

PART E: TECHNICAL AND CONFORMING AMENDMENTS

Proposed Amendments (Part E):

§2B2.3. Trespass

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Commentary

Application Notes:

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2. ~~Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft): "Loss" for purposes of subsection (b)(3) shall be determined in accordance with Application Note 2 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).~~

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§2B3.1. Robbery

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Commentary

Application Notes:

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3. ~~Valuation of is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft): "Loss" for purposes of subsection (b)(7) shall be determined in accordance with Application Note 2 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).~~

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

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Commentary

Application Notes:

1. Subsection (b)(3), referring to an "organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts," provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or "chop shop." "Vehicles" refers to all forms of vehicles, including aircraft and watercraft. ~~See Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)~~ §2B1.1 (Theft, Property Destruction, and Fraud).

2. The term "increase by the ~~corresponding~~ number of levels from the table in ~~§2F1.1 (Fraud and Deceit)~~§2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount" as used in subsection (b)(1), refers to the number of levels corresponding to the retail value of the motor vehicles or parts involved.

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

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Commentary

Application Notes:

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2. ~~"Loss" is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and includes both actual and intended loss~~ "Loss" for purposes of subsection (b)(2)(A) shall be determined in accordance with Application Note 2 of the Commentary to §2B1.1(Theft, Property Destruction, and Fraud). The value of "the benefit received or to be received" means the net value of such benefit. Examples: (1) A government employee, in return for a \$500 bribe, reduces the price of a piece of surplus property offered for sale by the government from \$10,000 to \$2,000; the value of the benefit received is \$8,000. (2) A \$150,000 contract on which \$20,000 profit was made was awarded in return for a bribe; the value of the benefit received is \$20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the above examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.

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§2C1.7. Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

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Commentary

Application Notes:

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3. ~~"Loss" is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and includes both actual and intended loss~~ "Loss" for purposes of subsection (b)(1)(A) shall be determined in accordance with Application Note 2 of the Commentary to

~~§2B1.1(Theft, Property Destruction, and Fraud).~~

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§2H3.3. Obstructing Correspondence

(a) Base Offense Level:

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(2) if the conduct was theft or destruction of mail, apply ~~§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)~~ §2B1.1 (Theft, Property Destruction, and Fraud);

~~(3) if the conduct was destruction of mail, apply §2B1.3 (Property Damage or Destruction).~~

Commentary

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Background: The statutory provision covered by this guideline is sometimes used to prosecute offenses more accurately described as theft or destruction of mail. In such cases, §2B1.1 (~~Larceny, Embezzlement, and Other Forms of Theft~~) or ~~§2B1.3 (Property Damage or Destruction)~~ Theft, Property Destruction, and Fraud

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§2J1.1. Contempt

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Commentary

Application Notes:

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2. For offenses involving the willful failure to pay court-ordered child support (violations of 18 U.S.C. § 228), the most analogous guideline is ~~§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)~~ §2B1.1 (Theft, Property Destruction, and Fraud). The amount of the loss is the amount of child support that the defendant willfully failed to pay. *Note:* This guideline applies to second and subsequent offenses under 18 U.S.C. § 228(a)(1) and to any offense under 18 U.S.C. § 228(a)(2) and (3). A first offense under 18 U.S.C. § 228(a)(1) is not covered by this guideline because it is a Class B misdemeanor.

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

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

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(3) 2 plus the offense level from §2F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud; or §2B1.1 (Theft, Property Destruction, and Fraud).

(4) 2 plus the offense level from §2B1.3 (Property Damage or Destruction).

(b) Specific Offense Characteristics

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(2) If the base offense level is not determined under (a)(43), and the offense occurred on a national cemetery, increase by 2 levels.

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§2N2.1. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product

(a) Base Offense Level: 6

(b) Cross References

(1) If the offense involved fraud, apply §2F1.1 (Fraud and Deceit) §2B1.1 (Theft, Property Destruction, and Fraud).

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Commentary

Application Notes:

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2. The cross reference at subsection (b)(1) addresses cases in which the offense involved theft, property destruction, and fraud. The cross reference at subsection (b)(2) addresses cases in which the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline (e.g., theft, bribery, revealing trade secrets, or destruction of propertybribery).

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4. The Commission has not promulgated a guideline for violations of 21 U.S.C. § 333(e) (offenses involving human growth hormones). Offenses involving anabolic steroids are covered by Chapter Two, Part D (Offenses Involving Drugs). In the case of an offense involving a substance purported to be an anabolic steroid, but not containing any active ingredient, apply §2F1.1 (Fraud and Deceit) §2B1.1 (Theft, Property Destruction, and

Fraud) with "loss" measured by the amount paid, or to be paid, by the victim for such substance.

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§2N3.1. Odometer Laws and Regulations

- (a) Base Offense Level: **6**
- (b) Cross Reference
 - (1) If the offense involved more than one vehicle, apply ~~§2F1.1 (Fraud and Deceit)~~ §2B1.1 (Theft, Property Destruction, and Fraud).

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Commentary

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***Background:** The base offense level takes into account the deceptive aspect of the offense assuming a single vehicle was involved. If more than one vehicle was involved, ~~the guideline for fraud and deception, §2F1.1,~~ §2B1.1 (Theft, Property Destruction, and Fraud) is to be applied because it is designed to deal with a pattern or scheme.*

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§2Q1.6. Hazardous or Injurious Devices on Federal Lands

- (a) Base Offense Level (Apply the greatest):
 - (2) If the intent was to obstruct the harvesting of timber, and property destruction resulted, apply ~~§2B1.3 (Property Damage or Destruction)~~ §2B1.1 (Theft, Property Destruction, and Fraud);

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§2T1.6. Failing to Collect or Truthfully Account for and Pay Over Tax

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- (b) Cross Reference

- (1) Where the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it, apply ~~§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)~~ §2B1.1 (Theft, Property Destruction, and Fraud) if the resulting offense level is greater than that determined above.

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§3B1.3. Abuse of Position of Trust or Use of Special Skill

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Commentary

Application Notes:

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

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

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

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§3D1.2. Groups of Closely Related Counts

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(d)

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§§2B1.1, ~~2B1.3~~2B1.4, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.7;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§2E4.1, 2E5.1;

~~§§2F1.1, 2F1.2;~~

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Commentary

Application Notes:

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6. *Subsection (d) likely will be used with the greatest frequency. It provides that most property crimes (except robbery, burglary, extortion and the like), drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together. The list of instances in which this subsection should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection (d).*

A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d).

Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. In such cases, the offense guideline that results in the highest offense level is used; see §3D1.3(b). The "same general type" of offense is to be construed broadly; ~~and would include, for example, larceny, embezzlement, forgery, and fraud.~~

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§3D1.3. Offense Level Applicable to Each Group of Closely Related Counts

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- (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 offenses of the same general type to which different guidelines apply (~~e.g., theft and fraud~~), apply the offense guideline that produces the highest offense level.

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Commentary

Application Notes:

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3. When counts are grouped pursuant to §3D1.2(d), the offense guideline applicable to the aggregate behavior is used. If the counts in the Group are covered by different guidelines (~~e.g., theft and fraud~~), use the guideline that produces the highest offense level. Determine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole. Note that guidelines for similar property offenses have been coordinated to produce identical offense levels, at least when substantial property losses are involved. However, when small sums are involved the differing specific offense characteristics that require increasing the offense level to a certain minimum may affect the outcome. ~~In addition, the adjustment for "more than minimal planning" frequently will apply to multiple count convictions for property offenses.~~

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§3D1.5. Determining the Total Punishment

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Illustrations of the Operation of the Multiple-Count Rules

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2. ~~Defendant B 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 (Offenses Involving Property), while Counts 2, 4, 6 and 7 involve offenses under Part F (Offenses Involving Fraud and Deceit). For purposes of §3D1.2(d), 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 an offense level that is as high as or higher than the theft guideline. The base offense level is 6; 1 level is added because of the value of the property (§2F1.1(b)(1)); and 2 levels are added because the conduct involved repeated acts with some planning (§2F1.1(b)(2)(A)). The resulting offense level is 9.~~

32.

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43. Defendant D 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)~~ §2B1.1 (Theft, Property Destruction, and Fraud). The bribery counts are covered by §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), which treats the offense as a sophisticated fraud. The total money involved is \$74,000, which results in an offense level of 14 under either §2B4.1 or ~~§2F1.1~~ §2B1.1. Since these two guidelines produce identical offense levels, the combined offense level is 14.

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§8A1.2. Application Instructions - Organizations

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Commentary

Application Notes:

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- (i) "Pecuniary loss" is derived from 18 U.S.C. § 3571(d) and is equivalent to the term "loss" as used in Chapter Two (Offense Conduct). See Commentary to ~~§§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), 2F1.1 (Fraud and Deceit)~~ §2B1.1 (Theft, Property Destruction, and Fraud), and definitions of "tax loss" in Chapter Two, Part T (Offenses Involving Taxation).

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§8C2.1. Applicability of Fine Guidelines

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- (a) §§2B1.1, ~~2B1.3~~ §2B1.4, 2B2.3, 2B4.1, 2B5.3, 2B6.1;

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~~§§2F1.1, 2F1.2;~~

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Commentary

Application Notes:

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2. If the Chapter Two offense guideline for a count is not listed in subsection (a) or (b) above, but the applicable guideline results in the determination of the offense level by use of a listed guideline, apply the provisions of §§8C2.2 through 8C2.9 to that count. For example, where the conduct set forth in a count of conviction ordinarily referenced to §2N2.1 (an offense guideline not listed in subsection (a)) establishes ~~§2F1.1 (Fraud and Deceit)~~ §2B1.1 (Theft,

Property Destruction, and Fraud) as the applicable offense guideline (an offense guideline listed in subsection (a)), §§8C2.2 through 8C2.9 would apply because the actual offense level is determined under ~~§2F1.1 (Fraud and Deceit)~~§2B1.1 (Theft, Property Destruction, and Fraud).

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APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 1010	2F1.1 2B1.1	
18 U.S.C. § 1011	2F1.1 2B1.1	
18 U.S.C. § 1012	2B1.1, 2C1.3, 2F1.1	
18 U.S.C. § 1013	2F1.1 2B1.1	
18 U.S.C. § 1014	2F1.1 2B1.1	
18 U.S.C. § 1015	2F1.1 2B1.1, 2J1.3, 2L2.1, 2L2.2	
18 U.S.C. § 1016	2F1.1 2B1.1	
18 U.S.C. § 1017	2F1.1 2B1.1	
18 U.S.C. § 1018	2F1.1 2B1.1	
18 U.S.C. § 1019	2F1.1 2B1.1	
18 U.S.C. § 1020	2F1.1 2B1.1	
18 U.S.C. § 1021	2F1.1 2B1.1	
18 U.S.C. § 1022	2F1.1 2B1.1	
18 U.S.C. § 1023	2B1.1, 2F1.1	
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18 U.S.C. § 1025	2F1.1 2B1.1	
18 U.S.C. § 1026	2F1.1 2B1.1	
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18 U.S.C. § 1028	2F1.1 2B1.1, 2L2.1, 2L2.2	
18 U.S.C. § 1029	2F1.1 2B1.1	
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18 U.S.C. § 1030(a)(4)	2F1.1 2B1.1	
18 U.S.C. § 1030(a)(5)	2B1.1 2B1.1	
		* * *
18 U.S.C. § 1030(a)(6)	2F1.1 2B1.1	
		* * *
18 U.S.C. § 1031	2F1.1 2B1.1	
18 U.S.C. § 1032	2B1.1, 2B4.1, 2F1.1	
18 U.S.C. § 1033	2B1.1, 2F1.1 , 2J1.2	
18 U.S.C. § 1035	2F1.1 2B1.1	
		* * *
18 U.S.C. § 1341	2B1.1, 2C1.7, 2F1.1	
18 U.S.C. § 1342	2B1.1, 2C1.7, 2F1.1	
18 U.S.C. § 1343	2B1.1, 2C1.7, 2F1.1	
18 U.S.C. § 1344	2F1.1 2B1.1	

18 U.S.C. § 1347	2F1.1 2B1.1	* * *
18 U.S.C. § 1361	2B1.3 2B1.1	
18 U.S.C. § 1362	2B1.3 2B1.1, 2K1.4	
18 U.S.C. § 1363	2B1.3 2B1.1, 2K1.4	* * *
18 U.S.C. § 1366	2B1.3 2B1.1	* * *
18 U.S.C. § 1422	2B1.1, 2C1.2, 2F1.1	* * *
18 U.S.C. § 1702	2B1.1, 2B1.3 , 2H3.3	
18 U.S.C. § 1703	2B1.1, 2B1.3 , 2H3.3	
18 U.S.C. § 1704	2B1.1, 2F1.1	
18 U.S.C. § 1705	2B1.3 2B1.1	
18 U.S.C. § 1706	2B1.3 2B1.1	* * *
		* * *
18 U.S.C. § 1708	2B1.1, 2F1.1	* * *
18 U.S.C. § 1712	2F1.1 2B1.1	* * *
18 U.S.C. § 1716C	2F1.1 2B1.1	* * *
18 U.S.C. § 1720	2F1.1 2B1.1	* * *
		* * *
18 U.S.C. § 1728	2F1.1 2B1.1	* * *
18 U.S.C. § 1852	2B1.1, 2B1.3	
18 U.S.C. § 1853	2B1.1, 2B1.3	
18 U.S.C. § 1854	2B1.1, 2B1.3	* * *
18 U.S.C. § 1857	2B1.3 2B1.1, 2B2.3	* * *
18 U.S.C. § 1861	2F1.1 2B1.1	* * *
18 U.S.C. § 1902	2F1.1 2B1.4	* * *
18 U.S.C. § 1919	2F1.1 2B1.1	
18 U.S.C. § 1920	2F1.1 2B1.1	
18 U.S.C. § 1923	2F1.1 2B1.1	* * *
18 U.S.C. § 1992	2A1.1, 2B1.3 2B1.1, 2K1.4, 2X1.1	

		* * *
18 U.S.C. § 2071	2B1.1, 2B1.3	
18 U.S.C. § 2072	2F1.1 2B1.1	
18 U.S.C. § 2073	2F1.1 2B1.1	
		* * *
18 U.S.C. § 2197	2F1.1 2B1.1	
		* * *
18 U.S.C. § 2272	2F1.1 2B1.1	
		* * *
18 U.S.C. § 2275	2B1.3 2B1.1, 2K1.4	
18 U.S.C. § 2276	2B1.3 2B1.1, 2B2.1	
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18 U.S.C. § 2280	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.3 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1	
18 U.S.C. § 2281	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.3 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1	
		* * *
18 U.S.C. § 2314	2B1.1, 2F1.1	
18 U.S.C. § 2315	2B1.1, 2F1.1	
		* * *
18 U.S.C. § 2332a	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.5, 2A2.1, 2A2.2, 2B1.3 2B1.1, 2K1.4	
		* * *
19 U.S.C. § 1434	2F1.1 2B1.1, 2T3.1	
19 U.S.C. § 1435	2F1.1 2B1.1, 2T3.1	
19 U.S.C. § 1436	2F1.1 2B1.1, 2T3.1	
		* * *
19 U.S.C. § 1919	2F1.1 2B1.1	
19 U.S.C. § 2316	2F1.1 2B1.1	
		* * *
20 U.S.C. § 1097(a)	2B1.1, 2F1.1	
20 U.S.C. § 1097(b)	2F1.1 2B1.1	
20 U.S.C. § 1097(d)	2F1.1 2B1.1	
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21 U.S.C. § 333(a)(2)	2F1.1 2B1.1, 2N2.1			
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22 U.S.C. § 1980(g)	2F1.1 2B1.1			
22 U.S.C. § 2197(n)	2F1.1 2B1.1			
			*	*
22 U.S.C. § 4221	2F1.1 2B1.1			
25 U.S.C. § 450d	2B1.1, 2F1.1			
			*	*
26 U.S.C. § 7208	2F1.1 2B1.1			
			*	*
26 U.S.C. § 7214	2B1.1, 2C1.1, 2C1.2, 2F1.1			
			*	*
26 U.S.C. § 7232	2F1.1 2B1.1			
			*	*
29 U.S.C. § 1141	2B1.1, 2B3.2, 2F1.1			
			*	*
38 U.S.C. § 787	2F1.1 2B1.1			
			*	*
38 U.S.C. § 3502	2F1.1 2B1.1			
			*	*
41 U.S.C. § 423(e)	2B1.1, 2C1.1, 2C1.7, 2F1.1			
			*	*
42 U.S.C. § 408	2F1.1 2B1.1			
42 U.S.C. § 1307(a)	2F1.1 2B1.1			
42 U.S.C. § 1307(b)	2F1.1 2B1.1			
42 U.S.C. § 1320a-7b	2B1.1, 2B4.1, 2F1.1			
42 U.S.C. § 1383(d)(2)	2F1.1 2B1.1			
42 U.S.C. § 1383a(a)	2F1.1 2B1.1			
42 U.S.C. § 1383a(b)	2F1.1 2B1.1			
42 U.S.C. § 1395nn(a)	2F1.1 2B1.1			
			*	*
42 U.S.C. § 1395nn(c)	2F1.1 2B1.1			
42 U.S.C. § 1396h(a)	2F1.1 2B1.1			
			*	*
42 U.S.C. § 1713	2F1.1 2B1.1			
42 U.S.C. § 1760(g)	2B1.1, 2F1.1			
42 U.S.C. § 1761(o)(1)	2F1.1 2B1.1			
42 U.S.C. § 1761(o)(2)	2B1.1, 2F1.1			
			*	*
42 U.S.C. § 3220(a)	2F1.1 2B1.1			
42 U.S.C. § 3220(b)	2B1.1, 2F1.1			
42 U.S.C. § 3426	2F1.1 2B1.1			
			*	*

42 U.S.C. § 3791	2B1.1, 2F1.1	
42 U.S.C. § 3792	2F1.1 2B1.1	
42 U.S.C. § 3795	2B1.1, 2F1.1	
42 U.S.C. § 5157(a)	2F1.1 2B1.1	* * *
45 U.S.C. § 359(a)	2F1.1 2B1.1	
46 U.S.C. § 1276	2F1.1 2B1.1	* * *
49 U.S.C. § 121	2F1.1 2B1.1 (for offenses committed prior to July 5, 1994)	* * *
49 U.S.C. § 11903	2F1.1 2B1.1	
49 U.S.C. § 11904	2F1.1 2B1.1 (2B4.1 for offenses committed prior to January 1, 1996)	
49 U.S.C. § 14912	2F1.1 2B1.1	* * *
49 U.S.C. § 16102	2F1.1 2B1.1	* * *
49 U.S.C. § 60123(d)	2B1.1 32B1.1	
49 U.S.C. § 80116	2F1.1 2B1.1	
49 U.S.C. § 80501	2B1.1 32B1.1	
49 U.S.C. App. § 1687(g)	2B1.1 32B1.1 (for offenses committed prior to July 5, 1994)	

Part F: Computing Tax Loss under §2T1.1

Synopsis of Proposed Amendment: *This proposed amendment addresses a circuit conflict regarding how tax loss under §2T1.1 (Tax Evasion) is computed for cases that involve a defendant's under-reporting of income on both individual and corporate tax returns. Such a case often arises when (1) the defendant fails to report, and pay corporate income taxes on, income earned by the corporation, (2) diverts that unreported corporate income for the defendant's personal use, and (3) fails to report, and to pay personal income taxes on, that income. The proposed amendment clarifies that the amount of the tax loss is the aggregate amount of federal income tax that would have due by both the corporation and the individual defendant.*

More specifically, the circuits are split on which methodology should be used to calculate tax loss in these cases. Two circuits use a sequential calculation method the aggregate tax loss. Under this method, the court determines the corporate federal income tax that would have been due, subtracts that amount from the amount diverted to the defendant personally, then determines the personal federal income tax that would have been due on the reduced diverted amount. See United States v. Harvey, 996 F.2d 919 (7th Cir. 1993); United States v. Martinez-Rios, 143 F.3d 662 (2d Cir. 1998). In contrast, one circuit holds that the court should determine the aggregate tax loss by adding the corporate federal income tax that would have been due on the total amount of unreported income and the personal federal income tax that would have been due on that total amount. See United States v. Cseplo, 42 F.3d 36 (6th Cir. 1994).

The amendment adopts the Harvey approach, clarifying the existing rule in Application Note 7 of §2T1.1 that "if the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together".

The amendment also clarifies that the loss in §2T1.1 refers to federal, and not state and local, tax loss. The alternative interpretation of this provision would greatly complicate the guideline because of the multitude of state and local tax rates and provisions.

The amendment also adds an application note to §2T1.1 clarifying that a tax evasion count and a count charging the offense that provided the income on which tax was evaded are grouped together under §3D1.2(c). This application note is consistent with the longstanding view of the staff has to how such counts should be treated for grouping purposes.

Proposed Amendment (Part F):

§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

* * *

(b) Specific Offense Characteristics

- (2) If the offense involved sophisticated concealment means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

* * *

(c) Special Instructions

For the purposes of this guideline --

- (1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed).

Notes:

(A) If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved improperly claiming a deduction or an exemption, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction or exemption (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(C) If the offense involved improperly claiming a deduction to provide a basis for tax evasion in the future, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(D) If the offense involved (i) conduct described in paragraphs (A), (B), or (C); and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.

- (2) If the offense involved failure to file a tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay.

Notes:

(A) If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved (i) conduct described in paragraph (A), and; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.

* * *

Commentary

* * *

Application Notes:

1. *"Tax loss" is defined in subsection (c). The tax loss does not include interest or penalties except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203. Although the definition of tax loss corresponds to what is commonly called the "criminal figures," its amount is to be determined by the same rules applicable in determining any other sentencing 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.*

"Tax loss" means federal tax loss; it does not include state or local tax loss.

* * *

4. *Sophisticated Means Enhancement.— For purposes of subsection (b)(2), "sophisticated concealment" means " means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect" intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.*

* * *

7. *If the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together. Accordingly, in a case in which a defendant fails to report income derived from a corporation on either the defendant's individual tax return or the corporate tax return, the tax loss is the aggregate amount due to the treasury from the offenses taken together. For example, the defendant, the sole owner of a corporation, fraudulently understates the corporation's income in the amount of \$100,000 on the corporation's tax return, diverts the funds to his own use, and does not*

report these funds on the defendant's individual tax return. For purposes of this example, assume that the applicable tax rate is 34% and the applicable individual tax rate is 28%. The tax loss attributable to the defendant's corporate tax returns is \$34,000 (\$100,000 multiplied by 34%). The tax loss attributable to the defendant's individual tax return is based on the unreported \$100,000 in income less the \$34,000 in corporate tax on these same funds. This avoids "double counting" because the \$34,000 in corporate tax reduces the defendant's effective income from \$100,000 to \$66,000. The tax loss attributable to the defendant's individual tax return is \$18,480 (\$66,000 multiplied by 28%). Consequently, the aggregate tax loss for the offenses, taken together, is \$52,480 (\$34,000 plus \$18,480).

8. If the defendant is sentenced for a count charging an offense from which the defendant derived income and a count charging a tax offense involving that criminally derived income, the counts are to be grouped together as closely related counts under subsection (c) of §3D1.2 (Groups of Closely Related Counts). Such counts are to be grouped together whether or not the amount of criminally derived income is sufficient to warrant the enhancement under subsection (b)(1).

* * *

§2T1.4. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the offense involved sophisticated concealment means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

Commentary

* * *

Application Notes:

* * *

3. Sophisticated Means.—For purposes of subsection (b)(2), "sophisticated concealment means" means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities,

corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.

Part G: Cultural Heritage Resources

Synopsis of Proposed Amendment: *This part of the amendment proposes to add to Chapter Two, Part B a new guideline, §2B1.5, to cover a variety of offenses involving the theft of, damage to, or destruction of, cultural heritage resources (e.g., artifacts from ancient civilizations found in national parks, or property from national landmarks). The proposal was devised partly in response to concerns raised by the Department of the Interior and others that the guidelines inadequately address such offenses. According to INTERPOL, “[t]he annual dollar value of art and cultural property theft is exceeded only by trafficking in illicit narcotics, money laundering, and arms trafficking.” However, the effect of cultural heritage resource crimes transcends monetary considerations. Individuals, communities, and nations identify themselves through intellectual, emotional, and spiritual connections to places and objects. For much of this cultural heritage in the United States, the federal government has a perpetual duty to act either as a trustee for the public, generally, or as a fiduciary on behalf of American Indians, Alaska Natives and Native Hawaiian Organizations. However, today, the guidelines do not adequately address the importance of cultural identity and fiduciary obligation when crimes are committed against cultural heritage resources. Thus a separate guideline amendment is proposed that takes account the transcendent value of cultural heritage resources, and punishes in a proportionate way the particular offense characteristics associated with the range of heritage resource crimes.*

The proposed guideline contains a number of provisions geared toward providing adequate treatment of these offenses. First, the amendment proposes a base offense level of level [6][8], which is [two levels higher than] the base offense level proposed in the economic crime package for theft and property destruction offenses that do not involve cultural heritage resources.

Second, the amendment proposes an enhancement, tied to the proposed loss table for theft, property destruction, and fraud cases, that measures the economic value of the cultural heritage resources involved in the offense. The amendment places a monetary “value” on cultural heritage resources for the limited purpose of determining the monetary costs to return, the cultural heritage resource to its pre-offense condition. Value in this context does not take into consideration that damage and destruction to cultural heritage resources can never be restored to pre-offense condition. In great part, the purpose of creating a separate guideline is to disassociate the unique and irreplaceable nature of cultural heritage resources from the use of “loss” as a measure of harm. Use of the standard economic crime concept of “loss” in the context of heritage resource crimes implies in some respects, a fungible and compensatory system of value which is inadequate to measure the harm caused by heritage resources offenses. Accordingly, staff recommends a base offense level two levels greater than that in property offenses in order to recognize the important social, the non-monetary value of cultural heritage resources.

This amendment proposes to adopt the determinations of value already codified in various federal laws and regulations dealing with cultural heritage resources. The law recognizes two categories of cultural heritage resources consisting of (1) archeological resources and (2) all other cultural heritage resources. Thus, the value of cultural heritage resources are defined either as "archaeological value" when determining the value of archeological resources or "commercial value" when determining the value of all other cultural heritage resources or when "archaeological value" cannot be determined. Included in the value of the cultural heritage resource are the costs of restoration, repair, curation, consultation, disposition, and reburial, which may be necessary to return the cultural heritage resource to its pre-offense condition.

Third, the amendment proposes a two-level enhancement if the offense involved commercial advantage or private financial gain, in order to distinguish between offenders who are motivated by financial gain or commercial purposes from offenders who are motivated by their interest in the past and personal desire to possess archeological and cultural resources.

Fourth, the amendment proposes a tiered system of enhancements that increase the offense level depending on the recognized relative rarity and irreplaceability of specific cultural heritage resources. Both the location and nature of the cultural heritage resources affect this determination, and the staff proposes a set of cumulative specific offense characteristics to address this aspect of heritage resource crimes. Cultural heritage resources located in properties listed in the World Heritage List, a list of the world's most significant cultural and national heritage sites, receive a four-level increase. Because of their national significance, cultural heritage resources located at National Historic Landmarks, national monuments, or within the national park system receive a two-level increase. An additional two-level increase attaches to those cultural heritage resources, that by their nature, Congress has determined are worthy of special consideration, e.g., human remains, funerary objects, cemetery property, designated archeological or ethnological materials, or pre-Columbian monumental or architectural sculptures or murals.

Fifth, the amendment proposes a two-level enhancement and a minimum offense level of level 13 are provided if a firearm was possessed or a dangerous weapon (including a firearm) was brandished, that reflect the increased danger of violence and risk to law enforcement officers and others.

Sixth, a two-level enhancement is provided if the offense involved sophisticated means, and examples are provided to illustrate conduct that may constitute sophisticated means in such cases.

Seventh, a cross reference to the new guideline is proposed to be added to the proposed consolidated theft, fraud, and property destruction guideline.

Finally, the Statutory Index (Appendix) is updated to reference a variety of offenses to the new guideline.

Proposed Amendment:

Chapter Two, Part B, Subpart 1, as amended by Parts A through F of this amendment, is further amended by adding at the end the following:

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources

- (a) Base Offense Level: **[6][8]**
- (b) Specific Offense Characteristics
 - (1) If the value of the cultural heritage resources (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1(Theft, Property Destruction, and Fraud) corresponding to that amount.
 - (2) If the offense involved a cultural heritage resource from a property included on the World Heritage List, increase by **4** levels.
 - (3) If the offense involved a cultural heritage resource (A) from the national park system; or (B) from or constituting (i) a National Historic Landmark, or (ii) a national monument, increase by **2** levels.
 - (4) If the offense involved a cultural heritage resource constituting (A) human remains; (B) a funerary object; (C) cemetery property; (D) designated archeological or ethnological material; or (E) a pre-Columbian monumental or architectural sculpture or mural, increase by **2** levels.
 - (5) If the offense was committed for commercial advantage or private financial gain, increase by **2** levels.
 - (6) If the offense involved sophisticated means, increase by **2** levels.
 - (7) If (A) a dangerous weapon (including a firearm) was brandished; or (B) a firearm was possessed, increase by **2** levels. If the resulting offense level is less than level **13**, increase to level **13**.

Commentary

Statutory Provisions: 16 U.S.C. § 470ee; 18 U.S.C. §§ 541-546, 641, 666, 668, 1151-1153, 1163, 1170, 1361, 2314-2315. For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Brandished", "dangerous weapon", and "firearm" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

"Cemetery property" (A) means any property reasonably related to a cemetery; and (B) does not include human remains and funerary objects.

"Commercial advantage or private financial gain" means the receipt, or expectation of receipt, of anything of value, including money, goods, or services.

"Cultural heritage resource" means any of the following: (A) a historic property, as defined in 16 U.S.C. § 470w(5); (B) a historic resource, as defined in 16 U.S.C. § 470w(5); (C) an archeological resource, as defined in as defined in 16 U.S.C. § 470bb(1) (see also section .3(a) of 43 C.F.R. Part 7, 36 C.F.R. Part 296, 32 C.F.R. Part 299, and 18 C.F.R. Part 1312); (D) a sacred object, as defined in 25 U.S.C. § 3001(3)(C) (see also 43 C.F.R. 10.2(d)(3)); (E) cultural patrimony, as defined in 25 U.S.C. § 3001(3)(D) (see also 43 C.F.R. 10.2(d)(4)); and (F) object of cultural heritage, as defined in 18 U.S.C. § 668(a).

"Designated archeological or ethnological material" has the meaning given that term in 19 U.S.C. § 2601(7).

"Funerary object" means an object that, as a part of the death rite or ceremony of a culture, was placed intentionally, at the time of death or later, with or near human remains.

"Human remains" (A) means the physical remains of the body of an individual; and (B) does not include remains that reasonably may be determined to have been freely disposed of or naturally shed by the individual from whose body the remains were obtained, such as hair made into ropes or nets.

"National Historic Landmark" has the meaning given that term in 16 U.S.C. § 470(a)(1)(B).

"National monument" has the meaning given that term in 16 U.S.C. § 431.

"National park system" has the meaning given that term in 16 U.S.C. § 1c(a).

"Pre-Columbian monumental or architectural sculpture or mural" has the meaning given that term in 19 U.S.C. § 2095(3).

"World Heritage List" means the World Heritage List maintained by the World Heritage Committee of the United Nations Educational, Scientific, and Cultural Organization in accordance with the Convention Concerning the Protection of the World Cultural and Natural Heritage.

2. Value of the Cultural Heritage Resources.—This note applies to the determination of the value of the cultural heritage resources for purposes of subsection (b)(1).

(A) Archeological Resources.—The value of the cultural heritage resource, in the case of an archeological resource, is—

- (i) either (I) its archeological value, if its archeological value can be determined and is greater than its commercial value; or (II) its commercial value, otherwise; and
- (ii) the cost of restoration and repair of the archeological resource.

(B) Other Cultural Heritage Resources.—The value of the cultural heritage resource, in the case of a cultural heritage resource other than an archeological resource, is—

- (i) its commercial value; and
- (ii) the cost of restoration and repair of the cultural heritage resource.

(C) Definitions.—For purposes of this application note:

- (i) "Archeological value" of an archeological resource means the value of the information associated with the archeological resource, as determined by the cost of the retrieval of the scientific information which would have been obtainable prior to the offense, including the cost of preparing a research design, conducting field work, conducting laboratory analysis, and preparing reports as would be necessary to realize the information potential. (See 43 C.F.R. § 7.14(a); 36 C.F.R. § 296.14(a); 32 C.F.R. § 229.14(a); 18 C.F.R. § 1312.14(a).)
- (ii) "Commercial value" of a cultural heritage resource, including an archeological resource, means the fair market value of the cultural heritage resource. In the case of a cultural heritage resource that has been damaged as a result of the offense, the fair market value shall be determined using the condition of the cultural heritage resource prior to commission of the offense, if the prior condition can be determined. (See 43 C.F.R. § 7.14(b); 36 C.F.R. § 296.14(b); 32 C.F.R. § 229.14(b); 18 C.F.R. § 1312.14(b).)
- (iii) "Cost of restoration and repair" includes all actual and projected costs of curation, disposition, and appropriate reburial of, and consultation with respect to, the cultural heritage resource; and any other actual and projected costs to complete restoration and repair of the cultural heritage resource, including (I) its reconstruction and stabilization; (II) reconstruction and stabilization of ground contour and surface; (III) research necessary to conduct reconstruction and stabilization; (IV) the

construction of physical barriers and other protective devices; (V) examination and analysis of the cultural heritage resource as part of efforts to salvage remaining information about the resource; (VI) preparation of reports. (See 43 C.F.R. § 7.14(c); 36 C.F.R. § 296.14(c); 32 C.F.R. § 229.14(c); 18 C.F.R. § 1312.14(c).)

(D) Determination of Value in Cases Involving A Variety of Cultural Heritage Resources.—In a case involving both an archeological resource and a cultural heritage resource other than an archeological resource, the value of the cultural heritage resources is the sum of all calculations made for those resources under subdivisions (A) and (B) of this note.

3. Sophisticated Means.—For purposes of subsection (b)(6), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of the offense, including: (A) relocating, or participating in relocating, the cultural heritage resource to another jurisdiction to evade law enforcement or regulatory officials; (B) the use of mechanical or electronic equipment (e.g., a metal detector, powered tool, global positioning system, communication device, or excavation machinery or equipment) to locate or excavate a cultural heritage resource; (C) complex or intricate efforts to conceal the offender, a mechanical or electronic device, or a cultural heritage resource; and (D) the use of a publication providing information on the location of, or on search techniques concerning, a cultural heritage resource.

If the conduct that forms the basis for an enhancement under subsection (b)(4) 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.

§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

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(c) Cross References

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(4) If the offense involved theft of a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources), if the resulting offense level is greater than that determined above.

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Application Notes:

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—. *For purposes of subsection (c)(4), "cultural heritage resource" means any of the following: (A) a historic property, as defined in 16 U.S.C. § 470w(5); (B) a historic resource, as defined in 16 U.S.C. § 470w(5); (C) an archeological resource, as defined in as defined in 16 U.S.C. § 470bb(1) (see also section .3(a) of 43 C.F.R. Part 7, 36 C.F.R. Part 296, 32 C.F.R. Part 299, and 18 C.F.R. Part 1312); (D) a sacred object, as defined in 25 U.S.C. § 3001(3)(C) (see also 43 C.F.R. 10.2(d)(3)); (E) cultural patrimony, as defined in 25 U.S.C. § 3001(3)(D) (see also 43 C.F.R. 10.2(d)(4)); and (F) object of cultural heritage, as defined in 18 U.S.C. 668(a).*

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