

## REVISED PROPOSED AMENDMENT: ECONOMIC CRIME PACKAGE

### Part A. Consolidation of Theft, Property Destruction and Fraud

- 12. Synopsis of Proposed Amendment:** *This amendment consolidates the three guidelines covering theft (§2B1.1), property destruction (§2B1.3), and fraud (§2F1.1). Consolidation of these guidelines is proposed in response to concerns raised by probation officers, judges, and practitioners over several years. The issues were among those discussed during Commission public hearings in 1997 and 1998 on difficulties posed by having different commentary in the theft and fraud guidelines applicable to the calculation and definition of loss and related issues. Commentators have also noted that although theft and fraud offenses are conceptually similar, differences in guideline structure can lead to disparate penalty levels among similar cases, depending on how the offense is charged, and the court's choice of the applicable guideline pursuant to §1B1.2.*

*Bracketed place holders are indicated for the loss table (see Part B), definition of loss (see Part C), and the options regarding two circuit conflicts: tax loss (see Part F) and new commentary regarding the application of subsection (b)(3) regarding a "person in the business of receiving and selling receiving stolen property," and a scholarship fraud enhancement and accompanying application note. In the event that the Commission does not promulgate the consolidation proposal, these bracketed options can be promulgated separately.*

**Base Offense Level:** *The proposal calls for a base offense level of level 6. The current base offense level for fraud offenses is level 6; the base offense level for theft and property destruction offenses currently is level 4. Starting with the base offense level 6, the proposed loss table for the consolidated guideline envisions two-level increments for increasing loss amounts beginning at \$5,000. Currently the loss table for theft offenses provides one-level enhancements when loss exceeds \$100, \$1,000, \$2,000, and \$5,000, respectively, so that a theft offense involving more than \$2,000 in loss results in an offense level of level 7, with the possibility of an additional increase for more-than-minimal planning. Under the proposed consolidated loss table, a theft offense involving more than \$2,000 (but less than \$5,000) would receive the base offense level of level 6, with no possible increase for more-than-minimal planning.*

*In contrast, under the proposed table, a fraud offense involving the same amount of loss would start with the same base offense level of level 6 but would receive no additional increase based on the loss amount. Under the current fraud table, this offense would result in an offense level of level 7 for loss because the current fraud loss table provides a one-level increase for loss amounts in excess of \$2,000 (but less than \$5,000).*

**More than Minimal Planning:** *Section 2F1.1(b)(2) currently provides a two-level increase if the offense involved (A) more than minimal planning, or (B) a scheme to*

*defraud more than one victim. The proposal deletes this enhancement from the consolidated guideline. The more than minimal planning enhancement is deleted due to the potential overlap between this enhancement and the sophisticated means enhancement. The scheme to defraud more than one victim enhancement is deleted for two reasons: (1) If the adjustment were retained unmodified in a consolidated guideline, it would apply to cases currently sentenced under §2B1.1 where it is not currently applicable; and (2) in its current form it might be hard to justify providing a two-level increase in every case in which there is more-than-one victim, particularly in the face of the new Chapter Three adjustment in the vulnerable victim guideline (§3A1.1) that provides (only) a two-level increase if the offense involved "a large number of vulnerable victims."*

*As an alternative to the scheme to defraud more than one victim enhancement, this amendment provides an enhancement based on the number of victims, to provide additional punishment for offenses involving multiple victims. The victim table proposes building in the current "mass-marketing" enhancement as an alternative way of triggering the two-level increase provided if there were more than 4 and less than 50 victims. The amendment proposes that if the proposed victim table is adopted, and a victim enhancement is applicable in a given case, then the enhancement under 3A1.1(b)(2) for "a large number of vulnerable victims" could not also apply in that case.*

***Theft of Undelivered U.S. Mail:*** *The current "floor" offense level of level 6 for the theft of undelivered United States mail is proposed to be deleted because the proposal raises the base offense level from level 4 to 6 for such offenses, making the floor unnecessary. However, if the Commission adopts the enhancement providing for a two-level reduction if loss is less than \$2,000, it might be necessary to retain this floor of level 6.*

***In the Business of Receiving and Selling Stolen Property:*** *Section 2B1.1(b)(4)(B) provides a 2-level enhancement if the offense involved receiving stolen property and the defendant was in the business of receiving and selling stolen property. The proposed amendment addresses an issue that has arisen in case law regarding what conduct qualifies a defendant for the 4-level enhancement.*

*In determining the meaning of "in the business of", three circuits apply what has been coined the "fence test" in which the court must consider (1) if the stolen property was bought and sold, and (2) to what extent the stolen property transactions encouraged others to commit property crimes. Three other circuits have adopted the "totality of the circumstances test" that focuses on the "regularity and sophistication" of the defendant's operation. Though the factors considered by all of these circuits are similar, the approaches are different.*

*The fence test involves making an ultimate determination of whether (1) the stolen property was bought and sold, and (2) the stolen property transactions encouraged*

*others to commit property crimes. In making this determination, the court considers factors such as the regularity of the defendant's operation, the volume of the business, the quick turnover of the stolen items, the value of the stolen items, the sophistication of the defendant's operation, any use of a legitimate business to facilitate the turnover of the stolen items, the defendant's connections with thieves and purchasers of the stolen items, and the use of technology and communications.*

*The totality of the circumstances test involves consideration of the circumstances in each case with particular emphasis on the regularity and sophistication of the defendant's operation, looking at such factors as the amount of income generated through fencing activities, the value of the property handled, the defendant's past activities, the defendant's demonstrated interest in continuing or expanding the operation, the use of technology and communication, and the defendant's connections with thieves and purchasers of stolen property.*

*This amendment adopts the totality of the circumstances test, basing application of the enhancement on the circumstances surrounding the defendant and his business as opposed to the effect the fencing operation has in encouraging others to commit crimes.*

### **College Scholarship Fraud**

*Subsection (b)(9)(D) implements the the directive in section 3 of the College Scholarship Fraud Prevention Act of 1999, Pub. L. 106–420. The directive requires the Commission to amend the guidelines:*

*...in order to provide for enhanced penalties for any offense involving fraud or misrepresentation in connection with the obtaining or providing of, or the furnishing of information to a consumer on, any scholarship, grant, loan, tuition, discount, award, or other financial assistance for purposes of financing an education at an institution of higher education, such that those penalties are comparable to the base offense level for misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency.*

*The amendment adds an additional alternative enhancement that applies if the offense involves a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education. This proposed enhancement is targeted at the provider of the financial assistance or scholarship services, not the individual applicant for such assistance or scholarship, consistent with the intent of the legislation.*

***Risk of Bodily Injury Enhancement:*** *The proposal provides for two substantive changes with respect to the enhancement involving conscious or reckless risk of serious*

*bodily injury. First, it increases the "floor" offense level from level 13 to level 14. Second, it inserts "death" before the term "or serious bodily injury" because, as a practical matter, a risk of serious bodily injury is likely also to entail a risk of death. Including "of death" also will provide consistency throughout the Guidelines Manual. Currently, "risk of death or serious bodily injury" appears in a number of other guidelines as either an alternative base offense level, specific offense characteristic, or invited upward departure (see, e.g., §2A2.2 comment (n.3); §2K1.4(a)(1)(2); §2Q1.4(b)(1)). The fraud guideline is the only guideline in which risk of serious bodily injury appears as a sentencing factor without a reference to "risk of death".*

*This enhancement stems from a 1988 congressional directive in which the Commission was instructed to amend the fraud guideline to provide an appropriate enhancement for a fraud offense that creates a conscious or reckless risk of serious bodily injury. The Commission was further instructed to consider the appropriateness of a minimum enhancement of two offense levels for this conduct. The legislation did not require a "floor" offense level.*

*The proposal increases the "floor" from level 13 to level 14 to promote proportionality between this and other guidelines covering similar conduct. Within the current theft and fraud guidelines, there are three specific offense characteristics that have a higher floor offense level than the current risk of bodily injury enhancement: (1) "chop shops": level 14; (2) jeopardizing the solvency of a financial institution: level 24; and (3) personally receiving more than \$1 million from a financial institution: level 24 (congressionally directed minimum).*

*Other conceptually similar offense conduct under various guidelines is graded as follows:*

- (1) Reckless voluntary manslaughter (§2A1.4): level 14*
- (2) Operating a common carrier under influence of drugs or alcohol, no death or serious bodily injury resulting (§2D2.3): level 13*
- (3) Arson creating a substantial risk of death or serious bodily injury (§2K1.4): level 20*
- (4) Immigration smuggling offense creating a substantial risk of death or serious bodily injury (§2L1.1): 2-level enhancement, "floor" of level 18*
- (5) Environmental offenses resulting in risk of death or serious bodily injury (§§2Q1.1, 2Q1.2, 2Q1.3, 2Q1.4): Offense level varies from level 17 to level 24.*

**Gross Receipts Enhancement:** *The proposed amendment presents two options for modifying this enhancement, which currently provides a 4-level increase and a floor*

*offense level of level 24 for a defendant who personally derives more than \$1 million in gross receipts from an offense that affected a financial institution.*

*The gross receipts enhancement derives from a 1990 congressional directive requiring a minimum offense level of level 24 if the defendant derived more than \$1 million in gross receipts from certain offenses that affected financial institutions. The Commission had received and implemented a related directive the previous year requiring that the guidelines provide a "substantial period of incarceration" for certain specific offenses that "substantially jeopardize the safety and soundness of a federally insured financial institution." In each case, the Commission constructed an enhancement that was considerably broader and more severe than the directive required. In part, this was the Commission's way of responding to the increases in statutory maximum penalties for financial institution offenses that Congress enacted in 1989 and 1990. The Commission had modestly increased the penalties for all fraud offenses with substantial monetary losses in 1989. Rather than increase the loss table again, or adopt a generally applicable enhancement for fraud against financial institutions, the Commission elected to use the two congressionally directed enhancements as mechanisms for ensuring more stringent penalties for the more severe forms of those offenses.*

*Option 1 deletes the 4-level increase for deriving more than \$1 million in gross receipts from the offense but retains the "floor" offense level of level 24 for such conduct (in order to retain compliance with the congressional directive). The 4-level increase is deleted under the assumption that a loss table will be adopted that builds in increases for relatively high dollar losses; the deletion would prevent double-counting for the fact of a high dollar loss. Option 2 retains the current floor offense level but reduces the 4-level enhancement to 2 levels.*

*Sentencing Data: Due to the structure of this enhancement and the Commission's data collection methods it is impossible to determine which offenders received increases for jeopardizing a financial institution and which offenders received increases for gross receipts in excess of \$1,000,000. Nevertheless, 33 fraud offenders (0.5 %) received an increase under this enhancement.*

***Additional Cross References:***

- (A) *This proposal adds a more generally applicable cross reference that would apply whenever a broadly applicable fraud statute is used to reach conduct that is more specifically addressed in another Chapter Two guideline [if the resulting offense level is greater].*

*Currently, Application Note 14 in the fraud guideline instructs the user to move to another, more appropriate Chapter Two guideline under circumstances in which:*  
*(1) the defendant is convicted of a broadly applicable fraud statute (e.g., 18 U.S.C.*

§ 1001), and (2) the convicted conduct is more appropriately covered by another Chapter Two guideline specifically tailored to that conduct. In essence, this note is not a cross reference, but rather a reminder of the principles enunciated in §1B1.2 regarding application of the guideline most appropriate for the convicted conduct. Moreover, unlike the more typical cross reference, under this instruction the user locates and applies the more appropriate guideline, even if it yields an offense level lower than would have been obtained under the fraud guideline.

Experience over the years demonstrates that this application note is not well known or understood, and hence, not applied consistently. One way of possibly addressing these problems would be to convert the application note into a cross reference. The more highly visible approach of incorporating the instruction directly into the guideline should ensure more consistent application, without changing the basic policy of using the cross reference to move to the guideline most appropriate for the conduct of which the defendant was convicted.

#### **Proposed Amendment (Part A):**

### **PART B - BASIC ECONOMIC OFFENSES**

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

##### Introductory Commentary

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

#### **§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

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

(b) Specific Offense Characteristics

(1) If the loss exceeded \$5,000, increase the offense level as follows:

[Loss Table Options -See Part B of this amendment ]

- (2) If the offense involved—
- (A) (i) involved more than 4, but less than 50, victims; or (ii) was committed through mass-marketing, increase by **2** levels; or
  - (B) involved 50 or more victims, increase by 4 levels.
- (3) If the offense involved a theft from the person of another, increase by **2** levels.
- (4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.
- (5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit any foreign government, foreign instrumentality, or foreign agent, increase by **2** levels.
- (6) If the offense involved theft to, damage of, or destruction of property from, a national cemetery, increase by **2** levels.
- (7) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.
- (8) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (9) If the offense involved—
- (A) the possession or use of any device-making equipment;
  - (B) the production or trafficking of any unauthorized access device or counterfeit access device; or
  - (C) (i) the unauthorized transfer or use of any means of identification

unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from another means of identification or obtained by the use of another means of identification,

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

- (10) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the offense level is less than level 14, increase to level 14.
- (11) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.
- (12) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.
- (13) If the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels. If the resulting offense level is less than level 24, increase to level 24.]

(c) Cross References

- (1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate, if the resulting offense level is greater than that determined above.
- (2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.
- (3) If (A) none of subdivisions (1) or (2) of this subsection apply; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of



conviction establishes an offense specifically covered by another guideline in Chapter Two, apply that other guideline.

(d) Special Instruction

- (1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4) or (a)(5) the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644; 18 U.S.C. §§ 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4), 1030(a)(5), 1031, 1341-1344, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail is involved), 1702, 1708, 1831, 1832, 2113(b), 2312-2317; 29 U.S.C. § 501(c). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Financial institution" as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

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

"Foreign instrumentality" and "foreign agent" are defined in 18 U.S.C. § 1839(1) and (2), respectively.

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

"Mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of

persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.

"National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

"Trade secret" is defined in 18 U.S.C. § 1839(3).

2. [Definition of Loss - See Part C of this amendment]

3. Value of Controlled Substances.—Controlled substances should be valued at their estimated street value.

4. Enhancement for Business of Receiving and Selling Stolen Property.—

(A) In General.—The court shall consider the totality of the circumstances to determine whether a defendant was in the business of receiving and selling stolen property for purposes of subsection (b)(4).

(B) Factors to Consider.—The following is a non-inclusive list of factors that the court may consider in determining whether the defendant was in the business of receiving and selling stolen property for purposes of subsection (b)(4):

(i) the regularity or sophistication of the defendant's activities;

(ii) the value and size of the inventory of stolen property maintained by the defendant;

(iii) the extent to which the defendant's activities encouraged or facilitated other crimes; or

(iv) the defendant's past activities involving stolen property.

5. Application of Subsection (b)(7).—

(A) In General.—The adjustments in subsection (b)(7) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.

(B) Misrepresentation Defendant Was Acting On Behalf of Charitable Institution.—Subsection (b)(7)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously

affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.

- (C) Fraud in Contravention of Prior Judicial Order.—Subsection (b)(7)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).

- (D) College Scholarship Fraud.—

For the purposes of subsection (b)(7)(D)—

"Financial assistance" means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purposes of financing an education.

"Institution of higher education" has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).

- (E) Non-Applicability of Enhancement.—If the conduct that forms the basis for an enhancement under (b)(7)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.

6. Application of Subsection (b)(8).—

- (A) Definition of United States.—"United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

- (B) Sophisticated Means Enhancement.— For purposes of subsection (b)(8)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through

*the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.*

- (C) *Non-Applicability of Enhancement.*—*If the conduct that forms the basis for an enhancement under subsection (b)(8) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.*

7. *Application of Subsection (b)(9).*—

- (A) *Definitions.*—*For purposes of subsection (b)(10):*

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

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

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

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

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

- (B) *Subsection (b)(9)(C)(i).*—*This subsection applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.*

- (C) *Examples of Conduct Under (b)(9)(C)(i).* —*Examples of conduct to which this subsection should apply are as follows:*

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

obtained unlawfully.

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

(D) Nonapplicability of Subsection (b)(9)(C)(i): —Examples of conduct to which this subsection should not apply are as follows:

- (i) A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.
- (ii) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.

(E) Subsection (b)(9)(C)(ii).—This subsection applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.

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

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

(G) Counterfeit Access Devices.—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device. In any such case, loss shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only

possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means.

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

9. Substantially Jeopardized the Safety and Soundness of a Financial Institution.— For the purposes of subsection (b)(12), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

10. Application of Subsection of (b)(13).—

In General.—For the purposes of (b)(13), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.

Gross Receipts From the Offense.—"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

11. Cross References in Subsection (c)(3).—

(A) General Fraud Statutes.—Subsection (c)(3) provides a cross reference to another Chapter Two guideline in cases in which the defendant is convicted of a general fraud statute, and the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 would be more apt, and false statements to a customs officer, for which §2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses.

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

13. Continuing Financial Crimes Enterprise.—If the defendant is convicted under 18 U.S.C. § 225

(relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise."

14. Partially Completed Offenses.—In the case of a partially completed offense (e.g., an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.
15. Upward Departure in Cases Involving Theft of Information from a Protected Computer.—In cases involving theft of information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), an upward departure may be warranted where the defendant sought the stolen information to further a broader criminal purpose.
16. Multiple Count Indictments.—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).
17. Upward Departure in Cases Involving Access Devices.—Offenses involving access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. In such a case, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.
18. Vulnerable Victims.—
  - (A) In General.—Except as provided in subdivision (b)(2)(B), if the fraud exploited vulnerable victims, an enhancement shall apply. See §3A1.1 (Hate Crime Motivation or Vulnerable Victim).
  - (B) Nonapplicability of §3A1.1(b)(2) in Certain Cases.—If subsection (b)(2)(B) applies, an enhancement under §3A1.1(b)(2) shall not apply.

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

Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with

*extreme variation in severity. The specific offense characteristics [and cross references] contained in this guideline are designed with these considerations in mind.*

*[Loss Background Commentary - See Part C]*

*Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under §2B3.1 (Robbery).*

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

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

*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.*

*Subsection (b)(6) implements the instruction to the Commission in section 2 of Public Law 105–101.*

*Subsection (b)(8) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.*

*Subsections (b)(9)(A) and (B) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.*

*Subsection (b)(9)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding," in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" *i.e.*, produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification," the*



new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part, because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (*i.e.*, produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain harms have already occurred (*e.g.*, a damaged credit rating or inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (*e.g.*, harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

Subsection (b)(11)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.

Subsection (b)(12) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.

Subsection (b)(13) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101-647.

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

\* \* \*

#### **§2B1.4. Insider Trading**

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

(b) Specific Offense Characteristic

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

#### Commentary

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

#### Application Note:

1. Application of Subsection of §3B1.3.—Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should be applied only if the defendant occupied and abused a position of special trust. Examples might include a corporate president or an attorney who misused information regarding a planned but unannounced takeover attempt. It typically would not

*apply to an ordinary "tippee."*

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

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

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