the most analogous guideline.

*Commentary*

*§2X5.1 (18 U.S.C. § 3553(a)(2)). This section addresses cases in which a defendant has been convicted of an offense for which there is no specific guideline. If no sufficiently analogous guideline exists, the court may impose any sentence that is reasonable and consistent with the purposes of sentencing. 18 U.S.C. § 3553(a)(2).*

## CHAPTER THREE - ADJUSTMENTS

## PART A - VICTIM-RELATED ADJUSTMENTS

### 1. VICTIM-RELATED ADJUSTMENTS

The following adjustments are included in this Part because they may apply to a wide variety of offenses. They are to be treated as specific offense characteristics. Do not apply these adjustments if the offense guideline incorporates these factors either in the base offense level or as a specific offense characteristic.

### §3A1.1. Vulnerable Victim

If the defendant knew or should have known that the victim of the offense was unusually vulnerable due to age, physical or mental condition, or that the victim was particularly susceptible to the criminal conduct, increase by 2 levels.

*Commentary*

*This adjustment applies to all offenses where the victim's vulnerability played any part in the defendant's decision to commit the offense. The adjustment would apply, for example, in a fraud case where the defendant marketed an ineffective cancer cure, but not in a case where the defendant sold fraudulent securities to the general public and one of the purchasers happened to be senile. Similarly, it would apply in a robbery case where the defendant selected a handicapped victim, but not in an assault case where an elderly wife assaulted her husband.*

### §3A1.2. Official Victim

If the victim was any law-enforcement or corrections officer, any other official as defined in 18 U.S.C. § 1114, or a member of the immediate family thereof, and the crime was motivated by such status, increase by 3 levels.

*Commentary*

*This adjustment applies to all offenses where the defendant knew that the victim was in the performance of the victim's official duties, or the offense was committed because of the official status.*

### §3A1.3. Restraint of Victim

If the victim of a crime was physically restrained in the course of the offense, increase by 2 levels.

*Commentary*

*This adjustment applies to offenses in Chapter Two, Part A (Offenses Against the Person) and Part H (Offenses Involving Individual Rights) where the victim was physically restrained, as by being tied, bound or locked up.*

## PART B - ROLE IN THE OFFENSE

Sections 3B1.1 and 3B1.2 address relative responsibility in cases involving more than one participant. Section 3B1.3 applies regardless of the number of participants.

### §3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

### §3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

### §3B1.3. Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed in addition to that provided for in §3B1.1, nor may it be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.

**§3B1.4.** In any other case, no adjustment is made for role in the offense.

*Commentary*

*In offenses involving more than one participant, the number of persons involved is often suggestive of a criminal organization or structure within which the defendant's role or relative*

*responsibility can be defined in fact and for purposes of sentencing. The size of the organization or activity may also be indicative of the degree of success the participants may enjoy and the potential duration or permanency (and long-term effects) of the scheme. Where the offense involves more than one participant, the sentencing judge shall select the most appropriate category in §§3B1.1-3B1.2, or §3B1.4, to reflect the defendant's role in the offense and relative culpability. In selecting the appropriate category, all persons involved during the course of the entire offense shall be included in determining the size of the association or conspiracy.*

*Section 3B1.1 distinguishes relative responsibility for purposes of sentencing. The extent of the activity is suggestive of the scope of the undertaking, its harms or its effects. A fraud or scheme that only involves three participants but involves the unknowing services of many outsiders could be considered extensive. In distinguishing leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision-making authority, the degree of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the planning or organization of the offense, the scope of the illegal activity, the nature and seriousness of the criminal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy.*

*In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of §3B1.1(c).*

*Section 3B1.2(a) applies to a defendant who plays a minimal role in concerted activity. It is intended to apply to defendants who are plainly among the least culpable of those involved in the conduct of a group of individuals. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant. It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marijuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.*

*For purposes of §3B1.2(b), a minor participant means any participant who is less culpable than most others in the scheme but who has more than a minimal role.*

*The adjustment in §3B1.3 applies to persons who abuse their positions of trust, or their special skills, to significantly facilitate the commission or concealment of a crime. The position of trust must have contributed in some substantial way, and not merely have provided an opportunity that could have as easily been afforded to other persons.*

*"Special skill" refers to a skill not possessed by members of the general public, and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists and demolition experts.*

## PART C - OBSTRUCTION

### §3C1.1. Willfully Obstructing or Impeding Proceedings

If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level from Chapter Two by **2** levels.

*Commentary*

*This section provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or to otherwise willfully interfere with the disposition of criminal charges. The following conduct, while not exclusive, may provide a basis for applying this adjustment:*

*(1) destroying or concealing material evidence, or attempting to do so;*

*(2) directing or procuring another person to destroy or conceal material evidence, or attempting to do so;*

*(3) testifying untruthfully or suborning untruthful testimony concerning a material fact, or producing or attempting to produce an altered, forged, or counterfeit document or record during a preliminary or grand jury proceeding, trial, a sentencing proceeding, or any other judicial proceeding;*

*(4) threatening, intimidating, or otherwise unlawfully attempting to influence a co-defendant, witness or juror, directly or indirectly;*

*(5) furnishing material falsehoods to a probation officer in the course of a presentence or other investigation for the court.*

*In applying this provision, a sentencing judge should evaluate suspect testimony and statements in a light most favorable to the defendant.*

*This provision is not intended to punish a defendant for the exercise of a Constitutional right. A defendant's denial of guilt is not a basis for application of this provision.*

*Sentences imposed after an independent prosecution for perjury or obstruction of justice are governed by Chapter Two, Part J (Offenses Involving the Administration of Justice).*

## PART D - MULTIPLE COUNTS

### INTRODUCTION

This Part provides rules for determining the combined offense level when the defendant is convicted of multiple counts. Determining and implementing the resulting sentence is dealt with in Chapter Five, Determining the Sentence.

The provisions of this Part are necessarily detailed. In essence, they call for a three-step procedure. First, the court will group the various counts of conviction into Groups of Closely-Related Counts, each group consisting of counts representing closely-related conduct. Second, the court will determine the guideline offense level applicable to each Group. Third, the court will identify the Group carrying the highest offense level and determine the extent to which that offense level must be increased to produce the combined offense level.

The basic idea underlying this Part is to add up commensurable items, such as money and drugs, contained in separate counts, and treat the result as if it were a conviction on a single count for the total amount and total offense behavior. In situations where a person is convicted of several independent offenses embodied in several different counts, the punishment will be aggravated for each additional offense, but on a diminishing scale. Where the other offenses are closely interrelated, they are grouped together and treated as a single count. The reason the Part is complicated is that there must be rules for determining whether separate counts really do in fact embody distinct offenses that should result in added punishment.

### §3D1.1. Procedure for Determining Offense Level on Multiple Counts

When a defendant has been convicted of more than one count, the court shall:

(a) Group the counts resulting in conviction into distinct Groups of Closely-Related Counts ("Groups") by applying the rules specified in §3D1.2.

(b) Determine the offense level applicable to each Group by applying the rules specified in §3D1.3.

(c) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in §3D1.4.

### §3D1.2. Groups of Closely-Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. A count for which the statute mandates imposition of a consecutive sentence is excluded from such groups for purposes of §§3D1.2-3D1.5. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan, including, but not limited to:

(1) A count charging conspiracy or solicitation and a count charging any substantive offense that was the sole object of the conspiracy or solicitation. 28 U.S.C. § 994(*l*)(2).

(2) A count charging an attempt to commit an offense and a count charging the commission of the offense. 18 U.S.C. § 3584(a).

(3) A count charging an offense based on a general prohibition and a count charging violation of a specific prohibition encompassed in the general prohibition. 28 U.S.C. § 994(u).

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When counts involve the same general type of offense and the guidelines for that type of offense determine the offense level primarily on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm. Offenses of this kind are found in Chapter Two, Part B (except §§2B2.1-2B3.3), Part D (except §§2D1.6-2D3.4), Part E (except §§2E1.1-2E2.1), Part F, Part G (§§2G2.2-2G3.1), Part K (§2K3.3), Part N (§§2N2.1, 2N3.1), Part Q (§§2Q2.1, 2Q2.2), Part R, Part S, and Part T. This rule also applies where the guidelines deal with offenses that are continuing, e.g., §§2L1.3 and 2Q1.3(b)(1)(A).

§3D1.3. Offense Level Applicable to Each Group of Closely-Related Counts

Determine the offense level applicable to each of the Groups as follows:

(a) In the case of counts grouped together pursuant to §3D1.2(a) - (c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group.

(b) In the case of counts grouped together pursuant to §3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve varying offenses, apply the offense guideline that produces the highest offense level.

§3D1.4. Determining the Combined Offense Level

The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level by the amount indicated in the following table:

| Number of Units | Increase in Offense Level |
|---|---|
| 1 | none |
| 1 1/2 | add **1** level |
| 2 | add **2** levels |
| 3 | add **3** levels |
| 4 or 5 | add **4** levels |
| More than 5 | add **5** levels |

In determining the number of Units for purposes of this section:

(a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from **1** to **4** levels less serious.

(b) Count as one-half Unit any Group that is **5** to **8** levels less serious than the Group with the highest offense level.

(c) Disregard any Group that is **9** or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

(d) Except when the total number of Units is 1 1/2, round up to the next largest whole number.

§3D1.5. Determining the Total Punishment

Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.

*Commentary*

*§3D1.1. This section summarizes the procedure to be used for determining a combined offense level for use in determining and implementing the sentence pursuant to Chapter Five.*

*§3D1.2. The first step in determining the appropriate punishment in a case involving multiple counts is to combine counts that involve the same harm, or harms that are closely related because they arise out of the same transaction or a common scheme. This section specifies, however, that when the defendant has been convicted on a count for which the statute mandates imposition of a consecutive sentence, such as 18 U.S.C. § 924(c) (use of firearm in commission of a crime of violence), that count is excluded from the punishment calculations under §§3D1.2-3D1.4. Note that for convictions under 18 U.S.C. § 924(c), the offense level for other counts will be affected, however, because the specific offense characteristics for weapon use are ignored. See Commentary to §2K2.4.*

*To group counts as required by this section, the court must determine whether the counts involve the same victim and the same or closely related transactions. For example, if a defendant, in the course of a single attack, inflicted two stab wounds on one victim, and if each wound were the subject of a separate assault count, the two counts would be grouped together because they involve harm inflicted on the same victim in the same transaction. In*

*the abstract, infliction of two wounds is more serious than infliction of one, but the number of blows is less significant than the overall seriousness of the injuries, which will determine the offense level regardless of the manner in which counts are formally drafted.*

*The Commission also concluded that the same principle should apply even when different kinds of harm are inflicted on the victim, provided that such harms arise out of the same or closely related transactions. For example, a defendant who commits a forcible sexual offense, inflicts stab wounds, and then takes the victim's purse may be convicted in separate counts of rape, aggravated assault and robbery. Under §3D1.2(b), the three counts would be grouped together and their seriousness (determined under §3D1.3) would be determined by the offense level applicable to the most serious of the counts (rape), as adjusted to reflect the circumstances of its occurrence. Although rape accompanied by robbery is somewhat more serious than rape alone, it is in no way comparable, in danger or in victim suffering, to a rape followed two days later by robbery of the same or a different victim. The Commission concluded that guidelines treating counts as distinct whenever they involved any distinguishable harms would be unacceptable because doing so would overcount and would not capture the essential distinction between contemporaneous harms to the same victim and harms to separate victims in distinct transactions. The offense guideline for rape includes the most common aggravating factors, including injury; the additional factor of property loss from the robbery ordinarily can be considered adequately within the guideline range, which is fairly wide.*

*A related issue concerns the treatment of the defendant who harms several victims in the course of a single transaction. A defendant may shoot three F.B.I. agents in a single gun fight. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together even when there are distinct victims. However, the Commission concluded that cases involving injury to distinct victims are roughly comparable, whether or not the injuries are inflicted in distinct transactions, and each such count should be treated separately. In general, counts are grouped together only when they involve both the same victim and the same or closely related transactions, except as provided in §3D1.2(d).*

*Section 3D1.2(c) provides that when a factor that represents a separate count, e.g., weapon possession or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that factor is to be grouped with the count as to which it constitutes an aggravating factor. Note that sometimes there may be several counts, each of which could be treated as an aggravating factor to another, more serious count, but the more serious count allows an adjustment only for one occurrence of that factor. In such cases, only the count representing the most serious of those factors is to be grouped with the other count. For example, if in a bank robbery on a federal enclave two tellers are assaulted and one of them is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault would be treated separately.*

*Section 3D1.2(d) requires grouping of offenses for which the guidelines use some measure of aggregate harm as the primary criterion for determining the offense level. When a teller embezzles funds from a bank, the seriousness of the offense depends primarily on the total amount taken; punishment should not be influenced significantly by whether one or several distinct acts are charged. Similarly, in a mail fraud case, the seriousness of the offense depends on the scope and sophistication of the fraud, not on the number of mailings.*

*Note that a Group often will include only one count.*

*§3D1.3. This section provides rules for determining the offense level associated with each set of counts grouped together as a single Group of Closely-Related Counts. When applying subsection (b), note that guidelines for similar offenses have been coordinated to produce identical offense levels, at least when large sums are involved.*

*§3D1.4. This section provides a rule for calculating the combined offense level applicable to all counts taken together. The court should first identify the offense level applicable to the most serious Group and then increase that offense level by the number of offense levels indicated in the table. However, when the most serious Group carries an offense level substantially higher than that applicable to the other Groups, counting those Groups fully for purposes of the table could add more punishment than such offenses would carry if prosecuted separately. To avoid this anomalous result the Commission determined that Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17. When this approach produces a fraction in the total Units, other than 1 1/2, it is rounded up to the nearest whole number. Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of substantially more than 5 Units.*

*An alternative method for ensuring that offense level increases reflect the potentially much lower seriousness of other Groups would be to determine the appropriate offense level adjustment through a more complex mathematical formula. The Commission concluded that any gain in precision achieved by such an approach would be more than offset by its complexity. Since the problem arises only when the most serious offense is much more serious than all of the others, the judge ordinarily will have room to impose added punishment by sentencing toward the upper end of the range authorized for the most serious offense. Situations in which this approach will leave inadequate scope for ensuring some additional punishment for the additional crimes are likely to be unusual and can be handled, if they arise, by departure from the guidelines.*

*Another problem can arise when all Groups carry very low offense levels, as for example when the defendant trespasses on two distinct pieces of property in the course of a single transaction. The first trespass count would carry an offense level of 4 and the second count would increase the offense level to 6, raising the maximum authorized term of imprisonment by 50%. Again, this problem could be avoided by relying on precise mathematical formulae, but the Commission concluded that such an approach was unnecessary since the authorized ranges at the lower offense levels are broad enough to permit courts to avoid any excessive punishment increases for counts of minor significance. Once again situations in which this approach will be inadequate to avoid injustice are likely to be rare and can be handled by departure from the guidelines.*

*§3D1.5. This section refers the court to Chapter Five in order to determine the total punishment to be imposed based upon the combined offense level.*

*Illustrations. The following examples, drawn from presentence reports in the Commission's files, illustrate the operation of the guidelines on consecutive and concurrent sentences:*

*1. Defendant A was convicted on four counts each charging robbery of a different bank. Because each count involved a different victim, each would represent a distinct Group. §3D1.2. In each of the first three robberies, the offense level was 19 (18 plus a 1-level increase because a financial institution was robbed) (§2B2.1). In the fourth robbery $12,000 was taken*

*and a gun was discharged; the offense level was therefore 25. As the first three counts are 6 levels lower than the fourth, each of the first three represents one-half a unit for purposes of §3D1.4. Altogether there are 2 1/2 units (rounded up to 3), and the offense level for the most serious (25) is therefore increased by 3 levels under the table. The combined offense level is 28.*

*2. Defendant B, a housing inspector, was convicted on four counts, each charging receipt of a bribe. Counts one and two charged receiving payments of $3,000 and $2,000 from Landlord X in return for a single action with respect to a single property. Count three charged receipt of $1,500 from Landlord X for taking action with respect to another property, and count four charged receipt of $1,000 from Landlord Y for taking action with respect to a third property. Counts one and two, arising out of the same transaction, are combined into a single Group involving a $5,000 bribe and hence an offense level of 11 (§2C1.1(a)(1), §2F1.1). Each of the two remaining counts represents a distinct Group, at offense level 10. As there are altogether three Count Units, the offense level for the most serious (11) is increased by 3 levels. The combined offense level is 14.*

*3. Defendant C was convicted on the following seven counts: (1) theft of a $2,000 check; (2) uttering the same $2,000 check; (3) possession of a stolen $1,200 check; (4) forgery of a $600 check; (5) possession of a stolen $1,000 check; (6) forgery of the same $1,000 check; (7) uttering the same $1,000 check.*

*Counts 1, 3 and 5 involve offenses under Part B (Theft), while Counts 2, 4, 6 and 7 involve offenses under Part F (Fraud and Deceit). For purposes of §2D1.2(c), fraud and theft are treated as offenses of the same kind, and therefore all counts are grouped into a single Group, for which the offense level depends on the aggregate harm. The total value of the checks is $4,800. The fraud guideline is applied, because it produces results that are at least as large as the theft guideline. The base offense level is 6, and there is an aggravator of 1 level for property value. However, because the conduct involved repeated acts, the offense level is raised to 10 (§2F1.1(b)(2)(B)). The combined offense level therefore is 10.*

*4. Defendant D was convicted on four counts: (1) distribution of 230 grams of cocaine; (2) distribution of 150 grams of cocaine; (3) distribution of seventy-five grams of heroin; (4) offering a DEA agent $20,000 to avoid prosecution. The combined offense level for drug offenses is determined by the total quantity of drugs, converted to heroin equivalents. Count 1 translates into forty-six grams of heroin; Count 2 translates into thirty grams of heroin. The total is 151 grams of heroin. Under §2D1.1, the combined offense level for the drug offenses is 26. In addition, because of the attempted bribe of the DEA agent, this offense level is increased by 2 levels to 28 under §3C1.1 (Obstruction). Because the bribery is accounted for by §3C1.1, it becomes part of the drug Group and would not otherwise increase the offense level of the drug Group. §3D1.2(c).*

*5. Defendant E was convicted of four counts arising out of a scheme pursuant to which he received kickbacks from subcontractors. The counts were as follows: (1) The defendant received $27,000 from subcontractor A relating to contract X (Mail Fraud). (2) The defendant received $12,000 from subcontractor A relating to contract X (Commercial Bribery). (3) The defendant received $15,000 from subcontractor A relating to contract Y (Mail Fraud). (4) The defendant received $20,000 from subcontractor B relating to contract Z (Commercial Bribery). The mail fraud counts are covered by §2F1.1 (Fraud and Deceit). The bribery counts are covered by §2B4.1 (Commercial Bribery), which treats the offense as a sophisticated fraud. The total money involved is $74,000, which results in an offense level of 13 under either §2B4.1 or §2F1.1. Consequently, the combined offense level is 13.*

## PART E - ACCEPTANCE OF RESPONSIBILITY

**§3E1.1. Acceptance of Responsibility**

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense of conviction, reduce the offense level by 2 levels.

(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.

(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

*Commentary*

*The reduction of sentence available under §3E2.1 recognizes a number of societal interests. The defendant who affirmatively accepts personal responsibility for the offense, who takes affirmative steps to dissociate himself from criminal conduct, and who attempts to rectify the harm caused by the conduct may be entitled to receive recognition for these socially desirable actions. In determining whether the defendant qualifies for this provision, the timeliness of the defendant's conduct in manifesting an acceptance of responsibility for the offense is particularly important. Other appropriate considerations include, but are not limited to, the following:*

*(1) voluntary termination or withdrawal from criminal activity or associations;*

*(2) voluntary payment of restitution to a victim prior to adjudication of guilt;*

*(3) voluntary and truthful admission to authorities of involvement in the offense and related conduct;*

*(4) voluntary surrender to authorities before charges are filed or an arrest warrant is executed;*

*(5) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;*

*(6) voluntary resignation from the office or position held during the commission of the offense.*

*The sentencing judge is in a unique position to evaluate the defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review and should not be disturbed unless without foundation.*

*Subdivisions (b) and (c) provide that the availability of a reduction under §3E2.1 is not governed by the plea entered. A defendant may manifest sincere contrition and take steps toward reparation and rehabilitation even if he exercises his constitutional right to a trial. This may occur when a defendant decides to go to trial to assert and preserve issues that do not relate to factual guilt, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct, or to raise evidentiary issues that may result in an acquittal. Conversely, a defendant who perjures himself, suborns perjury or otherwise obstructs the trial or the administration of justice, cf. §3E1.1, is not entitled to an adjustment for acceptance of responsibility.*

*Although a guilty plea may be some evidence of the defendant's acceptance of responsibility, it does not automatically entitle him to a sentencing adjustment.*

# CHAPTER FOUR - CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

## PART A - CRIMINAL HISTORY

### INTRODUCTION

The Comprehensive Crime Control Act sets forth four purposes of sentencing. (See 18 U.S.C. § 3553(a)(2).) A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.

The specific factors included in §4A1.1 and §4A1.3 are consistent with the extant empirical research assessing correlates of recidivism, and patterns of career criminal behavior. While empirical research has shown that other factors are correlated highly with the likelihood of recidivism, e.g., age, drug abuse, for policy reasons they were not here included at this time. The Commission has made no definitive judgment as to the reliability of the existing data. However, the Commission will review further data insofar as they become available in the future.

### §4A1.1. Criminal History Category

The total points from items (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not included in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b). If 2 points are added for item (d), add only 1 point for this item.

§4A1.2. Definitions and Instructions for Computing Criminal History

(a) Prior Sentence Defined

(1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.

(2) Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history. Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.

(3) A conviction for which the imposition of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).

(b) Sentence of Imprisonment Defined

(1) The term "sentence of imprisonment" means a sentence of incarceration and refers to the maximum sentence imposed.

(2) If part of a sentence of imprisonment was suspended, "sentence of imprisonment" refers only to the portion that was not suspended.

(c) Sentences Counted and Excluded

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

Contempt of court
Disorderly conduct or disturbing the peace
Driving without a license or with a revoked or suspended license
False information to a police officer
Fish and game violations
Gambling
Hindering or failure to obey a police officer
Leaving the scene of an accident
Local ordinance violations
Non-support
Prostitution
Resisting arrest
Trespassing

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Hitchhiking
Juvenile status offenses and truancy
Loitering
Minor traffic infractions
Public intoxication
Vagrancy

(d) Offenses Committed Prior to Age Eighteen

(1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under §4A1.1(a) for each such sentence.

(2) In any other case,

(A) add 2 points under §4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;

(B) add 1 point under §4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).

(e) Applicable Time Period

(1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month that resulted in the defendant's incarceration during any part of such fifteen-year period.

(2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted.

(3) Any prior sentence not within the time periods specified above is not counted.

(f) Diversionary Dispositions

Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

(g) **Military Sentences**

Sentences resulting from military offenses are counted if imposed by a general or special court martial. Sentences imposed by a summary court martial or Article 15 proceeding are not counted.

(h) **Foreign Sentences**

Sentences resulting from foreign convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).

(i) **Tribal Court Sentences**

Sentences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).

(j) **Expunged Convictions**

Sentences for expunged convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).

(k) **Revocations of Probation, Parole, Mandatory Release, or Supervised Release**

(1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable.

(2) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the points for §4A1.1(e) in respect to the recency of last release from confinement. It may also affect the time period under which certain sentences are counted as provided in §4A1.2(e)(1).

*Commentary*

*Sections 4A1.1 and 4A1.2 provide instructions for calculation of criminal history. The total criminal history points determine a defendant's criminal history category for the Sentencing Table in Chapter Five.*

*Criminal History Points. Three points are added for each sentence counted under §4A1.1(a). There is no limit to the number of points countable under this item. Two points are added for each sentence counted under §4A1.1(b). There is no limit to the number of points countable under this item. One point is added for each sentence counted under §4A1.1(c), up to a maximum of four points for this item. If the defendant was under any form of criminal justice control at the time of the instant offense as specified in §4A1.1(d), two points are added. If the defendant committed the instant offense less than two years after release from imprisonment, as specified in §4A1.1(e), two points are added, except that the total number of points for both (d) and (e) is limited to three.*

*Prior Sentences. Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. Imposition of a sentence exceeding a year and one month of imprisonment generally reflects a judicial assessment that the underlying criminal conduct was serious. In recognition of the imperfection of this measure however, §4A1.3 permits information about the significance or similarity of past conduct underlying prior convictions to be used as a basis for imposing a sentence outside the applicable guideline range.*

*Subdivisions (a), (b), and (c) of §4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house. To be considered a confinement sentence, time must have been served (or, if the defendant escaped, would have been served). For purposes of applying §4A1.1(a), (b), or (c), a sentence of imprisonment is the stated maximum. That is, criminal history points are based on the sentence pronounced, not the time actually served. A sentence of probation is to be treated as a sentence under §4A1.1(c) unless a condition of probation requiring imprisonment of at least sixty days was imposed.*

*Section 4A1.1(d) implements one measure of recency by adding two points if the defendant was under criminal justice control during the commission of the instant offense.*

*Section 4A1.1(e) implements another measure of recency by adding two points if the defendant committed any part of the instant offense less than two years immediately following his release from confinement on a sentence counted under §4A1.1(a) or (b). This also applies if the defendant committed the instant offense while still in confinement on such a sentence. Because of the potential overlap of (d) and (e), their combined impact is limited to three points. However, a defendant who falls within both (d) and (e) is more likely to commit additional crimes; thus, (d) and (e) are not completely combined.*

*Sentences Imposed in the Alternative. Sentences which specify a fine as an alternative to a term of imprisonment (e.g., $1,000 fine or ninety days' imprisonment) should be treated as a sentence under §4A1.1(c).*

*Related Cases. Cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing. The court should be aware that there may be instances in which this definition is overly broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that he presents to the public. For example, if the defendant commits a number of offenses on independent occasions separated by arrests, and the resulting criminal cases are consolidated and result in a combined sentence of eight years, counting merely three points for this factor will not adequately reflect either the seriousness of the defendant's criminal history or the frequency with which he commits crimes. In such circumstances, the court should consider whether departure is warranted. See §4A1.3.*

*Invalid Convictions. Sentences resulting from convictions that have been reversed or vacated because of errors of law, or because of subsequently-discovered evidence exonerating the defendant, are not to be counted. Any other sentence resulting in a valid conviction is to be counted in the criminal history score. Convictions which the defendant shows to have been*

*constitutionally invalid may not be counted in the criminal history score. Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score. Nonetheless, any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 if it provides reliable evidence of past criminal activity.*

*Convictions Set Aside or Defendant Pardoned. A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. §4A1.2(j).*

*Offenses Committed Prior to Age Eighteen. Section 4A1.2 (d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a "juvenile," this provision applies to all offenses committed prior to age eighteen.*

*Applicable Time Period. Section 4A1.2(e) establishes the time period within which prior sentences are counted. If the government is able to show that a sentence imposed outside this time period is evidence of similar misconduct or the defendant's receipt of a substantial portion of income from criminal livelihood, the court may consider this information in determining whether to depart and sentence above the applicable guideline range.*

*Diversionary Dispositions. Section 4A1.2(f) requires counting prior adult diversionary dispositions if they involved a judicial determination of guilt or an admission in open court of guilt. This reflects a policy that defendants who receive the benefit of a rehabilitory sentence and continue to commit crimes should not be treated with further leniency.*

*Revocations to be Considered. Section 4A1.2(j) covers revocations of probation and other conditional sentences where the original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.*

§4A1.3. Adequacy of Criminal History Category (Policy Statement)

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

(a) prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses);

(b) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;

(c) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;

(d) whether the defendant was pending trial, sentencing, or appeal on another charge at the time of the instant offense;

(e) prior similar adult criminal conduct not resulting in a criminal conviction.

A departure under this provision is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes. Examples might include the case of a defendant who (1) had several previous foreign sentences for serious offenses, (2) had received a prior consolidated sentence of ten years for a series of serious assaults, (3) had a similar instance of large scale fraudulent misconduct established by an adjudication in a Security Exchange Commission enforcement proceeding, (4) committed the instant offense while on bail or pretrial release for another serious offense or (5) for appropriate reasons, such as cooperation in the prosecution of other defendants, had previously received an extremely lenient sentence for a serious offense. The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines. However, a prior arrest record itself shall not be considered under §4A1.3.

There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category (Category II), and therefore consider a downward departure from the guidelines.

In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for a Category VI criminal is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a decision above the guideline range for a defendant with a Category VI

criminal history may be warranted. However, this provision is not symmetrical. The lower limit of the range for a Category I criminal history is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for a Category I criminal history on the basis of the adequacy of criminal history cannot be appropriate.

*Commentary*

*§4A1.3. This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.*

## PART B - CAREER OFFENDERS AND CRIMINAL LIVELIHOOD

28 U.S.C. § 994(h)
28 U.S.C. § 994(i)(2)

### §4B1.1. Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense is a crime of violence or trafficking in a controlled substance, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

| Offense Statutory Maximum | Offense Level |
|---|---|
| (A) Life | 37 |
| (B) 20 years or more | 34 |
| (C) 10 years or more, but less than 20 years | 26 |
| (D) 5 years or more, but less than 10 years | 19 |
| (E) More than 1 year, but less than 5 years | 12 |
| (F) 1 year or less | 4 |

### §4B1.2. Definitions

(1) The term "crime of violence" as used in this provision is defined under 18 U.S.C. § 16.

(2) The term "controlled substance offense" as used in this provision means an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 955a, 959; §§ 405B and 416 of the Controlled Substance Act as amended in 1986, and similar offenses.

(3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions for either a crime of violence or a controlled substance offense (i.e., two crimes of violence, two controlled substance offenses, or one crime of violence and one controlled substance offense), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of Part A of this Chapter. The date that a defendant sustained a conviction shall be the date the judgment of conviction was entered.

### §4B1.3. Criminal Livelihood.

If the defendant committed an offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income, his offense level shall be not less than 13. In no such case will the defendant be eligible for a sentence of probation.

*Commentary*

*28 U.S.C. § 994(h) mandates that the Commission assure that certain "career" or special offenders, as defined in the statute, receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this mandate. The legislative history of this provision suggests that the phrase "maximum term authorized" should be construed as the maximum term authorized by statute. See S. Rep. 98-225, 98th Cong., 1st Sess. 175 (1983), 128 Cong. Rec. 12792, 97th Cong., 2d Sess. (1982) ("Career Criminals" amendment No. 13 by Senator Kennedy), 12796 (explanation of amendment), and 12798 (remarks by Senator Kennedy).*

*The guideline levels for career criminals were established by using the statutory maximum for the offense of conviction to determine the class of felony provided in 18 U.S.C. § 3559. Then the maximum authorized sentence of imprisonment for each class of felony was determined as provided by 18 U.S.C. § 3581. A guideline range for each class of felony was then chosen so that the maximum of the guideline range was at or near the maximum provided in 18 U.S.C. § 3581.*

*Section 4B1.2 provides the definitions for §4B1.1. The definition of the term "crime of violence", as that term is used in 28 U.S.C. § 994(h), is taken from Section 1001 of the Comprehensive Crime Control Act of 1984, which defined the term for purposes of all of Title 18, United States Code. See S. Rep. 98-225, 98th Cong., 1st Sess. 307 (1983).*

*The term "controlled substance offense" is defined to include the offenses described in 28 U.S.C. § 994(h), as these offenses have been modified by amendments to the Controlled Substances Act made by the Anti-Drug Abuse Act of 1986, Pub. L. 99-570.*

*Section 4B1.3 implements 28 U.S.C. § 994(i)(2), which directs the Commission to construct guidelines that specify a "substantial term of imprisonment" for a defendant who committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income. Under this guideline provision, the offense level is to be increased to level 13 if it is not already level 13 or greater. Probation shall not be a sentencing alternative for these offenders.*

# CHAPTER FIVE - DETERMINING THE SENTENCE

## INTRODUCTION

For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).

## PART A - SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

## SENTENCING TABLE

Criminal History Category

| Offense Level | I 0 or 1 | II 2 or 3 | III 4, 5, 6 | IV 7, 8, 9 | V 10, 11, 12 | VI 13 or more |
|---|---|---|---|---|---|---|
| 1 | 0 - 1 | 0 - 2 | 0 - 3 | 0 - 4 | 0 - 5 | 0 - 6 |
| 2 | 0 - 2 | 0 - 3 | 0 - 4 | 0 - 5 | 0 - 6 | 1 - 7 |
| 3 | 0 - 3 | 0 - 4 | 0 - 5 | 0 - 6 | 2 - 8 | 3 - 9 |
| 4 | 0 - 4 | 0 - 5 | 0 - 6 | 2 - 8 | 4 - 10 | 6 - 12 |
| 5 | 0 - 5 | 0 - 6 | 1 - 7 | 4 - 10 | 6 - 12 | 9 - 15 |
| 6 | 0 - 6 | 1 - 7 | 2 - 8 | 6 - 12 | 9 - 15 | 12 - 18 |
| 7 | 1 - 7 | 2 - 8 | 4 - 10 | 8 - 14 | 12 - 18 | 15 - 21 |
| 8 | 2 - 8 | 4 - 10 | 6 - 12 | 10 - 16 | 15 - 21 | 18 - 24 |
| 9 | 4 - 10 | 6 - 12 | 8 - 14 | 12 - 18 | 18 - 24 | 21 - 27 |
| 10 | 6 - 12 | 8 - 14 | 10 - 16 | 15 - 21 | 21 - 27 | 24 - 30 |
| 11 | 8 - 14 | 10 - 16 | 12 - 18 | 18 - 24 | 24 - 30 | 27 - 33 |
| 12 | 10 - 16 | 12 - 18 | 15 - 21 | 21 - 27 | 27 - 33 | 30 - 37 |
| 13 | 12 - 18 | 15 - 21 | 18 - 24 | 24 - 30 | 30 - 37 | 33 - 41 |
| 14 | 15 - 21 | 18 - 24 | 21 - 27 | 27 - 33 | 33 - 41 | 37 - 46 |
| 15 | 18 - 24 | 21 - 27 | 24 - 30 | 30 - 37 | 37 - 46 | 41 - 51 |
| 16 | 21 - 27 | 24 - 30 | 27 - 33 | 33 - 41 | 41 - 51 | 46 - 57 |
| 17 | 24 - 30 | 27 - 33 | 30 - 37 | 37 - 46 | 46 - 57 | 51 - 63 |
| 18 | 27 - 33 | 30 - 37 | 33 - 41 | 41 - 51 | 51 - 63 | 57 - 71 |
| 19 | 30 - 37 | 33 - 41 | 37 - 46 | 46 - 57 | 57 - 71 | 63 - 78 |
| 20 | 33 - 41 | 37 - 46 | 41 - 51 | 51 - 63 | 63 - 78 | 70 - 87 |
| 21 | 37 - 46 | 41 - 51 | 46 - 57 | 57 - 71 | 70 - 87 | 77 - 96 |
| 22 | 41 - 51 | 46 - 57 | 51 - 63 | 63 - 78 | 77 - 96 | 84 - 105 |
| 23 | 46 - 57 | 51 - 63 | 57 - 71 | 70 - 87 | 84 - 105 | 92 - 115 |
| 24 | 51 - 63 | 57 - 71 | 63 - 78 | 77 - 96 | 92 - 115 | 100 - 125 |
| 25 | 57 - 71 | 63 - 78 | 70 - 87 | 84 - 105 | 100 - 125 | 110 - 137 |
| 26 | 63 - 78 | 70 - 87 | 78 - 97 | 92 - 115 | 110 - 137 | 120 - 150 |
| 27 | 70 - 87 | 78 - 97 | 87 - 108 | 100 - 125 | 120 - 150 | 130 - 162 |
| 28 | 78 - 97 | 87 - 108 | 97 - 121 | 110 - 137 | 130 - 162 | 140 - 175 |
| 29 | 87 - 108 | 97 - 121 | 108 - 135 | 121 - 151 | 140 - 175 | 151 - 188 |
| 30 | 97 - 121 | 108 - 135 | 121 - 151 | 135 - 168 | 151 - 188 | 168 - 210 |
| 31 | 108 - 135 | 121 - 151 | 135 - 168 | 151 - 188 | 168 - 210 | 188 - 235 |
| 32 | 121 - 151 | 135 - 168 | 151 - 188 | 168 - 210 | 188 - 235 | 210 - 262 |
| 33 | 135 - 168 | 151 - 188 | 168 - 210 | 188 - 235 | 210 - 262 | 235 - 293 |
| 34 | 151 - 188 | 168 - 210 | 188 - 235 | 210 - 262 | 235 - 293 | 262 - 327 |
| 35 | 168 - 210 | 188 - 235 | 210 - 262 | 235 - 293 | 262 - 327 | 292 - 365 |
| 36 | 188 - 235 | 210 - 262 | 235 - 293 | 262 - 327 | 292 - 365 | 324 - 405 |
| 37 | 210 - 262 | 235 - 293 | 262 - 327 | 292 - 365 | 324 - 405 | 360 - life |
| 38 | 235 - 293 | 262 - 327 | 292 - 365 | 324 - 405 | 360 - life | 360 - life |
| 39 | 262 - 327 | 292 - 365 | 324 - 405 | 360 - life | 360 - life | 360 - life |
| 40 | 292 - 365 | 324 - 405 | 360 - life | 360 - life | 360 - life | 360 - life |
| 41 | 324 - 405 | 360 - life | 360 - life | 360 - life | 360 - life | 360 - life |
| 42 | 360 - life | 360 - life | 360 - life | 360 - life | 360 - life | 360 - life |
| 43 | life | life | life | life | life | life |

## PART B - PROBATION

18 U.S.C. § 3561
18 U.S.C. § 3563

### §5B1.1. Imposition of a Term of Probation

(a) Subject to the statutory restrictions in subsection (b) below, sentence of probation is authorized:

(1) if the minimum term of imprisonment in the range specified by the Sentencing Table in Part A, is zero months;

(2) if the minimum term of imprisonment specified by the Sentencing Table is at least one but not more than six months, provided that the court imposes a condition or combination of conditions requiring intermittent confinement or community confinement as provided in §5C2.1(c)(2) (Imposition of a Term of Imprisonment).

(b) A sentence of probation may not be imposed in the event:

(1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);

(2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);

(3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

### §5B1.2. Term of Probation

(a) When probation is imposed, the term shall be:

(1) at least one year but not more than five years if the offense level is 6 or greater;

(2) no more than three years in any other case.

### §5B1.3. Conditions of Probation

(a) If a term of probation is imposed, the court shall impose a condition that the defendant shall not commit another federal, state, or local crime during the term of probation. 18 U.S.C. § 3563(a)(1).

(b) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing and (2) involve only such deprivations of liberty or property as are reasonably necessary to effect the

purposes of sentencing. 18 U.S.C. § 3563(b). Recommended conditions are set forth in §5B1.4.

(c) If a term of probation is imposed for a felony, the court shall impose at least one of the following as a condition of probation: a fine, an order of restitution, or community service. 18 U.S.C. § 3563(a)(2).

(d) Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation. 18 U.S.C. § 3563(b)(11). Intermittent confinement shall be credited toward the guideline term of imprisonment at §5C2.1 as provided in the schedule at §5C2.1(e).

*Commentary*

*The Comprehensive Crime Control Act of 1984 makes probation a sanction in and of itself. 18 U.S.C. § 3561. Probation may be used as an alternative to incarceration provided that the terms of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant.*

*Section 5B1.1 provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless prohibited by statute or inconsistent with the requirements of the guideline for the imposition of a term of imprisonment, §5C2.1 (Imposition of a Term of Imprisonment). Given these restraints, the court may impose a sentence of probation where the minimum term of imprisonment in the range is zero months and may not impose probation where the minimum term in the range is more than six months. Subsection 5B1.1(a)(2) provides a transition between those offenses where a probationary term is allowed and those where probation is prohibited. Where the guidelines call for a minimum term of imprisonment of at least one but not more than six months, the court may impose a sentence of probation provided that it includes, as a condition of that probation, an incarceration alternative requiring intermittent confinement, community confinement, or a combination thereof.*

*Subsection 5B1.1(b)(3) reflects Congressional intent that split sentences of imprisonment and probation be abolished. S. Rep. No. 225, 98th Cong., 1st Sess. 89.*

*Section 5B1.2 governs the length of a term of probation. Subject to statutory restrictions, the guidelines provide that a term of probation may not exceed three years if the offense level is less than 6. If a defendant has an offense level of 6 or greater, the guidelines provide that a term of probation be at least one year but not more than five years. Although some distinction in the length of a term of probation is warranted based on the circumstances of the case, a term of probation may also be used to enforce conditions such as fine or restitution payments, or attendance in a program of treatment such as drug rehabilitation. Often, it may not be possible to determine the amount of time required for the satisfaction of such payments or programs in advance. This issue has been resolved by setting forth two broad ranges for the duration of a term of probation depending upon the offense level. Within the guidelines set forth in this section, the determination of the length of a term of probation is within the discretion of the sentencing judge.*

*Section 5B1.3 describes mandatory and discretionary conditions of probation.*

§5B1.4. Recommended Conditions of Probation and Supervised Release (Policy Statement)

(a) The following "standard" conditions (1-13) are generally recommended for both probation and supervised release:

(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support his dependents and meet other family responsibilities;

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation

officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

(b) The following "special" conditions of probation and supervised release (14-24) are either recommended or required by law under the circumstances described, or may be appropriate in a particular case:

(14) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense, it is recommended that the court impose a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(15) Restitution

If the court imposes an order of restitution, it is recommended that the court impose a condition requiring the defendant to make payment of restitution or adhere to a court ordered installment schedule for payment of restitution. See §5E4.1 (Restitution).

(16) Fines

If the court imposes a fine, it is recommended that the court impose a condition requiring the defendant to pay the fine or adhere to a court ordered installment schedule for payment of the fine.

(17) Debt Obligations

If an installment schedule of payment of restitution or fines is imposed, it is recommended that the court impose a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(18) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine, it is recommended that the court impose a condition requiring the defendant to provide the probation officer access to any requested financial information.

(19) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation or supervised release. See §5F5.1 (Community Confinement).

(20) Home Detention

Home detention may be imposed as a condition of probation or supervised release. See §5F5.2 (Home Detention).

(21) Community Service

Community service may be imposed as a condition of probation or supervised release. See §5F5.3 (Community Service).

(22) Occupational Restrictions

Occupational restrictions may be imposed as a condition of probation or supervised release. See §5F5.5 (Occupational Restrictions).

(23) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol, it is recommended that the court impose a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

(24) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment, it is recommended that the court impose a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

* * * * *

## PART C - IMPRISONMENT

18 U.S.C. § 3581
18 U.S.C. § 3582

§5C2.1. Imposition of a Term of Imprisonment

(a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the guideline range.

(b) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is zero months, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.

(c) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is at least one but not more than six months, the minimum term may be satisfied by (1) a sentence of imprisonment; (2) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement or community confinement for imprisonment according to the schedule in §5C2.1(e); or (3) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement according to the schedule in §5C2.1(e), provided that at least one-half of the minimum term, but in no event less than one month, is satisfied by imprisonment.

(d) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but not more than ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement according to the schedule in §5C2.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.

(e) Schedule of Substitute Punishments:

(1) Thirty days of intermittent confinement in prison or jail for one month of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);

(2) One month of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one month of imprisonment.

(f) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than ten months, the guidelines require that the minimum term be satisfied by a sentence of imprisonment.

*Commentary*

*The court shall determine the appropriate sentence within the applicable guideline range. For example, if the offense level is 20, Criminal History Category I, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.*

*Subsection 5C2.1(b) provides that if the minimum term of imprisonment set forth in the Sentencing Table is zero months, the court is permitted, but not required, to impose a sentence of probation unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense.*

*Subsection 5C2.1(c) provides that if the minimum term of imprisonment set forth in the Sentencing Table of at least one but not more than six months, the minimum term may be satisfied by a sentence of imprisonment, a sentence of probation with a condition requiring a period of intermittent confinement or community confinement; or a sentence of imprisonment that includes a term of supervised release with a condition requiring a period of community confinement, provided that at least one-half of the minimum term, but in no event less than one month, is satisfied by imprisonment.*

*Subsection 5C2.1(d) provides that if the minimum term of imprisonment set forth in the Sentencing Table of more than six but not more than ten months, the minimum term may be satisfied by a sentence of imprisonment; or a sentence of imprisonment that includes a term of supervised release with a condition requiring a period of community confinement, provided that at least one-half of the minimum term is satisfied by imprisonment. For example, if the guideline calls for eight months of imprisonment, the court may decide to impose a four-month term of imprisonment to be followed by four months in a halfway house.*

*As noted previously, 18 U.S.C. § 3561(a)(3) prohibits the imposition of a sentence of probation where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. While this provision has effectively abolished the use of 'split sentences' imposable pursuant to the former 18 U.S.C. § 3561, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be "achieved by a more direct and logically consistent route" by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89).*

*There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases where the defendant's criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.*

*Subsection 5C2.1(e) sets forth a schedule of imprisonment substitutes. Home detention may not be substituted for imprisonment.*

*The use of substitutes for imprisonment as provided in §5C2.1(c) and (d) is generally not warranted in the case of a defendant with a criminal history category greater than Category II. Such defendants have generally not benefitted from previous application of such alternatives.*

*Subsection 5C2.1(f) provides that, if the minimum term of imprisonment set forth in the Sentencing Table is more than ten months, the minimum term must be satisfied by a sentence of imprisonment without the use of any of the incarceration alternatives in §5C2.1(e).*

## PART D - SUPERVISED RELEASE

18 U.S.C. § 3583

### §5D3.1. Imposition of a Term of Supervised Release

(a) The court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, or when required by statute.

(b) The court may order a term of supervised release to follow imprisonment in any other case.

### §5D3.2. Term of Supervised Release

(a) If a defendant is convicted under a statute that requires a term of supervised release, the term shall be at least three years but not more than five years, or the minimum period required by statute, whichever is greater.

(b) Otherwise, when a term of supervised release is ordered, the length of the term shall be:

(1) three years for a defendant convicted of a Class A or B felony;

(2) two years for a defendant convicted of a Class C or D felony;

(3) one year for a defendant convicted of a Class E felony or a misdemeanor.

### §5D3.3. Conditions of Supervised Release

(a) If a term of supervised release is imposed, the court shall impose a condition that the defendant not commit another federal, state, or local crime. 18 U.S.C. § 3583(d).

(b) In order to fulfill any authorized purposes of sentencing, the court may impose other conditions reasonably related to (1) the nature and circumstances of the offense, and (2) the history and characteristics of the defendant. 18 U.S.C. § 3583(d).

(c) Recommended conditions of supervised release are set forth in §5B1.4.

*Commentary*

*Subsection 5D3.1(a) requires imposition of supervised release following any sentence of imprisonment for a term of more than one year or if required by a specific statute. While there may be cases within this category that do not require post release supervision, these cases are the exception and may be handled by departure from the guideline requiring post release supervision.*

*Under §5D3.1(b), the court may impose a term of supervised release in cases involving imprisonment for a term of one year or less. The court may consider the need for a term of supervised release to facilitate the reintegration of the defendant into the community; to enforce a fine, restitution order, or other condition; or to fulfill any other purpose authorized by statute.*

*Section 5D3.2 specifies the length of a term of supervised release that is to be imposed. Subsection (a) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release. Subsection (b) applies to all other statutes, and specifies terms that are the maximum permitted by law.*

*Section 5D3.3 applies to conditions of supervised release. The conditions generally recommended for supervised release are those recommended for probation. See §5B1.4.*

## PART E - RESTITUTION, FINES, ASSESSMENTS, FORFEITURES

18 U.S.C. §§ 1956-1957
18 U.S.C. § 1963
18 U.S.C. § 3013
18 U.S.C. §§ 3553-3554
18 U.S.C. § 3556
18 U.S.C. §§ 3571-3572
18 U.S.C. § 3579
18 U.S.C. § 3614
18 U.S.C. §§ 3663-3664
18 U.S.C. §§ 3681-3682
21 U.S.C. § 841
21 U.S.C. § 848
21 U.S.C. § 853
21 U.S.C. § 960

### §5E4.1. Restitution

(a) Restitution shall be ordered for convictions under Title 18 of the United States Code or under 49 U.S.C. § 1472(h), (i), (j) or (n) in accordance with 18 U.S.C. §3663(d).

(b) If a defendant is ordered to make restitution and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

*Commentary*

*Section 3553(a)(7) of Title 18 requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Section 3556 of Title 18 authorizes the court to impose restitution in accordance with 18 U.S.C. §§ 3663 and 3664 for violations of Title 18 and of designated subdivisions of 49 U.S.C. § 1472. Restitution is not precluded, however, as a condition of probation or supervised release for other offenses. See S. Rep. No. 225, 98th Cong., 1st Sess. 95-96. An order of restitution may be appropriate in offenses not specifically referenced in 18 U.S.C. § 3663 where victims require relief more promptly than the civil justice system provides.*

*Section 3663(d) requires the court to "impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong sentencing." If the court does not order restitution, or orders only partial restitution, it must state its reasons for doing so. 18 U.S.C. § 3663(a)(2).*

*In determining whether to impose an order of restitution, and the amount of restitution, the court shall consider the amount of loss the victim suffered as a result of the offense, the financial resources of the defendant, the financial needs of the defendant and his dependents, and other factors the court deems appropriate. 18 U.S.C. § 3664(a).*

*Pursuant to Rule 32(c)(2)(D), Federal Rules of Criminal Procedure, the probation officer's presentence investigation report must contain a victim impact statement. That report must contain information about the financial impact on the victim and the defendant's financial condition. The sentencing judge may base findings on the presentence report or other testimony or evidence supported by a preponderance of evidence. 18 U.S.C. § 3664(d).*

*A court's authority to deny restitution is limited. Even "in those unusual cases where the precise amount owed is difficult to determine, section 3579(d) [the identical predecessor of section 3663(d)] authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim." S. Rep. No. 532, 97th Cong., 2d Sess. 31, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2537.*

*Unless the court orders otherwise, restitution must be made immediately. 18 U.S.C. § 3663(f)(3). The court may permit the defendant to make restitution within a specified period or in specified installments, provided that the last installment is paid not later than the expiration of probation, five years after the end of the defendant's term of imprisonment, or in any other case five years after the date of sentencing. 18 U.S.C. § 3663(f)(1) and (2). The restitution order should specify how and to whom payment is to be made.*

§5E4.2. Fines for Individual Defendants

(a) Except as provided in subsection (f) below, the court shall impose a fine in all cases. If the guideline for the offense in Chapter Two prescribes a different rule for imposing fines, that rule takes precedence over this subsection.

(b) The generally applicable minimum and maximum fine for each offense level is shown in the Fine Table in subsection (c) below. Unless a statute expressly authorizes a greater amount, no fine may exceed $250,000 for a felony or a misdemeanor resulting in the loss of human life; $25,000 for any other misdemeanor; or $1,000 for an infraction. 18 U.S.C. § 3571(b)(1).

(c) (1) The minimum fine range is the greater of:

(A) the amount shown in column A of the table below; or

(B) any monetary gain to the defendant, less any restitution made or ordered.

(2) Except as specified in (4) below, the maximum fine is the greater of:

(A) the amount shown in column B of the table below;

(B) twice the estimated loss caused by the offense; or

(C) three times the estimated gain to the defendant.

(3) Fine Table

| Offense Level | A Minimum | B Maximum |
|---|---|---|
| 1 | $25 | $250 |
| 2-3 | $100 | $1,000 |
| 4-5 | $250 | $2,500 |
| 6-7 | $500 | $5,000 |
| 8-9 | $1,000 | $10,000 |
| 10-11 | $2,000 | $20,000 |
| 12-13 | $3,000 | $30,000 |
| 14-15 | $4,000 | $40,000 |
| 16-17 | $5,000 | $50,000 |
| 18-19 | $6,000 | $60,000 |
| 20-22 | $7,500 | $75,000 |
| 23-25 | $10,000 | $100,000 |
| 26-28 | $12,500 | $125,000 |
| 29-31 | $15,000 | $150,000 |
| 32-34 | $17,500 | $175,000 |
| 35-37 | $20,000 | $200,000 |
| 38 and above | $25,000 | $250,000 |

(4) Subsection (c)(2), limiting the maximum fine, does not apply if the defendant is convicted under a statute authorizing (A) a maximum fine greater than $250,000, or (B) a fine for each day of violation. In such cases, the court may impose a fine up to the maximum authorized by the statute.

(d) In determining the amount of the fine, the court shall consider:

(1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;

(2) the ability of the defendant to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;

(3) the burden that the fine places on the defendant and his dependents relative to alternative punishments;

(4) any restitution or reparation that the defendant has made or is obligated to make;

(5) any collateral consequences of conviction, including civil obligations arising from the defendant's conduct;

(6) whether the defendant previously has been fined for a similar offense; and

(7) any other pertinent equitable considerations.

(e) The amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive.

(f) If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine. In these circumstances, the court shall consider alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive. Although any additional sanction not proscribed by the guidelines is permissible, community service is the generally preferable alternative in such instances.

(g) If the defendant establishes that payment of the fine in a lump sum would have an unduly severe impact on him or his dependents, the court should establish an installment schedule for payment of the fine. The length of the installment schedule generally should not exceed twelve months, and shall not exceed the maximum term of probation authorized for the offense. The defendant should be required to pay a substantial installment at the time of sentencing. If the court authorizes a defendant sentenced to probation or supervised release to pay a fine on an installment schedule, the court shall require as a condition of probation or supervised release that the defendant pay the fine according to the schedule. The court also may impose a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit unless he is in compliance with the payment schedule.

(h) If the defendant knowingly fails to pay a delinquent fine, the court shall resentence him in accordance with 18 U.S.C. § 3614.

(i) Notwithstanding of the provisions of subsection (c) of this section, but subject to the provisions of subsection (f) herein, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered.

*Commentary*

*These guidelines permit a relatively wide range of fines. The Commission may promulgate more detailed guidelines for the imposition of fines after analyzing practice under these initial guidelines. Recent legislation provides for substantial increases in fines. 18 U.S.C. § 3571(b). With few restrictions, 42 U.S.C. § 10601(b), and (c) authorize fine payments up to $100 million to be deposited in the Crime Victims Fund in the United States Treasury. With vigorous enforcement by the Department of Justice and United States Probation Officers, higher fines will be effective punitive and deterrent sanctions.*

*Subsection 5E4.2(c)(2) provides for alternative calculations of the maximum fine as three times the gain or twice the loss. These alternatives are, of course, subject to the applicable statutory maximums. Different multiples were chosen to reflect the fact that most offenses result in losses to society that are larger than the provable gain to defendants. When only the gain can be estimated, it is likely that the court will be unable to require restitution. Hence, a higher multiple of the gain is needed to approximate a fine based on the loss involved. It is intended that these alternatives will not require precise calculation.*

*Subsection 5E4.2(c)(4) applies to statutes that contain special provisions permitting larger fines. These statutes include, among others: 21 U.S.C. §§ 841(b) and 960(b), which authorize fines up to $8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S.C. § 848(a), which authorizes fines up to $4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S.C. § 1956(a), which authorizes a fine equal to the greater of $500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; 18 U.S.C. § 1957(b)(2), which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction; 33 U.S.C. § 1319(c), which authorizes a fine of up to $50,000 per day for violations of the Water Pollution Control Act; 42 U.S.C. § 6928(d), which authorizes a fine of up to $50,000 per day for violations of the Resource Conservation Act; and 42 U.S.C. § 7413(c), which authorizes a fine of up to $25,000 per day for violations of the Clean Air Act.*

*The existence of income or assets that the defendant failed to disclose may justify a larger fine than that which otherwise would be warranted under §5E4.2. The court may base its conclusion as to this factor on information revealing significant unexplained expenditures by the defendant or unexplained possession of assets that do not comport with the defendant's reported income. If the court concludes that the defendant willfully misrepresented all or part of his income or assets, it may aggravate his sentence in accordance with Chapter Three, Part C (Obstruction).*

*If no term of imprisonment is imposed and the fine is not paid in full at the time of sentencing, it is recommended that the court sentence the defendant to a term of probation, and that payment of the fine be a condition of probation. If a fine is imposed in addition to a term of imprisonment, it is recommended that the court impose a term of supervised release following imprisonment as a means of enforcing payment of the fine.*

*Subsection 5E4.2(i) provides for an additional fine sufficient to pay the costs of any imprisonment, probation, or supervised release ordered, subject to the defendant's ability to pay as prescribed in subsection 5E4.2(f). In making a determination as to the amount of any fine to be imposed under this provision, the court may be guided by reports published by the Bureau of Prisons and the Administrative Office of the United States Courts concerning such costs.*

## §5E4.3. Special Assessments

A special assessment must be imposed on a convicted defendant in the amount prescribed by statute.

### *Commentary*

*The Victims of Crime Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires the courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation. Monies deposited in the fund are awarded to the states by the Attorney General for victim assistance and compensation programs.*

*The Act requires the court to impose assessments in the following amounts:*

*$25, if the defendant is an individual convicted of a misdemeanor;*
*$50, if the defendant is an individual convicted of a felony;*
*$100, if the defendant is an organization convicted of a misdemeanor; and*
*$200, if the defendant is an organization convicted of a felony. 18 U.S.C. § 3013.*

*The Act does not authorize the court to waive imposition of the assessment.*

**§5E4.4. Forfeiture**

Forfeiture is to be imposed upon a convicted defendant as provided by statute.

*Commentary*

*Forfeiture generally. Forfeiture provisions exist in various statutes. For example, 18 U.S.C. § 3554 requires a court imposing a sentence under 18 U.S.C. § 1962 (proscribing the use of the proceeds of racketeering activities in the operation of an enterprise engaged in interstate commerce) or Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (proscribing the manufacture and distribution of controlled substances) to order the forfeiture of property in accordance with 18 U.S.C. § 1963 and 21 U.S.C. § 853, respectively. Those provisions require the automatic forfeiture of certain property upon conviction of their respective underlying offenses.*

*Special Forfeiture of Collateral Profits of Crime. The provisions of 18 U.S.C. §§ 3681-3682 authorize a court, in certain circumstances, to order the forfeiture of a violent criminal's proceeds from the depiction of his crime in a book, movie, or other medium. Those sections authorize the deposit of proceeds in an escrow account in the Crime Victims Fund of the United States Treasury. The money is to remain available in the account for five years to satisfy claims brought against the defendant by the victim(s) of his offenses. At the end of the five-year period, the court may require that any proceeds remaining in the account be released from escrow and paid into the Fund. 18 U.S.C. § 3681(c)(2).*

## PART F - SENTENCING OPTIONS

18 U.S.C. § 3553
18 U.S.C. § 3555
18 U.S.C. § 3563
18 U.S.C. § 3583
18 U.S.C. § 3663
18 U.S.C. § 3742

### §5F5.1. Community Confinement

Community confinement may be imposed as a condition of probation or supervised release.

*Commentary*

*"Community confinement" means residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility, and community service, gainful employment, or treatment during non-residential hours.*

*Community confinement generally should not be imposed for a period in excess of six months. A longer period may be imposed to accomplish the objectives of a specific rehabilitative program, such as drug rehabilitation. The sentencing judge may impose other discretionary conditions of probation or supervised release appropriate to effectuate community confinement.*

### §5F5.2. Home Detention

Home detention may be imposed as a condition of probation or supervised release.

*Commentary*

*"Home detention" means a program of confinement and supervision that restricts the defendant to his place of residence continuously, or during specified hours, enforced by appropriate means of surveillance by the probation office. The judge may also impose other conditions of probation or supervised release appropriate to effectuate home detention. If the confinement is only during specified hours, the defendant shall engage exclusively in gainful employment, community service or treatment during the non-residential hours.*

*Home detention generally should not be imposed for a period in excess of six months. However, a longer term may be appropriate for disabled, elderly or extremely ill defendants who would otherwise be imprisoned.*

## §5F5.3. Community Service

(a) Community service may be ordered as a condition of probation or supervised release. If the defendant was convicted of a felony, the court must order one or more of the following sanctions: a fine, restitution, or community service. 18 U.S.C. § 3563(a)(2).

(b) With the consent of the victim of the offense, the court may order a defendant to perform services for the benefit of the victim in lieu of monetary restitution. 18 U.S.C. § 3663(b)(4).

*Commentary*

*Community service generally should not be imposed in excess of 400 hours. Longer terms of community service impose heavy administrative burdens relating to the selection of suitable placements and the monitoring of attendance.*

## §5F5.4. Order of Notice to Victims

The court may order the defendant to pay the cost of giving notice to victims pursuant to 18 U.S.C. § 3555. This cost may be set off against any fine imposed if the court determines that the imposition of both sanctions would be excessive.

*Commentary*

*In cases where a defendant has been convicted of an offense involving fraud or "other intentionally deceptive practices," the court may order the defendant to "give reasonable notice and explanation of the conviction, in such form as the court may approve" to the victims of the offense. 18 U.S.C. § 3555. The court may order the notice to be given by mail, by advertising in specific areas or through specific media, or by other appropriate means. In determining whether a notice is appropriate, the court must consider the generally applicable sentencing factors listed in 18 U.S.C. § 3553(a) and the cost involved in giving the notice as it relates to the loss caused by the crime. The court may not require the defendant to pay more than $20,000 to give notice.*

*If an order of notice to victims is under consideration, the court must notify the government and the defendant. 18 U.S.C. § 3553(d). Upon motion of either party, or on its own motion, the court must: (1) permit the parties to submit affidavits and memoranda relevant to the imposition of such an order; (2) provide counsel for both parties the opportunity to address orally, in open court, the appropriateness of such an order; and (3) if it issues such an order, state its reasons for doing so. The court may also order any additional procedures that will not unduly complicate or prolong the sentencing process.*

*The legislative history indicates that, although the sanction was designed to provide actual notice to victims, a court might properly limit notice to only those victims who could be most readily identified, if to do otherwise would unduly prolong or complicate the sentencing process.*

## §5F5.5. Occupational Restrictions

(a) The court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession, or limiting the terms on which the defendant may do so, only if it determines that:

(1) a reasonably direct relationship existed between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction;

(2) there is a risk that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted; and

(3) imposition of such a restriction is reasonably necessary to protect the public.

(b) If the court decides to impose a condition of probation or supervised release restricting a defendant's engagement in a specified occupation, business, or profession, the court shall impose the condition for the minimum time and to the minimum extent necessary to protect the public.

*Commentary*

*The Comprehensive Crime Control Act authorizes the imposition of occupational restrictions as a condition of probation, 18 U.S.C. § 3563(b)(6), or supervised release, 18 U.S.C. § 3583(d). Pursuant to section 3563(b)(6), a court may require a defendant to:*

> *[R]efrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances.*

*Section 3583(d) incorporates this section by reference. The Senate Judiciary Committee Report on the Comprehensive Crime Control Act explains that the provision was "intended to be used to preclude the continuation or repetition of illegal activities while avoiding a bar from employment that exceeds that needed to achieve that result." S. Rep. No. 225, 98th Cong., 1st Sess. 96-97. The condition "should only be used as reasonably necessary to protect the public. It should not be used as a means of punishing the convicted person." Id. at 96. Section 5A5.5 accordingly limits the use of the condition and, if imposed, limits its scope, to the minimum reasonably necessary to protect the public.*

*The appellate review provisions permit a defendant to challenge the imposition of a probation condition under 18 U.S.C. § 3563(b)(6) if "the sentence includes . . . a more limiting condition of probation or supervised release under section 3563(b)(6) . . . than the maximum established in the guideline." 18 U.S.C. § 3742(a)(3)(A). The government may appeal if the sentence includes a "less limiting" condition of probation than the minimum established in the guideline. 18 U.S.C. § 3742(b)(3)(A).*

*The Comprehensive Crime Control Act expressly authorizes promulgation of policy statements regarding the appropriate use of conditions of probation and supervised release. 28 U.S.C. § 994(a)(2)(B). The Act does not expressly grant the authority to issue guidelines on the subject. The appellate review provisions of the Act, however, authorize appeals of occupational restrictions that deviate from the minimum and maximum limitations "established in the guideline" (emphasis added).*

## PART G - IMPLEMENTING THE TOTAL SENTENCE OF IMPRISONMENT

### §5G1.1. Sentencing on a Single Count of Conviction

(a) If application of the guidelines results in a sentence above the maximum authorized by statute for the offense of conviction, the statutory maximum shall be the guideline sentence.

(b) If application of the guidelines results in a sentence below the minimum sentence required by statute, the statutory minimum shall be the guideline sentence.

(c) In any other case, the sentence imposed shall be the sentence as determined from application of the guidelines.

### §5G1.2. Sentencing on Multiple Counts of Conviction

(a) The sentence to be imposed on a count for which the statute mandates a consecutive sentence shall be determined and imposed independently.

(b) Except as otherwise required by law (see §5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.

(c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law.

### §5G1.3. Convictions on Counts Related to Unexpired Sentences

If at the time of sentencing, the defendant is already serving one or more unexpired sentences, then the sentences for the instant offense(s) shall run consecutively to such unexpired sentences, unless one or more of the instant offense(s) arose out of the same transactions or occurrences as the unexpired sentences. In the latter case, such instant sentences and the unexpired sentences shall run concurrently, except to the extent otherwise required by law.

*Commentary*

*§5G1.1. This section simply states that if the statute requires imposition of a sentence other than that required by the guidelines, the statute shall control.*

*§5G1.2. This section specifies the procedure for determining the sentence that will be formally imposed on each count in order to produce the total punishment that is appropriate under the circumstances of a multiple count case. When one of the counts carries a statutory maximum adequate to permit imposition of the total punishment, the total punishment can be imposed on that count and the punishment on all other counts (equal to the lesser of the total punishment or the applicable statutory maximum) can run concurrently. When no count carries an adequate statutory maximum, consecutive sentences are imposed but only to the extent necessary to produce the total punishment, as determined in accordance with §3D1.5.*

*Counts for which the statute mandates a consecutive sentence, such as counts charging the use of a firearm in a violent crime (18 U.S.C. § 924(c)) are treated separately. The sentence imposed on such a count is the sentence indicated for the offense of conviction, determined in accordance with Chapter Two. That sentence then runs consecutively to the sentences imposed on the other counts. See Commentary to §2K2.4 regarding determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved.*

*§5G1.3. This section reflects the statutory presumption that sentences imposed at different times ordinarily run consecutively. See 18 U.S.C. § 3584(a). This presumption does not apply when the new counts arise out of the same transaction or occurrence as a prior conviction.*

## PART H - SPECIFIC OFFENDER CHARACTERISTICS

### INTRODUCTION

Congress has directed the Commission to consider whether certain specific offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined relevant by the Commission. 28 U.S.C. § 994(d).

### §5H1.1. Age (Policy Statement)

Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. Age may be a reason to go below the guidelines when the offender is elderly and infirm and where a form of punishment (e.g., home confinement) might be equally efficient as and less costly than incarceration. If, independent of the consideration of age, a defendant is sentenced to probation or supervised release, age may be relevant in the determination of the length and conditions of supervision.

### §5H1.2. Education and Vocational Skills (Policy Statement)

Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the guidelines, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. See §3B1.3 (Abuse of Position of Trust or Use of Special Skill) Neither are education and vocational skills relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. If, independent of consideration of education and vocational skills, a defendant is sentenced to probation or supervised release, these considerations may be relevant in the determination of the length and conditions of supervision for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the type or length of community service.

### §5H1.3. Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the guidelines, except as provided in the general provisions in Chapter Five. Mental and emotional conditions, whether mitigating or aggravating, may be relevant in determining the length and conditions of probation or supervised release.

### §5H1.4. Physical Condition, Including Drug Dependence and Alcohol Abuse (Policy Statement)

Physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should

fall. However, an extraordinary physical impairment may be a reason to impose a sentence other than imprisonment.

Drug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program. If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program.

This provision would also apply in cases where the defendant received a sentence of probation. The substance abuse condition is strongly recommended and the length of probation should be adjusted accordingly. Failure to comply would normally result in revocation of probation.

**§5H1.5. Previous Employment Record (Policy Statement)**

Employment record is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. Employment record may be relevant in determining the type of sentence to be imposed when the guidelines provide for sentencing options. If, independent of the consideration of employment record, a defendant is sentenced to probation or supervised release, considerations of employment record may be relevant in the determination of the length and conditions of supervision.

**§5H1.6. Family Ties and Responsibilities, and Community Ties (Policy Statement)**

Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the guidelines. Family responsibilities that are complied with are relevant in determining whether to impose restitution and fines. Where the guidelines provide probation as an option, these factors may be relevant in this determination. If a defendant is sentenced to probation or supervised release, family ties and responsibilities that are met may be relevant in the determination of the length and conditions of supervision.

**§5H1.7. Role in the Offense (Policy Statement)**

A defendant's role in the offense is relevant in determining the appropriate sentence. See Chapter Three, Part B, (Role in the Offense).

**§5H1.8. Criminal History (Policy Statement)**

A defendant's criminal history is relevant in determining the appropriate sentence. See Chapter Four, (Criminal History and Criminal Livelihood).

§5H1.9. **Dependence upon Criminal Activity for a Livelihood (Policy Statement)**

The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence. See Chapter Four, Part B (Career Offenders and Criminal Livelihood).

§5H1.10. **Race, Sex, National Origin, Creed, Religion and Socio-Economic Status (Policy Statement)**

These factors are not relevant in the determination of a sentence.

## PART J - RELIEF FROM DISABILITY PERTAINING TO CERTAIN EMPLOYMENT

### §5J1.1. Relief From Disability Pertaining to Certain Employment (Policy Statement)

With regard to labor racketeering offenses, a part of the punishment imposed by 29 U.S.C. §§ 504 and 511 is the prohibition of convicted persons from service in labor unions, employer associations, employee benefit plans, and as labor relations consultants. Violations of these provisions are felony offenses. Persons convicted after October 12, 1984, may petition the sentencing court to reduce the statutory disability (thirteen years after sentence or imprisonment, whichever is later) to a lesser period (not less than three years after entry of judgment in the trial court). After November 1, 1987, petitions for exemption from the disability that were formerly administered by the United States Parole Commission will be transferred to the courts. Relief shall not be given in such cases to aid rehabilitation, but may be granted only following a clear demonstration by the convicted person that he has been rehabilitated since commission of the crime.

## PART K - DEPARTURES

### 1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES

**§5K1.1. Substantial Assistance to Authorities (Policy Statement)**

Upon motion of the government stating that the defendant has made a good faith effort to provide substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following conduct:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

**§5K1.2. Refusal to Assist** (Policy Statement)

A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.

*Commentary*

*Under circumstances set forth in 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum mandatory sentence.*

*A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.*

*The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.*

*Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.*

*The Commission considered and rejected the use of a defendant's refusal to assist authorities as an aggravating sentencing factor. Refusal to assist authorities based upon continued involvement in criminal activities and association with accomplices may be considered, however, in evaluating a defendant's sincerity in claiming acceptance of responsibility.*

* * * * *

2. GENERAL PROVISIONS: (POLICY STATEMENT)

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. Nonetheless, the present section seeks to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing judge. Similarly, the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines (e.g., as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where the applicable guidelines, specific offense characteristics, and adjustments do take into consideration a factor listed in this part, departure from the guideline is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the offense of conviction is bribery or obstruction of justice. When the offense of conviction is theft, however, and when the theft caused disruption of a governmental function, departure from the applicable guideline more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the offense of conviction is robbery because the robbery guideline includes a specific sentence adjustment based on the extent of any

injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in the Overview to Chapter Two.

§5K2.1. Death (Policy Statement)

If death resulted, the court may increase the sentence above the authorized guideline range.

Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

§5K2.2. Physical Injury (Policy Statement)

If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in §5K2.1.

§5K2.3. Extreme Psychological Injury (Policy Statement)

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the

sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

§5K2.4. Abduction or Unlawful Restraint (Policy Statement)

If a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate the escape from the scene of the crime, the court may increase the sentence above the authorized guideline range.

§5K2.5. Property Damage or Loss (Policy Statement)

If the offense caused property damage or loss not taken into account within the guidelines, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.

§5K2.6. Weapons and Dangerous Instrumentalities (Policy Statement)

If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.

§5K2.7. Disruption of Governmental Function (Policy Statement)

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

§5K2.8. Extreme Conduct (Policy Statement)

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

§5K2.9. Criminal Purpose (Policy Statement)

If the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct.

§5K2.10. Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

(a) the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;

(b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;

(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;

(d) the danger actually presented to the defendant by the victim; and

(e) any other relevant conduct by the victim that substantially contributed to the danger presented.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A.3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

§5K2.11. Lesser Harms (Policy Statement)

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example,

providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected.

In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.

**§5K2.12. Coercion and Duress (Policy Statement)**

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. The Commission considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in sentence.

**§5K2.13. Diminished Capacity (Policy Statement)**

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

**§5K2.14. Public Welfare (Policy Statement)**

If national security, public health, or safety was significantly endangered, the court may increase the sentence above the guideline range to reflect the nature and circumstances of the offense.

# CHAPTER SIX - SENTENCING PROCEDURES AND PLEA AGREEMENTS

## PART A - SENTENCING PROCEDURES

### INTRODUCTION

This Part addresses sentencing procedures that are applicable in all cases, including those in which guilty or nolo contendere pleas are entered with or without a plea agreement between the parties, and convictions based upon judicial findings or verdicts.

### §6A1.1. Presentence Report

(a) A probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record. Rule 32(c)(1), Fed.R.Crim.P. The defendant may not waive preparation of the presentence report.

(b) The presentence report shall be disclosed to the defendant, counsel for the defendant and the attorney for the government, to the maximum extent permitted by Rule 32(c), Fed.R.Crim.P. Disclosure shall be made at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant. 18 U.S.C. § 3552(d).

### §6A1.2. Position of Parties with Respect to Sentencing Factors

(a) After receipt of the presentence report and within a reasonable time before sentencing, the attorney for the government and the attorney for the defendant, or the pro se defendant, shall each file with the court a written statement of the sentencing factors to be relied upon at sentencing. The parties are not precluded from asserting additional sentencing factors if notice of the intention to rely upon another factor is filed with the court within a reasonable time before sentencing.

(b) Copies of all sentencing statements filed with the court shall be contemporaneously served upon all other parties and submitted to the probation officer assigned to the case.

(c) In lieu of the written statement required by §6A1.2(a), any party may file:

(1) a written statement adopting the findings of the presentence report;

(2) a written statement adopting such findings subject to certain exceptions or additions; or

(3) a written stipulation in which the parties agree to adopt the findings of the presentence report or to adopt such findings subject to certain exceptions or additions.

(d) A district court may, by local rule, identify categories of cases for which the parties are authorized to make oral statements at or before sentencing, in lieu of the written statement required by this section.

(e) Except to the extent that a party may be privileged not to disclose certain information, all statements filed with the court or made orally to the court pursuant to this section shall:

(1) set forth, directly or by reference to the presentence report, the relevant facts and circumstances of the actual offense conduct and offender characteristics; and

(2) not contain misleading facts.

§6A1.3. **Resolution of Disputed Factors**

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed.R.Crim.P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

*Commentary*

*Part A sets forth the procedures for establishing the facts upon which the sentence will be based. Reliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing.*

*§6A1.1. A thorough presentence investigation is essential in determining the facts relevant to sentencing. In order to ensure that the sentencing judge will have information sufficient to determine the appropriate sentence, Congress deleted provisions of Rule 32(c), Fed.R.Crim.P., which previously permitted the defendant to waive the presentence report. Rule 32(c)(1) permits the judge to dispense with a presentence report, but only after explaining, on the record, why sufficient information is already available.*

*§6A1.2. In order to focus the issues prior to sentencing, the parties are required to respond to the presentence report and to identify any issues in dispute. The potential complexity of factors important to the sentencing determination normally requires that the position of the parties be presented in writing. However, because courts differ greatly with*

*respect to their reliance on written plea agreements and with respect to the feasibility of written statements under guidelines, district courts are encouraged to consider the approach that is most appropriate under local conditions. The Commission intends to reexamine this issue in light of experience under the guidelines.*

*§6A1.3. In current practice, factors relevant to sentencing are often determined in an informal fashion. The informality is to some extent explained by the fact that particular offense and offender characteristics rarely have a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.*

*In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F.Supp. 751 (D.C. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." United States v. Fatico, 579 F.2d at 713. Unreliable allegations shall not be considered. United States v. Weston, 448 F.2d 626 (9th Cir. 1971).*

*If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.*

## PART B - PLEA AGREEMENTS

### INTRODUCTION

Policy statements governing the acceptance of plea agreements under Rule 11(e)(1), Federal Rules of Criminal Procedure, are intended to ensure that plea negotiation practices:

(1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and

(2) do not perpetuate unwarranted sentencing disparity.

**§6B1.1. Plea Agreement Procedure (Policy Statement)**

(a) If the parties have reached a plea agreement, the court shall, on the record, require disclosure of the agreement in open court or, on a showing of good cause, in camera. Rule 11(e)(2), Fed.R.Crim.P.

(b) If the plea agreement includes a nonbinding recommendation pursuant to Rule 11(e)(1)(B), the court shall advise the defendant that the court is not bound by the sentencing recommendation, and that the defendant has no right to withdraw the defendant's guilty plea if the court decides not to accept the sentencing recommendation set forth in the plea agreement.

(c) The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under §6A1.1.

**§6B1.2. Standards for Acceptance of Plea Agreements (Policy Statement)**

(a) In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges [Rule 11(e)(1)(A)], the court may accept the agreement if the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing.

(b) In the case of a plea agreement that includes a nonbinding recommendation [Rule 11(e)(1)(B)], the court may accept the recommendation if the court is satisfied either that:

(1) the recommended sentence is within the applicable guideline range; or

(2) the recommended sentence departs from the applicable guideline range for justifiable reasons.

(c) In the case of a plea agreement that includes a specific sentence [Rule 11(e)(1)(C)], the court may accept the agreement if the court is satisfied either that:

(1) the agreed sentence is within the applicable guideline range; or

(2) the agreed sentence departs from the applicable guideline range for justifiable reasons.

§6B1.3. **Procedure Upon Rejection of a Plea Agreement (Policy Statement)**

If a plea agreement pursuant to Rule 11(e)(1)(A) or Rule 11(e)(1)(C) is rejected, the court shall afford the defendant an opportunity to withdraw the defendant's guilty plea. Rule 11(e)(4), Fed.R.Crim.P.

§6B1.4. **Stipulations (Policy Statement)**

(a) A plea agreement may be accompanied by a written stipulation of facts relevant to sentencing. Except to the extent that a party may be privileged not to disclose certain information, stipulations shall:

(1) set forth the relevant facts and circumstances of the actual offense conduct and offender characteristics;

(2) not contain misleading facts; and

(3) set forth with meaningful specificity the reasons why the sentencing range resulting from the proposed agreement is appropriate.

(b) To the extent that the parties disagree about any facts relevant to sentencing, the stipulation shall identify the facts that are in dispute.

(c) A district court may, by local rule, identify categories of cases for which the parties are authorized to make the required stipulation orally, on the record, at the time the plea agreement is offered.

(d) The court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing.

*Commentary*

*These policy statements are a first step toward implementing 28 U.S.C. § 994(a)(2)(E). Congress indicated that it expects judges "to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S. REP. 98-225, 98th Cong., 1st Sess. 63,167 (1983). In pursuit of this goal, the Commission shall study plea agreement practice under the guidelines and ultimately develop standards for judges to use in determining whether to accept plea agreements. Because of the difficulty in anticipating problems in this area, and because the sentencing guidelines are themselves to some degree*

*experimental, substantive restrictions on judicial discretion would be premature at this stage of the Commission's work.*

*The present policy statements move in the desired direction in two ways. First, the policy statements make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge. This is a reaffirmation of current practice. Second, the policy statements ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record. Explanations will be carefully analyzed by the Commission and will pave the way for more detailed policy statements presenting substantive criteria to achieve consistency in this aspect of the sentencing process.*

*§6B1.1. This provision parallels the procedural requirements of Rule 11(e), Fed.R.Crim.P. Plea agreements must be fully disclosed and a defendant whose plea agreement includes a nonbinding recommendation must be advised that the court's refusal to accept the sentencing recommendation will not entitle the defendant to withdraw the plea.*

*Section 6B1.1(c) deals with the timing of the court's decision whether to accept the plea agreement. Rule 11(e)(2) gives the court discretion to accept the plea agreement immediately or defer acceptance pending consideration of the presentence report. Prior to the guidelines, an immediate decision was permissible because, under Rule 32(c), Fed.R.Crim.P., the defendant could waive preparation of the presentence report. Section 6B1.1(c) reflects the changes in practice required by §6A1.1 and amended Rule 32(c)(1). Since a presentence report normally will be prepared, the court must defer acceptance of the plea agreement until the court has had an opportunity to consider the presentence report.*

*§6B1.2. This section makes clear that a court may accept a plea agreement provided that the judge complies with the obligations imposed by Rule 11(e), Fed.R.Crim.P. A judge may accept an agreement calling for dismissal of charges or an agreement not to pursue potential charges if the remaining charges reflect the seriousness of the actual offense behavior. This requirement does not authorize judges to intrude upon the charging discretion of the prosecutor. If the government's motion to dismiss charges or statement that potential charges will not be pursued is not contingent on the disposition of the remaining charges, the judge should defer to the government's position except under extraordinary circumstances. Rule 48(a), Fed.R.Crim.P. However, when the dismissal of charges or agreement not to pursue potential charges is contingent on acceptance of a plea agreement, the court's authority to adjudicate guilt and impose sentence is implicated, and the court is to determine whether or not dismissal of charges will undermine the sentencing guidelines.*

*Similarly, the court will accept a recommended sentence or a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that the contemplated sentence is within the guidelines or, if not, that the recommended sentence or agreement departs from the applicable guideline range for justifiable reasons and does not undermine the basic purposes of sentencing.*

*§6B1.3. This provision implements the requirements of Rule 11(e)(4). It assures the defendant an opportunity to withdraw the defendant's plea when the court has rejected a plea agreement that would require dismissal of charges or imposition of a specific sentence.*

*§6B1.4. This provision requires that when a plea agreement includes a stipulation of fact, the stipulation must fully and accurately disclose all factors relevant to the determination of sentence. This provision does not obligate the parties to reach agreement on issues that remain in dispute or to present the court with an appearance of agreement in areas where*

*agreement does not exist. Rather, the overriding principle is full disclosure of the circumstances of the actual offense and the agreement of the parties. The stipulation should identify all areas of agreement, disagreement and uncertainty that may be relevant to the determination of sentence. Similarly, it is not appropriate for the parties to stipulate to misleading or non-existent facts, even when both parties are willing to assume the existence of such "facts" for purposes of the litigation. Rather, the parties should fully disclose the actual facts and then explain to the court the reasons why the disposition of the case should differ from that which such facts ordinarily would require under the guidelines.*

*Because of the importance of the stipulations and the potential complexity of the factors that can affect the determination of sentences, stipulations ordinarily should be in writing. However, exceptions to this practice may be allowed by local rule. The Commission intends to give particular attention to this aspect of plea agreement procedure as experience under the guidelines develops. See Commentary to §6A1.2.*

*Section 6B1.4(d) makes clear that the court is not obliged to accept the stipulation of the parties. Even though stipulations are expected to be accurate and complete, the court cannot rely exclusively upon stipulations in ascertaining the factors relevant to determination of the sentence. Rather, in determining the factual basis for the sentence, the court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information.*

## CHAPTER SEVEN - VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

§7A1.1. Reporting of Violations of Probation and Supervised Release (Policy Statement)

(a) The Probation Officer shall promptly report to the court any alleged violation of a condition of probation or supervised release that constitutes new criminal conduct, other than conduct that would constitute a petty offense.

(b) The Probation Officer shall promptly report to the court any other alleged violation of a condition of probation or supervised release, unless the officer determines: (1) that such violation is minor, not part of a continuing pattern of violation, and not indicative of a serious adjustment problem; and (2) that non-reporting will not present an undue risk to the public or be inconsistent with any directive of the court relative to the reporting of violations.

§7A1.2. Revocation of Probation (Policy Statement)

(a) Upon a finding of a violation of probation involving new criminal conduct, other than criminal conduct constituting a petty offense, the court shall revoke probation.

(b) Upon a finding of a violation of probation involving conduct other than conduct under subsection (a), the court may: (1) revoke probation; or (2) extend the term of probation and/or modify the conditions of probation.

§7A1.3. Revocation of Supervised Release (Policy Statement)

(a) Upon a finding of a violation of supervised release involving new criminal conduct, other than criminal conduct constituting a petty offense, the court shall revoke supervised release.

(b) Upon a finding of a violation of supervised release involving conduct other than conduct under subsection (a), the court may: (1) revoke supervised release; or (2) extend the term of supervised release and/or modify the conditions of supervised release.

§7A1.4. No Credit for Time Under Supervision (Policy Statement)

(a) Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.

(b) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.

*Commentary*

*§7A1.1. This policy statement addresses the reporting of violations of probation and supervised release. It is the Commission's intent that significant violations be promptly reported to the court. At the same time, the Commission realizes that it would neither be practical nor desirable to require such reporting for every minor violation.*

*§§7A1.2 and 7A1.3. These policy statements express a presumption that probation and supervised release are to be revoked in the case of new criminal conduct other than a petty offense. For lesser violations, the policy statements provide that the court may revoke probation or supervised release; or may extend the term of supervision or modify the conditions of supervision.*

*§7A1.4. This policy statement provides that time spent on probation or supervised release is not to be credited in the determination of any term of imprisonment imposed upon revocation.*

## APPENDIX A - STATUTORY INDEX

### INTRODUCTION

This index specifies the guideline section or sections ordinarily applicable to the statute of conviction. If more than one guideline section is referenced for the particular statute, select the guideline most appropriate for the conduct of which the defendant was convicted. If, in an atypical case, the guideline section indicated for the statute of conviction is inappropriate because of the particular conduct involved, the court is to apply the guideline section which is most applicable to the conduct for which the defendant was convicted. (See §1B1.2.)

If the offense involved a conspiracy or an attempt, refer to §2X1.1 as well as the guideline for the substantive offense.

For those offenses not listed in this index, the most analogous guideline is to be applied. (See §2X5.1.)

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| 26 U.S.C. § 5762(a)(3) | 2T2.1 |
| 26 U.S.C. § 5861(a) | 2K2.3 |
| 26 U.S.C. § 5861(b)-(*l*) | 2K2.2 |

| Statute | Guideline |
|---|---|
| 26 U.S.C. § 5871 | 2K2.2, 2K2.3 |
| 26 U.S.C. § 7201 | 2T1.1 |
| 26 U.S.C. § 7202 | 2T1.6 |
| 26 U.S.C. § 7203 | 2T1.2 |
| 26 U.S.C. § 7204 | 2T1.8 |
| 26 U.S.C. § 7205 | 2T1.8 |
| 26 U.S.C. § 7206(1),(3),(4),(5) | 2T1.3 |
| 26 U.S.C. § 7206(2) | 2T1.4 |
| 26 U.S.C. § 7207 | 2T1.5 |
| 26 U.S.C. § 7210 | 2J1.1 |
| 26 U.S.C. § 7211 | 2T1.3 |
| 26 U.S.C. § 7214(a)(1) | 2C1.1 |
| 26 U.S.C. § 7214(a)(2) | 2C1.1 |
| 26 U.S.C. § 7214(a)(4)-(8) | 2F1.1 |
| 26 U.S.C. § 7214(a)(9) | 2C1.1 |
| 26 U.S.C. § 7215 | 2T1.7 |
| 26 U.S.C. § 7269 | 2T1.2 |
| 26 U.S.C. § 7512(b) | 2T1.7 |
| 26 U.S.C. § 9012(e) | 2B4.1 |
| 26 U.S.C. § 9042(d) | 2B4.1 |
| 28 U.S.C. § 1826(c) | 2P1.1 |
| 28 U.S.C. § 2902(e) | 2P1.1 |
| 29 U.S.C. § 186 | 2E5.6 |
| 29 U.S.C. § 431 | 2E5.5 |
| 29 U.S.C. § 432 | 2E5.5 |
| 29 U.S.C. § 433 | 2E5.5 |

| Statute | Guideline |
|---|---|
| 29 U.S.C. § 439 | 2E5.5 |
| 29 U.S.C. § 461 | 2E5.5 |
| 29 U.S.C. § 501(c) | 2E5.4 |
| 29 U.S.C. § 1141 | 2B3.2, 2F1.1 |
| 31 U.S.C. § 5313 | 2S1.3 |
| 31 U.S.C. § 5314 | 2S1.3 |
| 31 U.S.C. § 5316(a) | 2S1.3 |
| 31 U.S.C. § 5322 | 2S1.3 |
| 31 U.S.C. § 5324 | 2S1.3 |
| 33 U.S.C. § 403 | 2Q1.3 |
| 33 U.S.C. § 406 | 2Q1.3 |
| 33 U.S.C. § 407 | 2Q1.3 |
| 33 U.S.C. § 411 | 2Q1.3 |
| 33 U.S.C. § 506 | 2J1.1 |
| 33 U.S.C. § 1227(b) | 2J1.1 |
| 33 U.S.C. § 1232(b)(2) | 2A2.2, 2A2.3 |
| 33 U.S.C. § 1319 | 2Q1.1, 2Q1.2, 2Q1.3 |
| 33 U.S.C. § 1321 | 2Q1.2, 2Q1.3 |
| 33 U.S.C. § 1342 | 2Q1.2, 2Q1.3 |
| 33 U.S.C. § 1415(b) | 2Q1.3 |
| 33 U.S.C. § 1517 | 2Q1.2, 2Q1.3 |
| 33 U.S.C. § 1907 | 2Q1.3 |
| 33 U.S.C. § 1908 | 2Q1.3 |
| 38 U.S.C. § 787 | 2F1.1 |
| 38 U.S.C. § 3501(a) | 2B1.1 |
| 40 U.S.C. § 193e | 2B1.3 |

| Statute | Guideline |
|---|---|
| 41 U.S.C. § 51 | 2B4.1 |
| 41 U.S.C. § 53 | 2B4.1 |
| 41 U.S.C. § 54 | 2B4.1 |
| 42 U.S.C. § 261(a) | 2D1.1 |
| 42 U.S.C. § 262 | 2N2.1 |
| 42 U.S.C. § 300h-2 | 2Q1.2 |
| 42 U.S.C. § 408 | 2F1.1 |
| 42 U.S.C. § 1383(d)(2) | 2F1.1 |
| 42 U.S.C. § 1383a(a) | 2F1.1 |
| 42 U.S.C. § 1383a(b) | 2F1.1 |
| 42 U.S.C. § 1395nn(a) | 2F1.1 |
| 42 U.S.C. § 1395nn(b)(1) | 2B4.1 |
| 42 U.S.C. § 1395nn(b)(2) | 2B4.1 |
| 42 U.S.C. § 1396h(a) | 2F1.1 |
| 42 U.S.C. § 1396h(b)(1) | 2B4.1 |
| 42 U.S.C. § 1396h(b)(2) | 2B4.1 |
| 42 U.S.C. § 1713 | 2F1.1 |
| 42 U.S.C. § 1760(g) | 2B1.1, 2F1.1 |
| 42 U.S.C. § 1761(o)(1) | 2F1.1 |
| 42 U.S.C. § 1761(o)(2) | 2B1.1, 2F1.1 |
| 42 U.S.C. § 1973i(c) | 2H2.1 |
| 42 U.S.C. § 1973i(d) | 2H2.1 |
| 42 U.S.C. § 1973i(e) | 2H2.1 |
| 42 U.S.C. § 1973j(a) | 2H2.1 |
| 42 U.S.C. § 1973j(b) | 2H2.1 |
| 42 U.S.C. § 1973aa | 2H2.1 |

| Statute | Guideline |
|---|---|
| 42 U.S.C. § 1973aa-1 | 2H2.1 |
| 42 U.S.C. § 1973aa-1a | 2H2.1 |
| 42 U.S.C. § 1973aa-3 | 2H2.1 |
| 42 U.S.C. § 1973bb | 2H2.1 |
| 42 U.S.C. § 1995 | 2J1.1 |
| 42 U.S.C. § 2000e13 | 2A1.1, 2A1.2, 2A2.2, 2A2.3 |
| 42 U.S.C. § 2000h | 2J1.1 |
| 42 U.S.C. § 2077 | 2M6.1 |
| 42 U.S.C. § 2122 | 2M6.1 |
| 42 U.S.C. § 2131 | 2M6.1 |
| 42 U.S.C. § 2272 | 2M6.1 |
| 42 U.S.C. § 2273 | 2M6.2 |
| 42 U.S.C. § 2274(a),(b) | 2M3.1 |
| 42 U.S.C. § 2275 | 2M3.1 |
| 42 U.S.C. § 2276 | 2M3.5 |
| 42 U.S.C. § 2283(a) | 2A1.1, 2A1.2, 2A1.3, 2A1.4 |
| 42 U.S.C. § 2283(b) | 2A2.2, 2A2.3 |
| 42 U.S.C. § 2284(a) | 2M2.1, 2M2.3 |
| 42 U.S.C. § 3220(a) | 2F1.1 |
| 42 U.S.C. § 3220(b) | 2B1.1, 2F1.1 |
| 42 U.S.C. § 3426 | 2F1.1 |
| 42 U.S.C. § 3611(f) | 2J1.1 |
| 42 U.S.C. § 3631 | 2A2.2, 2A2.3, 2H1.3, 2H1.5 |
| 42 U.S.C. § 3791 | 2B1.1, 2F1.1 |
| 42 U.S.C. § 3792 | 2F1.1 |
| 42 U.S.C. § 3795 | 2B1.1, 2F1.1 |

| Statute | Guideline |
|---|---|
| 42 U.S.C. § 4012 | 2Q1.3 |
| 42 U.S.C. § 4912 | 2Q1.3 |
| 42 U.S.C. § 5157(a) | 2F1.1 |
| 42 U.S.C. § 6928(d) | 2Q1.2 |
| 42 U.S.C. § 6928(e) | 2Q1.1 |
| 42 U.S.C. § 7413 | 2Q1.2, 2Q1.3 |
| 42 U.S.C. § 9603(b) | 2Q1.2 |
| 42 U.S.C. § 9603(c) | 2Q1.2 |
| 42 U.S.C. § 9603(d) | 2Q1.2 |
| 43 U.S.C. § 1350 | 2Q1.2 |
| 43 U.S.C. § 1816(a) | 2Q1.2 |
| 43 U.S.C. § 1822(b) | 2Q1.2 |
| 46 U.S.C. § 1276 | 2F1.1 |
| 46 U.S.C. App. § 1903 | 2D1.1 |
| 47 U.S.C. § 223 | 2G3.2 |
| 47 U.S.C. § 605 | 2H3.1 |
| 49 U.S.C. § 121 | 2F1.1 |
| 49 U.S.C. § 1472(i)(1) | 2A5.1 |
| 49 U.S.C. § 1472(j) | 2A5.2 |
| 49 U.S.C. § 1472(*l*) | 2K1.5 |
| 49 U.S.C. § 1472(n)(1) | 2A5.1 |
| 49 U.S.C. § 1809(b) | 2K3.1 |
| 49 U.S.C. § 11904 | 2B4.1 |
| 49 U.S.C. § 11907(a) | 2B4.1 |
| 49 U.S.C. § 11907(b) | 2B4.1 |
| 50 U.S.C. § 421 | 2M3.9 |

| Statute | Guideline |
|---|---|
| 50 U.S.C. § 462 | 2M4.1 |
| 50 U.S.C. § 783(b) | 2M3.7 |
| 50 U.S.C. § 783(c) | 2M3.8 |
| 50 U.S.C. § 2410 | 2M5.1 |
| 50 U.S.C. App. § 462 | 2M4.1 |
| 50 U.S.C. App. § 2410 | 2M5.1 |

## APPENDIX B:

## AUTHORIZING LEGISLATION AND RELATED SENTENCING PROVISIONS

The legal authority for the United States Sentencing Commission ("Commission") and the related authority and procedures for sentencing in federal courts have their legislative foundation in the Sentencing Reform Act of 1984 (Chapter II of the Comprehensive Crime Control Act of 1984, Public Law 98-473, October 12, 1984.)

The statutory authority of the Commission is codified in Chapter 58 of Title 28, United States Code, effective October 12, 1984. The related statutory authority for sentencing is codified in the new Chapters 227 and 229 of Title 18, United States Code, effective November 1, 1987. The Sentencing Reform Act of 1984 also added a new section 3742 at the end of Chapter 235 of Title 18, pertaining to appellate review of sentences.

These provisions subsequently were amended by Public Law 99-22 (April 15, 1985); Public Law 99-217, "The Sentencing Reform Amendments Act of 1985" (December 26, 1985); Public Law 99-363, "The Sentencing Guideline Adjustment Act of 1986" (July 11, 1986); Public Law 99-570, "The Anti-Drug Abuse Act of 1986" (October 27, 1986); and Public Law 99-646, "The Criminal Law and Procedure Technical Amendments of 1986" (November 10, 1986).

Solely for the purpose of providing a reference to the law as it currently stands, these statutory provisions, as amended, are presented in this appendix. For the sake of brevity, historical notes and certain miscellaneous provisions are omitted. The Commission makes no representations concerning the accuracy of these provisions and recommends that authoritative sources be consulted where legal reliance is necessary.

# TITLE 18--CRIMES AND CRIMINAL PROCEDURE
## CHAPTER 227
## Subchapter A--General Provisions

### § 3551. Authorized sentences

(a) **In general.**--Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) **Individuals.**--An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to--

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D. A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

(c) **Organizations.**--An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to--

(1) a term of probation as authorized by subchapter B; or

(2) a fine as authorized by subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

### § 3552. Presentence reports

(a) **Presentence investigation and report by probation officer.**--A United States probation officer shall make a presentence investigation of a defendant that is required pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, and shall, before the imposition of sentence, report the results of the investigation to the court.

(b) **Presentence study and report by bureau of prisons.**--If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a misdemeanor or felony, it may order a study of the defendant. The study shall be conducted in the local community by qualified consultants unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau of Prisons or there are no adequate professional resources available in the local community to perform the study. The period of the study shall be no more than sixty days. The order shall specify the additional information that the court needs before determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for the offense committed. The study shall inquire into such matters as are specified by the court and any other matters that the Bureau of Prisons or the professional consultants believe are pertinent to the factors set forth in section 3553(a). The period of the study may, in the discretion of the court, be extended for an additional period of not more than sixty days. By the expiration of the period of the study, or by the expiration of any extension granted by the court, the United States marshal shall, if the defendant is in custody, return the defendant to the court for final sentencing. The Bureau of Prisons or the professional consultants shall provide the court with a written report of the pertinent results of the study and make to the court whatever recommendations the Bureau or the consultants believe will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau or the consultants concerning the guidelines and policy statements, promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994(a), that they believe are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under this chapter.

(c) **Presentence examination and report by psychiatric or psychological examiners.**--If the court, before or after its receipt of a report specified in subsection (a) or (b) desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, the court may order the same psychiatric or psychological examination and report thereon as may be ordered under Section 4244(b) of this title.

(d) **Disclosure of presentence reports.**--The court shall assure that a report filed pursuant to this section is disclosed to the defendant,

the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant.

## § 3553. Imposition of a sentence

**(a) Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

**(b) Application of guidelines in imposing a sentence.**--The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described. In the absence of applicable sentencing guidelines, the court shall impose an appropriate sentence, having due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, the applicable policy statements of the Sentencing Commission and the purposes of sentencing set forth in subsection (a)(2).

**(c) Statement of reasons for imposing a sentence.**--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described. If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The clerk of the court shall provide a transcription of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

**(d) Presentence procedure for an order of notice.**--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order. Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

**(e) Limited authority to impose a sentence below a statutory minimum.** --Upon motion of the government, the court shall have the authority to impose a sentence below a level established by the statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to Section 994 of Title 28, United States Code.

## § 3554. Order of criminal forfeiture

The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

## § 3555. Order of notice to victims

The court, in imposing a sentence on a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices, may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant give reasonable notice and explanation of the conviction, in such form as the court may approve, to the victims of the offense. The notice may be ordered to be given by mail, by advertising in designated areas or through designated media, or by other appropriate means. In determining whether to require the defendant to give such notice, the court shall consider the factors set forth in section 3553(a) to the extent that they are applicable and shall consider the cost involved in giving the notice as it relates to the loss caused by the offense, and shall not require the defendant to bear the costs of notice in excess of $20,000.

## § 3556. Order of restitution

The court, in imposing a sentence on a defendant who has been found guilty of an offense, may order restitution in accordance with the provisions of sections 3663 and 3664.

## § 3557. Review of a sentence

The review of a sentence imposed pursuant to section 3551 is governed by the provisions of section 3742.

## § 3558. Implementation of a sentence

The implementation of a sentence imposed pursuant to section 3551 is governed by the provisions of chapter 229.

## § 3559. Sentencing classification of offenses

(a) Classification.--An offense that is not specifically classified by a letter grade in the section defining it, is classified--

(1) if the maximum term of imprisonment authorized is--

(A) life imprisonment, or if the maximum penalty is death, as a Class A felony;

(B) twenty years or more, as a Class B felony;

(C) less than twenty years but ten or more years, as a Class C felony;

(D) less than ten years but five or more years, as a Class D felony;

(E) less than five years but more than one year, as a Class E felony;

(F) one year or less but more than six months, as a Class A misdemeanor;

(G) six months or less but more than thirty days, as a Class B misdemeanor;

(H) thirty days or less but more than five days, as a Class C misdemeanor; or

(I) five days or less, or if no imprisonment is authorized, as an infraction.

(b) Effect of classification.--An offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation except that:

(1) the maximum fine that may be imposed is the fine authorized by the statute describing the offense, or by this chapter, whichever is the greater; and

(2) the maximum term of imprisonment is the term authorized by the statute describing the offense.

## SUBCHAPTER B --PROBATION

### § 3561. Sentence of probation

**(a) In General.**--A defendant who has been found guilty of an offense may be sentenced to a term of probation unless--

(1) the offense is a Class A or Class B felony;

(2) the offense is an offense for which probation has been expressly precluded; or

(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense.

**(b) Authorized terms.**--The authorized terms of probation are--

(1) for a felony, not less than one nor more than five years;

(2) for a misdemeanor, not more than five years; and

(3) for an infraction, not more than one year.

### § 3562. Imposition of a sentence of probation

**(a) Factors to be considered in imposing a term of probation.**--The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.

**(b) Effect of finality of judgment.**--Notwithstanding the fact that a sentence of probation can subsequently be--

(1) modified or revoked pursuant to the provisions of section 3564 or 3565;

(2) corrected pursuant to the provisions of rule 35 and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742; a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

### § 3563. Conditions of probation

**(a) Mandatory conditions.**--The court shall provide, as an explicit condition of a sentence of probation--

(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation; and

(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13). If the court has imposed and ordered execution of a fine and placed the defendant on probation, payment of the fine or adherence to the court-established installment schedule shall be a condition of the probation.

**(b) Discretionary conditions.**--The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant--

(1) support his dependents and meet other family responsibilities;

(2) pay a fine imposed pursuant to the provisions of subchapter C;

(3) make restitution to a victim of the offense pursuant to the provisions of section 3556;

(4) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555;

(5) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;

(6) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;

(7) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;

(8) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(9) refrain from possessing a firearm, destructive device, or other dangerous weapon;
(10) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;
(11) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense during the first year of the term of probation;
(12) reside at, or participate in the program of, a community corrections facility for all or part of the term of probation;
(13) work in community service as directed by the court;
(14) reside in a specified place or area, or refrain from residing in a specified place or area;
(15) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;
(16) report to a probation officer as directed by the court or the probation officer;
(17) permit a probation officer to visit him at his home or elsewhere as specified by the court;
(18) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;
(19) notify the probation officer promptly if arrested or questioned by a law enforcement officer; or
(20) satisfy such other conditions as the court may impose.

**(c) Modifications of conditions.**--The court may modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the revocation or modification of probation.

**(d) Written statement of conditions.**--The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

## § 3564. Running of a term of probation

**(a) Commencement.**--A term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court.

**(b) Concurrence with other sentences.**--Multiple terms of probation, whether imposed at the same time or at different times, run concurrently with each other. A term of probation runs concurrently with any Federal, State, or local term of probation, supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation. A term of probation does not run while the defendant is imprisoned in connection with a conviction for a federal, state, or local crime unless the imprisonment is for a period of less than thirty consecutive days.

**(c) Early termination.**--The court, after considering the factors set forth in section 3553(a) to the extent that they are applicable, may terminate a term of probation previously ordered and discharge the defendant at any time in the case of a misdemeanor or an infraction or at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.

**(d) Extension.**--The court may, after a hearing, extend a term of probation, if less than the maximum authorized term was previously imposed, at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the term of probation.

**(e) Subject to revocation.**--A sentence of probation remains conditional and subject to revocation until its expiration or termination.

## § 3565. Revocation of probation

**(a) Continuation or revocation.**--If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable--
(1) continue him on probation, with or without extending the term of modifying or enlarging the conditions; or
(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

**(b) Delayed revocation.**--The power of the court to revoke a sentence of probation for violation of a condition of probation, and to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

## § 3566. Implementation of a sentence of probation

The implementation of a sentence of probation is governed by the provisions of subchapter A of chapter 229.

## § 3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress. If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term.

# SUBCHAPTER C --FINE

## § 3571. Sentence of fine

**(a) In general.**--A defendant who has been found guilty of an offense may be sentenced to pay a fine.

**(b) Authorized fines.**--Except as otherwise provided in this chapter, the authorized fines are--

(1) if the defendant is an individual--

(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $250,000;

(B) for any other misdemeanor, not more than $25,000; and

(C) for an infraction, not more than $1,000; and

(2) if the defendant is an organization--

(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $500,000;

(B) for any other misdemeanor, not more than $100,000; and

(C) for an infraction, not more than $10,000.

## § 3572. Imposition of a sentence of fine

**(a) Factors to be considered in imposing fine.**--The court, in determining whether to impose a fine, and, if a fine is to be imposed, in determining the amount of the fine, the time for payment, and the method of payment, shall consider--

(1) the factors set forth in section 3553(a), to the extent they are applicable, including, with regard to the characteristics of the defendant under section 3553(a), the ability of the defendant to pay the fine in view of the defendant's income, earning capacity, and financial resources and, if the defendant is an organization, the size of the organization;

(2) the nature of the burden that payment of the fine will impose on the defendant, and on any person who is financially dependent upon the defendant, relative to the burden which alternative punishments would impose;

(3) any restitution or reparation made by the defendant to the victim of the offense, and any obligation imposed upon the defendant to make such restitution or reparation to the victim of the offense;

(4) if the defendant is an organization, any measure taken by the organization to discipline its employees or agents responsible for the offense or to insure against a recurrence of such an offense; and

(5) any other pertinent equitable consideration.

**(b) Limit on aggregate of multiple fines.**--Except as otherwise expressly provided, the aggregate of fines that a court may impose on a defendant at the same time for different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage, is twice the amount imposable for the most serious offense.

**(c) Effect of finality of judgment.**--Notwithstanding the fact that a sentence to pay a fine can subsequently be--

(1) modified or remitted pursuant to the provisions of section 3573;

(2) corrected pursuant to the provisions of rule 35 and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742; a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

**(d) Time and method of payment.**--Payment of a fine is due immediately unless the court, at the time of sentencing--

(1) requires payment by a date certain; or

(2) establishes an installment schedule, the specific terms of which shall be fixed by the court.

**(e) Alternative sentence precluded.**--At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be served in the event that the fine is not paid.

**(f) Individual responsibility for payment.**--If a fine is imposed on an organization, it is the duty of each individual authorized to make disbursement of the assets of the organization to pay the fine from assets of the organization. If a fine is imposed on an agent or shareholder of an organization, the fine shall not be paid, directly or indirectly, out of the assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

**(g) Responsibility to provide current address.**--At the time of imposition of the fine, the court shall order the person fined to provide the Attorney General with a current mailing address for the entire period that any part of the fine remains unpaid. Failure to provide the Attorney General with a current address or a change in address shall be punishable as a contempt of court.

**(h) Stay of fine pending appeals.**--Unless exceptional circumstances exist, if a sentence to pay a fine is stayed pending appeal, the court granting the stay shall include in such stay--

(1) a requirement that the defendant, pending appeal, to deposit the entire fine amount, or the amount due under an installment schedule, during the pendency of an appeal, in an escrow account in the registry of the district court, or to give bond for the payment thereof; or

(2) an order restraining the defendant from transferring or dissipating assets found to be sufficient, if sold, to meet the defendant's fine obligation.

**(i) Delinquent fine.**--A fine is delinquent if any portion of such fine is not paid within thirty days of when it is due, including any fines to be paid pursuant to an installment schedule.

**(j) Default.**--A fine is in default if any portion of such fine is more than ninety days delinquent. When a criminal fine is in default, the entire amount is due with thirty days of notification of the default, notwithstanding any installment schedule.

## § 3573. Modification or remission of fine

**(a) Petition for modification or remission.**--A defendant who has been sentenced to pay a fine, and who--

(1) can show a good faith effort to comply with the terms of the sentence and concerning whom the circumstances no longer exist that warranted the imposition of the fine in the amount imposed or payment by the installment schedule, may at any time petition the court for--

(A) an extension of the installment schedule, not to exceed two years except in case of incarceration or special circumstances; or

(B) a remission of all or part of the unpaid portion including interest and penalties; or

(2) has voluntarily made restitution or reparation to the victim of the offense, may at any time petition the court for a remission of the unpaid portion of the fine in an amount not exceeding the amount of such restitution or reparation. Any petition filed pursuant to this subsection shall be filed in the court in which sentence was originally imposed, unless that court transfers jurisdiction to another court. The petitioner shall notify the Attorney General that the petition has been filed within ten working days after filing. For the purposes of clause (1), unless exceptional circumstances exist, a person may be considered to have made a good faith effort to comply with the terms of the sentence only after payment of a reasonable portion of the fine.

**(b) Order of modification or remission.**--If, after the filing of a petition as provided in subsection (a), the court finds that the circumstances warrant relief, the court may enter an appropriate order, in which case it shall provide the Attorney General with a copy of such order.

## § 3574. Implementation of a sentence of fine

The implementation of a sentence to pay a fine is governed by the provisions of subchapter B of chapter 229.

## § § 3575 to 3580. See Chapter 227 post.

## SUBSECTION D --IMPRISONMENT

### § 3581. Sentence of imprisonment

**(a) In general.**--A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment.

**(b) Authorized terms.**--The authorized terms of imprisonment are--

(1) for a Class A felony, the duration of the defendant's life or any period of time;

(2) for a Class B felony, not more than twenty-five years;

(3) for a Class C felony, not more than twelve years;

(4) for a Class D felony, not more than six years;

(5) for a Class E felony, not more than three years;

(6) for a Class A misdemeanor, not more than one year;

(7) for a Class B misdemeanor, not more than six months;

(8) for a Class C misdemeanor, not more than thirty days; and

(9) for an infraction, not more than five days.

### § 3582. Imposition of a sentence of imprisonment

**(a) Factors to be considered in imposing a term of imprisonment.**--The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

**(b) Effect of finality of judgment.**--Notwithstanding the fact that a sentence to imprisonment can subsequently be--

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742; a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

**(c) Modification of an imposed term of imprisonment.**--The court may not modify a term of imprisonment once it has been imposed except that--

(1) in any case--

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(n), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

**(d) Inclusion of an order to limit criminal association of organized crime and drug offenders.**--The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

## § 3583. Inclusion of a term of supervised release after imprisonment

**(a) In general.**--The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute.

**(b) Authorized terms of supervised release.**--Except as otherwise provided, the authorized terms of supervised release are--

(1) for a Class A or Class B felony, not more than three years;

(2) for a Class C or Class D felony, not more than two years; and

(3) for a Class E felony, or for a misdemeanor, not more than one year.

**(c) Factors to be considered in including a term of supervised release.**--The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

**(d) Conditions of supervised release.**--The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision. The court may order, as a further condition of supervised release, to the extent that such condition--

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B) and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(19), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

**(e) Modification of conditions or revocation.**--The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6)--

(1) terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;

(2) after a hearing, extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of this title; or

(4) revoke a term of supervised release and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision, if it finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and the provisions of applicable policy statements issued by the Sentencing Commission.

**(f) Written statement of conditions.**--The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

## § 3584. Multiple sentences of imprisonment

**(a) Imposition of concurrent or consecutive terms.**--If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

**(b) Factors to be considered in imposing concurrent or consecutive terms.**-- The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

**(c) Treatment of multiple sentence as an aggregate.**--Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

### § 3585. Calculation of a term of imprisonment

**(a) Commencement of sentence.**--A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

**(b) Credit for prior custody.**--A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences--

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed; that has not been credited against another sentence.

### § 3586. Implementation of a sentence of imprisonment

The implementation of a sentence of imprisonment is governed by the provisions of subchapter C of chapter 229 and, if the sentence includes a term of supervised release, by the provisions of subchapter A of chapter 229.

## CHAPTER 229 --POSTSENTENCE ADMINISTRATION

### § 3621. Imprisonment of a convicted person

**(a) Commitment to custody of Bureau of Prisons.**--A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

**(b) Place of imprisonment.**--The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering--

(1) the resources of the facility contemplated;

(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;

(4) any statement by the court that imposed the sentence--

(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

(B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another.

**(c) Delivery of order of commitment.**--When a prisoner, pursuant to a court order, is placed in the custody of a person in charge of a penal or correctional facility, a copy of the order shall be delivered to such person as evidence of this authority to hold the prisoner, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

**(d) Delivery of prisoner for court appearances.**--The United States marshal shall, without charge, bring a prisoner into court or return him to a prison facility on order of a court of the United States or on written request of an attorney for the Government.

### § 3622. Temporary release of a prisoner.

The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period if such release appears to be consistent with the purpose for which the sentence was imposed and any pertinent policy statement issued by the Sentencing

Commission pursuant to 28 U.S.C. 994(a)(2), if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that a prisoner will honor the trust to be imposed in him, by authorizing him, under prescribed conditions, to--

(a) visit a designated place for a period not to exceed thirty days, and then return to the same or another facility, for the purpose of-

(1) visiting a relative who is dying;

(2) attending a funeral of a relative;

(3) obtaining medical treatment not otherwise available;

(4) contacting a prospective employer;

(5) establishing or reestablishing family or community ties; or

(6) engaging in any other significant activity consistent with the public interest;

(B) participate in a training or educational program in the community while continuing in official detention at the prison facility; or

(C) work at paid employment in the community while continuing in official detention at the penal or correctional facility if-- (1) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the community; and

(D) the prisoner agrees to pay to the Bureau of Prisons such costs incident to official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the Treasury to the credit of the appropriation available for such costs at the time such collections are made.

## § 3623. Transfer of a prisoner to State authority.

The Director of the Bureau of Prisons shall order that a prisoner who has been charged in an indictment or information with, or convicted of, a State felony, be transferred to an official detention facility within such State prior to his release from a Federal prison facility if--

(a) the transfer has been requested by the Governor or other executive authority of the State;

(b) the State has presented to the Director a certified copy of the indictment, information, or judgment of conviction; and

(c) the Director finds that the transfer would be in the public interest.

If more than one request is presented with respect to a prisoner, the Director shall determine which request should receive preference. The expenses of such transfer shall be borne by the State requesting the transfer.

## § 3624. Release of a prisoner.

**(a) Date of release.**--A prisoner shall be released by the Bureau of Prisons on the date of the expiration of his term of imprisonment, less any time credited toward the service of his sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

**(b) Credit toward service of sentence for satisfactory behavior.**--A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of his life, shall receive credit toward the service of his sentence, beyond the time served, of fifty-four days at the end of each year of his term of imprisonment, beginning at the end of the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time that it is received. Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted. Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

**(c) Pre-release custody.**--The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

**(d) Allotment of clothing, funds, and transportation.**--Upon the release of a prisoner on the expiration of his term of imprisonment, the Bureau of Prisons shall furnish him with--

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of his conviction, to his bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

**(e) Supervision after release.**--A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned, in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than thirty consecutive days. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by the prisoner.

## § 3625. Inapplicability of the Administrative Procedure Act

The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter.

# CHAPTER 235 --APPEAL

## § 3742. Review of a sentence

**(a) Appeal by a defendant.**--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); or

(3) was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and the sentence is greater than--

(A) the sentence specified in the applicable guideline to the extent that the sentence includes a greater fine or term of imprisonment or term of supervised release than the maximum established in the guideline, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline; and

(B) the sentence specified in a plea agreement, if any, under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure; or

(4) was imposed for an offense for which no sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and is greater than the sentence specified in a plea agreement, if any, under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure.

**(b) Appeal by the Government.**--The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(1);

(3) was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and the sentence is less than--

(A) the sentence specified in the applicable guideline to the extent that the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guideline, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline; and

(B) the sentence specified in a plea agreement, if any, under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure; or

(4) was imposed for an offense for which no sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and is less than the sentence specified in as plea agreement, if any, under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure; and the Attorney General or the Solicitor General personally approves the filing of the notice of appeal.

**(c) Record on review.**--If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals--

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

**(d) Consideration.**--Upon review of the record, the court of appeals shall determine whether the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is outside the range of the applicable sentencing guideline, and is unreasonable, having regard for--

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c).

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous.

**(e) Decision and disposition.**--If the court of appeals determines that the sentence--

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.

(2) is outside the range of the applicable sentencing guideline and is unreasonable, it shall state specific reasons for its conclusions and--

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court deems appropriate;

(3) was not imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, and is not unreasonable, it shall affirm the sentence.

# TITLE 28
# UNITED STATES CODE
# Chapter 58 - UNITED STATES SENTENCING COMMISSION

## § 991. United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chairman. At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party. The Attorney General, or his designee, shall be an ex officio, nonvoting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to--

(1) establish sentencing policies and practices for the Federal criminal justice system that--

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

## § 992. Terms of office; compensation

(a) The voting members of the United States Sentencing Commission shall be appointed for six-year terms, except that the initial terms of the first members of the Commission shall be staggered so that--

(1) two members, including the Chairman, serve terms of six years;

(2) three members serve terms of four years; and

(3) two members serve terms of two years.

(b) No voting member may serve more than two full terms. A voting member appointed to fill a vacancy that occurs before the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term.

(c) The Chairman of the Commission shall hold a full-time position and shall be compensated during the term of office at the annual rate at which judges of the United States courts of appeals are compensated. The voting members of the Commission, other than the Chairman, shall hold full-time positions until the end of the first six years after the sentencing guidelines go into effect pursuant to section 235(a)(1)(B)(ii) of the Sentencing Reform Act of 1984, and shall be compensated at the annual rate at which judges of the United States courts of appeals are compensated. Thereafter, the voting members of the Commission, other than the Chairman, shall hold part-time positions and shall be paid at the daily rate at which judges of the United States courts of appeals are compensated. A Federal judge may serve as a member of the Commission without resigning his appointment as a Federal judge.

(d) Sections 44(c) and 134(b) of this title (relating to residence of judges) do not apply to any judge holding a full-time position on the Commission under subsection (c) of this section.

## § 993. Powers and duties of Chairman

The Chairman shall--

(a) call and preside at meetings of the Commission, which shall be held for at least two weeks in each quarter after the members of the Commission hold part-time positions; and

(b) direct--

(1) the preparation of requests for appropriations for the Commission; and

(2) the use of funds made available to the Commission. "Before the appointment of the first Chairman, the Administrative Office of the United States Courts may make requests for appropriations for the Commission.

## § 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System--

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including--

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term; and

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of--

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the maximum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance--

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance--

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood. The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and--

(1) has been convicted of a felony that is--

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); and

(2) has previously been convicted of two or more prior felonies, each of which is--

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a).

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant--

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 of 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect--

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of--

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.
(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.
(p) The Commission, at or after the beginning of a regular session of Congress but not later that the first day of May, shall report to the Congress any amendments of the guidelines promulgated pursuant to subsection (a)(1), and a report of the reasons therefor, and the amended guidelines shall take effect one hundred and eighty days after the Commission reports them, except to the extent the effective date is enlarged or the guidelines are disapproved or modified by Act of Congress.
(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including--

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than one year after the initial set of sentencing guidelines promulgated under Subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.
(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in--

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others. Within one hundred and eighty days of the filing of such petition the Commission shall provide written notice to the defendant whether or not it has approved the petition. If the petition is disapproved the written notice shall contain the reasons for such disapproval. The Commission shall submit to the Congress at least annually an analysis of such written notices.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.
(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.
(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.
(w) The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed a written report of this sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.
(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

## § 995. Powers of the Commission

(a) The Commission, by vote of a majority of the members present and voting, shall have the power to--

(1) establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out the purposes of this chapter;

(2) appoint and fix the salary and duties of the Staff Director of the Sentencing Commission, who shall serve at the discretion of the Commission and who shall be compensated at a rate not to exceed the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332);

(3) deny, revise, or ratify any request for regular, supplemental, or deficiency appropriations prior to any submission of such request to the Office of Management and Budget by the Chairman;

(4) procedure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code;

(5) utilize, with their consent, the services, equipment, personnel, information, and facilities of other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor;

(6) without regard to 31 U.S.C. 3324, enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or nonprofit organization;

(7) accept and employ, in carrying out the provisions of this title, voluntary and uncompensated services, notwithstanding the provisions of 31 U.S.C. 1342, however, individuals providing such services shall not be considered Federal employees except for purposes of chapter 81 of title 5, United States Code, with respect to job-incurred disability and title 28, United States Code, with respect to tort claims;

(8) request such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law;

(9) monitor the performance of probation officers with regard to sentencing recommendations, including application of the Sentencing Commission guidelines and policy statements;

(10) issue instructions to probation officers concerning the application of Commission guidelines and policy statements;

(11) arrange with the head of any other Federal agency for the performance by such agency of any function of the Commission, with or without reimbursement;

(12) establish a research and development program within the Commission for the purpose of--

(A) serving as a clearing house and information center for the collection, preparation, and dissemination of information on Federal sentencing practices; and

(B) assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices;

(13) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;

(14) publish data concerning the sentencing process;

(15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code;

(16) collect systematically and disseminate information regarding effectiveness of sentences imposed;

(17) devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field;

(18) devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process;

(19) study the feasibility of developing guidelines for the disposition of juvenile delinquents;

(20) make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy;

(21) hold hearings and call witnesses that might assist the Commission in the exercise of its powers or duties; and

(22) perform such other functions as are required to permit Federal courts to meet their responsibilities under section 3553(a) of title 18, United States Code, and to permit others involved in the Federal criminal justice system to meet their related responsibilities.

(b) The Commission shall have such other powers and duties and shall perform such other functions as may be necessary to carry out the purposes of this chapter, and may delegate to any member or designated person such powers as may be appropriate other than the power to establish general policy statements and guidelines pursuant to section 994(a)(1) and (2), the issuance of general policies and promulgation of rules and regulations pursuant to subsection (a)(1) of this section, and the decisions as to the factors to be considered

in establishment of categories of offenses and offenders pursuant to section 994(b). The Commission shall, with respect to its activities under subsections (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (a)(15), (a)(16), (a)(17), and (a)(18), to the extent practicable, utilize existing resources of the Administrative Office of the United States Courts and the Federal Judicial Center for the purpose of avoiding unnecessary duplication.
(c) Upon the request of the Commission, each Federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions
(d) A simple majority of the membership then serving shall constitute a quorum for the conduct of business. Other than for the promulgation of guidelines and policy statements pursuant to section 994, the Commission may exercise its powers and fulfill its duties by the vote of a simple majority of the members present.
(e) Except as otherwise provided by law, the Commission shall maintain and make available for public inspection a record of the final vote of each member on any action taken by it.

## § 996. Director and staff

(a) The Staff Director shall supervise the activities of persons employed by the Commission and perform other duties assigned to him by the Commission.
(b) The Staff Director shall, subject to the approval of the Commission, appoint such officers and employees as are necessary in the execution of the functions of the Commission. The officers and employees of the Commission shall be exempt from the provisions of part III of title 5, United States Code, except the following chapters: 81 (Compensation for Work Injuries), 83 (Retirement), 85 (Unemployment Compensation), 87 (Life Insurance), 89 (Health Insurance), and 91 (Conflicts of Interest).

## § 997. Annual report

The Commission shall report annually to the Judicial Conference of the United States, the Congress, and the President of the United States on the activities of the Commission.

## § 998. Definitions

As used in this chapter--
(a) "Commission" means the United States Sentencing Commission;
(b) "Commissioner" means a member of the United States Sentencing Commission;
(c) "guidelines" means the guidelines promulgated by the Commission pursuant to section 994(a) of this title; and
(d) "rules and regulations" means rules and regulations promulgated by the Commission pursuant to section 995 of this title.

# PUBLIC LAW 98-473
# COMPREHENSIVE CRIME CONTROL ACT OF 1984
# CHAPTER II --SENTENCING REFORM

## Effective Date

Sec. 235(a)(1) This chapter shall take effect on the first day of the first calendar month beginning thirty-six months after the date of enactment, except that--

(A) the repeal of chapter 402 of title 18, United States Code, shall take effect on the date of enactment;

(B)(i) chapter 58 of title 28, United States Code, shall take effect on the date of enactment of this Act or October 1, 1983, whichever occurs later, and the United States Sentencing Commission shall submit the initial sentencing guidelines promulgated under section 994(a)(1) of title 28 to the Congress within thirty months of the effective date of such chapter 58; and

(ii) the sentencing guidelines promulgated pursuant to section 994(a)(1), shall not go into effect until the day after--

(I) the United States Sentencing Commission has submitted the initial set of sentencing guidelines to the Congress pursuant to subparagraph (B)(1), along with a report stating the reasons for the Commission's recommendations;

(II) the General Accounting Office has undertaken a study of the guidelines, and their potential impact in comparison with the operation of the existing sentencing and parole release system, and has, within one hundred and fifty days of submission of the guidelines; reported to the Congress the results of its study; and

(III) the day after the Congress has had six months after the date described in subclause (I) in which to examine the guidelines and consider the reports; and

(IV) section 212(a)(2) takes effect, in the case of the initial sentencing guidelines so promulgated.

(2) For the purposes of section 992(a) of title 28, the terms of the first members of the United States Sentencing Commission shall not begin to run until the sentencing guidelines go into effect pursuant to paragraph (1)(B)(ii).

(b)(1) The following provisions of law in effect on the day before the effective date of this Act shall remain in effect for five years after the effective date as to an individual convicted of an offense or adjudicated to be a juvenile delinquent before the effective date and as to a term of imprisonment during the period described in subsection (a)(1)(B):

(A) Chapter 311 of title,18, United States Code.

(B) Chapter 309 of title 18, United States Code.

(C) Sections 4251 through 4255 of title 18, United States Code.

(D) Sections 5041 and 5042 of title 18, United States Code.

(E) Sections 5017 through 5020 of title 18, United States Code, as to a sentence imposed before the date of enactment.

(F) The maximum term of imprisonment in effect on the effective date for an offense committed before the effective date.

(G) Any other law relating to a violation of a condition of release or to arrest authority with regard to a person who violates a condition of release.

(2) Notwithstanding the provisions of section 4202 of title 18, United States Code, as in effect on the day before the effective date of this Act, the term of office of a Commissioner who is in office on the effective date is extended to the end of the five-year period after the effective date of this Act.

(3) The United States Parole Commission shall set a release date, for an individual who will be in its jurisdiction the day before the expiration of five years after the effective date of this Act, that is within the range that applies to the prisoner under the applicable parole guideline. A release date set pursuant to this paragraph shall be set early enough to permit consideration of an appeal of the release date, in accordance with Parole Commission procedures, before the expiration of five years following the effective date of this Act.

(4) Notwithstanding the other provisions of this subsection, all laws in effect on the day before the effective date of this Act pertaining to an individual who is--

(A) released pursuant to a provision listed in paragraph (1); and

(B)(i) subject to supervision on the day before the expiration of the five-year period following the effective date of this Act; or

(ii) released on a date set pursuant to paragraph (8); including laws pertaining to terms and conditions of release, revocation of release, provision of counsel, and payment of transportation costs, shall remain in effect as to the individual until the expiration of his sentence, except that the district court shall determine, in accord with the Federal Rules of Criminal Procedure, whether release should be revoked or the conditions of release amended for violation of a condition of release.

(5) Notwithstanding the provisions of section 991 of title 28, United States Code, and sections 4351 and 5002 of title 18, United States Code, the Chairman of the United States Parole Commission or his designee shall be a member of the National Institute of Corrections, and the Chairman of the United States Parole Commission shall be a member of the Advisory Corrections Council and a nonvoting member of the United States Sentencing Commission, ex officio, until the expiration of the five-year period following the effective date of this Act. Notwithstanding the provisions of section 4351 of title 18, during the five-year period the National Institute of Corrections shall have seventeen members, including seven ex officio members. Notwithstanding the provisions of section 991 of title 28, during the five-year period the United States Sentencing Commission shall consist of nine members, including two ex officio nonvoting members.

Sec. 236(a)(1) Four years after the sentencing guidelines promulgated pursuant to section 994(a)(1), and the provisions of sections 3581, 3583, and 3624 of title 18, United States Code, go into effect, the General Accounting Office shall undertake a study of the guidelines in order to determine their impact and compare the guidelines system with the operation of the previous sentencing and parole release system, and, within six months of the undertaking of such study, report to the Congress the results of its study.

(2) Within one month of the start of the study required under subsection (a), the United States Sentencing Commission shall submit a report to the General Accounting Office, all appropriate courts, the Department of Justice, and the Congress detailing the operation of the sentencing guideline system and discussing any problems with the system or reforms needed. The report shall include an evaluation of the impact of the sentencing guidelines on prosecutorial discretion, plea bargaining, disparities in sentencing, and the use of incarceration, and shall be issued by affirmative vote of a majority of the voting members of the Commission.

(b) The Congress shall review the study submitted pursuant to subsection (a) in order to determine--

(1) whether the sentencing guideline system has been effective;

(2) whether any changes should be made in the sentencing guideline system; and

(3) whether the parole system should be reinstated in some form and the life of the Parole Commission extended.

Sec. 237(a)(1) Except as provided in paragraph (2), for each criminal fine for which the unpaid balance exceeds $100 as of the effective date of this Act, the Attorney General shall, within one hundred and twenty days, notify the person by certified mail of his obligation, within thirty days after notification, to-- (A) pay the fine in full;

(A) specify, and demonstrate compliance with, an installment schedule established by a court before enactment of the amendments made by this Act, specifying the dates on which designated partial payments will be made; or

(B) establish with the concurrence of the Attorney General, a new installment schedule of duration not exceeding two years, except in special circumstances, and specifying the dates on which designated partial payments will be made.

(2) This subsection shall not apply in cases in which--

(A) the Attorney General believes the likelihood of collection is remote; or

(B) criminal fines have been stayed pending appeal.

(b) The Attorney General shall, within one hundred and eighty days after the effective date of this Act, declare all fines for which this obligation is unfulfilled to be in criminal default, subject to the civil and criminal remedies established by amendments made by this Act. No interest or monetary penalties shall be charged on any fines subject to this section.

(c) Not later than one year following the effective date of this Act, the Attorney General shall include in the annual crime report steps taken to implement this Act and the progress achieved in criminal fine collection, including collection data for each judicial district.