



PRELIMINARY DRAFT



103217

SENTENCING GUIDELINES UNITED STATES SENTENCING COMMISSION SEPTEMBER 1986

Published by the United States Sentencing Commission to encourage analysis and public comment.

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AN OPEN LETTER

The Sentencing Commission is committed to developing sentencing guidelines informed by the widest measure of public comment. To achieve this goal, the Commission has conducted its work openly. We have requested and received comment from hundreds of individuals and groups. We shall continue this approach as we work to produce a final product.

While this first draft is preliminary in nature, it does provide an excellent vehicle for public comment. We seek your critical analysis.

NCJRS
NOV 10 1986
ACQUISITIONS

Presently, judges in our federal criminal justice system are provided little guidance when confronted with the complex issue of sentencing a convicted offender. This lack of guidance has adversely affected the administration of justice by producing unwarranted disparity in sentencing. Analysis of past and current sentencing practices reveals that offenders with similar characteristics who commit similar crimes receive sentences that vary dramatically. This disparity has produced a system of justice that lacks an appropriate degree of certainty of punishment and, most importantly, fairness to the offender, the victim, and society.

After more than a decade of bipartisan efforts, the 98th Congress passed legislation that, in addition to other major criminal justice reforms, created the United States Sentencing Commission. Under its mandate from Congress, the Commission's primary responsibility is to establish sentencing policies and practices for the federal courts that avoid unwarranted disparity and meet the four purposes of sentencing: just punishment, deterrence, incapacitation, and rehabilitation. The Commission's goal is to provide a structure and framework for the sentencing decision so that similar offenders who commit similar offenses are sentenced in a similar fashion. The Commission's intention is that these efforts will ensure fairness and contribute to the reduction of crime.

The most pressing task of the Commission is to develop an intellectually sound, consistent, and workable set of sentencing guidelines for submission to Congress by April 1987. After the initial guidelines take effect, the Commission is charged with the ongoing responsibility of measuring the impact of the guidelines and their effectiveness in meeting the enumerated purposes of sentencing. In the years after initial implementation, the Commission will propose guideline amendments to Congress as revisions are needed and as new criminal statutes are enacted.

From its inception, the Commission has conducted its business openly, for it believes that this unique opportunity for sentencing reform can best be accomplished with full participation by all interested parties. Public policy is only as good as the quality and breadth of the public input that goes into its creation. The Commission has solicited comment from hundreds of individuals, organizations, and government agencies with an interest in the federal criminal justice system. In keeping with this philosophy, the Commission voted to publish a preliminary working draft of sentencing guidelines well in advance of any required publication date in order to provide a vehicle for critical analysis and public comment. While these guidelines do not reflect the views of all Commissioners, the Commission voted for publication to provide a means for identifying the issues that must ultimately be resolved. The Commission realizes that it runs a risk by publishing at this early date when the preliminary guidelines are not drafted for all offenses and when they are not as refined as they will be several months from now. The alternative, however, would severely limit public input, and the Commission finds this unacceptable.

The preliminary draft published for public comment seeks to accomplish several goals. The first is to focus public attention on a proposed format, a possible structure and suggested sentencing ranges. The format, structure, and suggested terms of imprisonment will all be reconsidered by the Commission before the final draft is written in light of further deliberation, continued empirical research, and the receipt of written and oral comment.

The publication also highlights a series of difficult policy issues that remain unresolved. The Commission underscores these policy issues for public comment because their resolution will determine, to a great extent, the final guidelines.

The Commission's ongoing sentencing data collection and analysis efforts will continue after the guidelines are in effect to assess the impact of the guidelines on the justice system as well as changes in the crime rate. The Commission will closely monitor the effectiveness of the guidelines in meeting the purposes of sentencing and will recommend to Congress changes to strengthen the system and eliminate unfairness. Significantly, for the first time in the history of the federal criminal justice system, the commitment to an efficient and just sentencing system will be inextricably linked to a continuous monitoring and measurement process. Refinement and improvement will be ongoing.

To achieve longer-term goals, the sentencing guidelines ultimately submitted to Congress must be workable, fair, and effective. That is why publication of this preliminary draft of guidelines is so important. Only with the benefit of the insight and experience of others will the Commission be able to achieve its goal of producing a sentencing system that truly serves the interests of justice.

In drafting these preliminary guidelines, the Commission has sought to identify facets of an offense that should lead to a greater or lesser punishment. In deciding what circumstances are relevant, the Commission has recognized that the guidelines cannot take all arguably relevant distinctions into account without producing guidelines that are unworkably complex. Too complex a system risks misapplication and invites a return to disparate sentences for similar offenses. An inadequate number of distinctions produces problems of a different kind. Guidelines that do not have a sufficient degree of complexity could result in two offenders engaging in quite different behavior receiving similar sentences.

The Commission has balanced the need for overall guideline simplicity and workability against the desirability of taking account of all potentially relevant factors. The public is asked to review the tentative judgments embodied in the preliminary guidelines with this problem in mind. It will be helpful for those commenting not simply to identify other potentially relevant features of an offense, but also to decide whether those features are sufficiently important in enough cases to warrant additional complexity. Conversely, it would be useful to identify distinctions that these preliminary guidelines presently make that might be eliminated in the interest of simplicity, without making the guidelines significantly less fair or less effective.

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CHAPTER ONE: INTRODUCTION AND OVERVIEW

I. AUTHORITY AND RESPONSIBILITY OF THE COMMISSION

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

As specified in 28 U.S.C. § 991(b), the policies, practices and sentencing guidelines established by the Commission are designed to:

1. effectuate the purposes of sentencing enumerated in 18 U.S.C. § 3553(a)(2) (in brief, those purposes are just punishment, deterrence, incapacitation, and rehabilitation);
2. provide certainty and fairness in sentencing practices, by avoiding unwarranted sentencing disparities among offenders with similar characteristics convicted of similar criminal conduct, while permitting sufficient judicial flexibility to take into account relevant aggravating or mitigating factors; and
3. reflect, to the extent practicable, advancement in knowledge of human behavior as related to the criminal justice process.

The Commission is also charged with the ongoing responsibilities of: evaluating the effects of the sentencing guidelines on the criminal justice system, including the impact on the resources of the Bureau of Prisons; recommending to Congress appropriate modifications of substantive criminal law and sentencing procedures, as well as revisions of the sentencing guidelines; establishing a research and development program on sentencing practices and procedures; and other related duties.

Created by the sentencing reform provisions of the Comprehensive Crime Control Act, Pub. L. No. 98-473 (1984), the Commission's authority and duties are set out in Chapter 58 of Title 28, United States Code. Procedures for implementing the guidelines system of sentencing are prescribed in a new Chapter 227 of Title 18, United States Code.

The statutory authority affecting the Commission has been amended by Congress. Public Law 99-217 (December 26, 1985) postponed by twelve months, until April, 1987, the deadline for submission to Congress of the initial set of sentencing guidelines. The guidelines will be subject to six months of Congressional review and take effect if no contrary action is taken by law. That legislation also postponed until November 1, 1987, the effective date for the sentencing procedure revisions accompanying the guidelines. Public Law 99-363 (July 11, 1986) clarified the authority of the Commission to write policy statements concerning the imposition of fines and permitted a maximum variation of six months or 25 percent, whichever is greater, between the minimum and maximum sentences of incarceration in a guideline

range. This same legislation also provided that if the maximum sentence is life imprisonment, the minimum sentence must be at least 30 years.

Pursuant to Sections 218 and 235 of the Comprehensive Crime Control Act of 1984, parole will be abolished for all offenders sentenced under the determinate sentences prescribed by the guidelines. This means that a sentence of five years will require imprisonment for five years, less statutory good time.

II. COMMISSION ACTIVITIES RELATING TO GUIDELINES DEVELOPMENT

Prior to Publication

Advisory and Working Groups. One of the Commission's first actions was to establish advisory and working groups with whom the Commission could consult on a continuing basis as it considered sentencing issues and drafted guidelines. These represent each of the following groups: United States Attorneys, state district attorneys, federal probation officers, defense attorneys, researchers, and federal judges. In addition to receiving written comments and critiques from the members of these groups, the Commission, over a period of several months, invited representatives of each group (including three groups of federal judges) to participate in working sessions with Commission members and staff. During these sessions, early drafts of guidelines were examined, and many of the important issues facing the Commission were given a full airing.

Topical Hearings. In order to have the benefit of a wide range of informed views the Commission has solicited written advice from hundreds of criminal justice practitioners, interest groups, and other interested individuals and organizations in conjunction with a series of five public hearings in Washington, D.C. The topics of these public hearings were: Offense Seriousness Ranking (April 15, 1986); Offender Characteristics: Prior Record (May 22); Organizational Sanctions (June 10); Sentencing Options (July 15); and Plea Agreements (September 23). In connection with these hearings, the Commission received oral testimony from 46 witnesses and written comments from more than 400 additional respondents. Those contributing to the hearing process included government officials representing all facets of the criminal justice system at the federal, state, and local levels, private attorneys, interest and advocacy groups espousing a range of philosophies, other specialists in sentencing issues, victim advocates, and inmates. These public hearings and written comments significantly contributed to the development of preliminary sentencing guidelines.

Meetings. Since its inception, the Commission has met regularly and all of these meetings have been open to the public. Although most of the work involved in drafting the preliminary guidelines necessarily was accomplished in informal working groups, the Commission has used its meetings to set an overall agenda and direction for the development of the guidelines, as well as to discuss, revise, and approve working group drafts as they have been presented to the Commission. Commission meetings also have included informational briefings and discussions with a wide variety of resource groups, including the Education and Probation Committees of the United States Judicial Conference, the General Accounting Office, the Bureau of Prisons, the National Institute for Sentencing Alternatives, the Community

Corrections Division of the National Institute of Corrections, various government agencies having law enforcement responsibilities, defense attorneys, and criminal justice scholars.

In-House Research. The Commission has established a research program to assist in the development, implementation, monitoring, and evaluation of the guidelines. The research staff has collected and will continue to collect pertinent data, including detailed information on past sentencing and correctional practices, and the post-conviction activities of probationers and parolees. These data are being used or will be used for several purposes: to describe offenses and offenders who are convicted in federal court; to determine which offenders pose a high risk of recidivism; to test the application of the guidelines to actual cases; to predict the impact of the guidelines on federal prison population and other components of the federal criminal justice system; and to monitor the use of the guidelines by the federal courts. In addition to performing empirical research, the research unit reviews criminal justice research, advises the Commission about the application of scientific theory and knowledge to sentencing practices, and provides general technical and computer support.

Liaison with Other Federal Agencies. The Commission solicited information from federal agencies about the specific nature and number of offenses occurring within their areas of responsibility. Information was provided by numerous divisions of the Department of Justice, the Department of the Treasury, the Departments of Defense, Education, Health and Human Services, Interior, and Labor, the Federal Deposit Insurance Corporation, the Postal Service, and the Securities and Exchange Commission. Many of these agencies cited sentencing factors they believed important in the cases within their respective jurisdictions.

Field Research and Related Activities. The Commission has traveled across the nation to obtain information and advice as well as to give presentations regarding the efforts of the Commission.

Commissioners and staff visited four federal prisons of various classifications to gain firsthand awareness of the current facilities and operations of the Federal Bureau of Prisons. In addition, Commission staff visited a number of states and communities in which a variety of sentencing options other than imprisonment were being used. Staff visited numerous intensive probation supervision programs, including those using house arrest, electronic monitoring, and community residential facilities. Specifically, staff met with officials of the New Jersey Intensive Supervised Probation Program; the Massachusetts Intensive Probation Program; the Quincy, Massachusetts District Court; the San Mateo County, California Adult Probation Office; the Texas Adult Probation Commission; and the Georgia Department of Offender Rehabilitation. Additionally, Commission staff met with officials of the Massachusetts Commission on Correctional Alternatives and officials of the intensive supervision program formerly operated by the state of Washington.

The fine collection and community service programs of a number of state probation departments were studied. In its efforts to establish reasonable and collectable fines and to determine an offender's likelihood and ability to pay fines, Commission staff met with officials of several banking and financial institutions, including the Fair-Isaac Companies and the Bank of America in California, and the

Credit Bureau, Inc., in Atlanta, Georgia. In addition, Commission staff met with the Vera Institute of Justice in New York City about its community service programs.

Commission representatives met with United States Probation Officers at ten regional seminars and district-wide staff meetings. Through these meetings, the Commission received input from officers in the majority of federal judicial districts.

Post-Publication

Distribution. These guidelines have been mailed to each Member of Congress, Article III Judge, United States Attorney, Federal Public Defender and Chief United States Probation Officer. Copies were also sent to hundreds of other individuals and groups on the Commission's mailing lists, including defense attorneys, academics, victim advocates, and private and professional membership groups.

Public Hearings. In order to structure and facilitate public comment on the preliminary guidelines, the Commission will hold a series of regional hearings. Public attendance and participation at any of the following hearings is encouraged:

October 17, 1986 -- Chicago
October 21, 1986 -- New York City
October 29, 1986 -- Atlanta
November 5, 1986 -- Denver
November 18, 1986 -- San Francisco
December 2-3, 1986 -- Washington, D.C.

Each hearing will begin at 10:00 a.m. in the host city's United States Courthouse. Following testimony by invited witnesses, the Commission will reserve time for comments from interested members of the public at each hearing.

Written Comments. The public comment period on the preliminary guidelines extends until December 3, 1986. The Commission encourages all groups and individuals with an interest in criminal justice to study the preliminary guidelines and submit written comments to the Commission by the close of the public comment period.

It will be most helpful to the Commission if written comments relating to specific guideline sections are typed on separate pages. All comments should be mailed to the following address:

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004
Attention: Guidelines Comments

As will be explained further in the overview of Chapter Two, preliminary guidelines for some offenses are not ready for publication at this time. They will be published in a timely fashion to allow public comment prior to submission of final guidelines to Congress.

Revision and Submission to Congress. The Commission will consider all written comments submitted, as well as the oral testimony presented at the public hearings. Based on public comment and its own continuing work, the Commission will revise and complete the guidelines and policy statements.

Under statute, the deadline for submission of the initial set of sentencing guidelines to Congress is April 13, 1987. In addition to the guidelines, the Commission must submit to Congress a report stating the reasons for the Commission's recommendations. Upon submission of the guidelines, the General Accounting Office must conduct a study assessing the potential impact of the Commission's guidelines in comparison with the operation of the existing sentencing and parole release system.

Congress has six months from the date the guidelines are submitted to study the guidelines and impact analyses. By law, the guidelines become effective at the conclusion of the six-month review period, if no contrary action is taken.

III. OVERVIEW OF THE GUIDELINES

The preliminary guidelines utilize three important features to produce a structure that considers the appropriate degree of actual offense conduct, facilitates similar treatment of similar offenders who commit similar crimes, and is easy to apply.

The first major feature is that these guidelines operate on a system of modified real offense sentencing. That system is described more fully later in this chapter (Section VII). It means that an offender will be sentenced on the basis of the conduct necessarily involved in the offense of conviction, plus the conduct done in furtherance of the offense of conviction and any injuries resulting from such conduct.

For example, every bank robbery involves some level of real, implicit, or threatened force, although those levels differ widely. The robbery in which the offender discharges a weapon is different from the robbery in which the offender pretends that there is a weapon in his or her pocket. The proposed modified real offense system takes these variations into account. This allows the sentencing judge to distinguish one offender from another, even though both are convicted of the same statutory offense.

The second feature of the guidelines is the use of generic offense descriptions. Federal criminal law contains scores of theft provisions, scores of false statement provisions, a dozen or more homicide statutes, and so forth. The preliminary guidelines group similar offense behavior and adjust that behavior by particular aggravating statutory factors where appropriate. This does not alter the substantive law, nor change the potential statutory range of punishment, but only provides offense categories for purposes of sentencing. Of course, where there is only one statute proscribing the conduct in question (tax evasion, for example), the guidelines identify the conduct by its statutory name.

The third feature, a narrative format, is one that seeks to reflect the thought process judges employ in making sentencing decisions. In this system, a numerical offense value is assigned to each relevant aspect of the offender's conduct. The offense value reflects each identified unlawful act or omission, injury or harm, hereinafter collectively referred to as the offense. The offense values in the preliminary guidelines designate the relative level of sanction for the offense in question, considering most prominently the harm resulting from the offense and the need to deter future similar offenses. The assigned values relate to a scale of 1-360. Comment is specifically invited on the offense values and aggravating and mitigating factors assigned to each offense.

To determine a sentence under these guidelines, the sentencing judge begins with the offense of conviction. The Statutory Index leads the judge to potentially applicable sections of the guidelines. The guidelines list aggravating and mitigating factors, including harms or injuries that may be present when a particular statutory offense is committed. This index is, in essence, a road map since it directs the judge to sections of the guidelines that may be applicable. If a specific section applies, the appropriate offense value is included.

To illustrate how the narrative guidelines system works, if an offender robs a bank, the offender is given a certain number of offense units for the robbery. If the offender uses a weapon, more units are added. If the offender injures someone, the judge is referred to the Assault and Battery section, where more specific units are added. A reference is also made to a property table, where additional units are assessed on the basis of the amount of money or value of the property stolen. This table is used for theft and burglary as well as for other offenses resulting in a financial loss or harm to property.

When all relevant offense characteristics have been identified and the corresponding offense values totaled, this score is adjusted up or down by applicable sections found in Chapter Three. This chapter deals with offender characteristics such as criminal history, role in the offense, acceptance of responsibility, and cooperation. Adjusting the total offense values by offender characteristics provides the total number of sanction units. Chapter Four translates those units into a sentence.

IV. STATEMENT OF PURPOSE

The preliminary guidelines and their accompanying policy statements are intended to establish sentencing policies and practices that:

1. assure that the sentences imposed on offenders convicted of federal crimes:
 - a. reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense;
 - b. afford adequate deterrence to criminal conduct;
 - c. protect the public from further crimes by the offender; and

d. to the extent consistent with the objectives of protecting the public and providing just punishment and deterrence, promote rehabilitation of the offender in the most effective manner;

2. provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among offenders with similar characteristics who have been found guilty of similar criminal conduct, while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

3. to the extent practicable under the circumstances, reflect advancement in knowledge of human behavior as it relates to the criminal justice process. See 28 U.S.C. § 991(b).

Conforming with the Congressional mandate, the guidelines adopt no single, overriding purpose for or theory of sentencing. Rather, in formulating the guidelines, the Commission has sought to take into consideration whether and to what extent each of the four stated purposes -- just deserts, deterrence, incapacitation, and rehabilitation -- applies in any given case, realizing that different forms of conduct are made criminal for different reasons.

Commentary

The Statement of Purpose reflects the Commission's commitment that the guidelines satisfy the multi-faceted Congressional mandate set forth in 28 U.S.C. § 991(b).

Clause 1 and the last paragraph make it clear that no single purpose of sentencing has been given preeminence. By relying on rehabilitation as a rationale for sentencing only "to the extent that it is not inconsistent with other purposes," the Statement of Purpose acknowledges that the Commission is of the view that while the promoting of rehabilitation is an important goal of sentencing, it cannot be considered a substitute for the other goals of sentencing (i.e., reflecting the seriousness of the offense, promoting respect for the law, providing just punishment and deterrence, and protecting the public from future criminality). The Commission believes that rehabilitation must be secondary to these other goals, especially that of protecting the public. As suggested by 28 U.S.C. § 994(k), rehabilitation is not to be accomplished through imprisonment, but rather through educational or treatment programs that are conditions of probation or supervised release. Thus, under the guidelines, rehabilitation can be a primary sentencing consideration only for relatively minor offenses where other statutory considerations do not mandate imposition of a substantial penalty. However, rehabilitation may be an additional consideration beyond punishment in any appropriate case.

Clause 2, reflecting 28 U.S.C. § 991(b), states that the guidelines are designed to reduce unwarranted sentencing disparity among similar offenders who have been found guilty of similar conduct. This statement is to be read in conjunction with the remainder of Chapter 58 of Title 28 and Chapter 227 of Title 18, including the need for guideline sentences to fulfill the purposes stated in 18 U.S.C. § 3553(a). Because of the many considerations that enter into assessing seriousness of offenses,

the amenability of the conduct to deterrence, and the need for incapacitation, the Commission has not assumed that any two offenses that produce the same level and type of harm, e.g., dollar loss or physical injury, are necessarily similar and therefore require identical treatment in the guidelines. Rather, the nature and degree of harm is but one of the factors that Congress has required the Commission to consider. Other factors may vary the punishment for otherwise similar offenses. See, e.g., 28 U.S.C. § 994(c) (Commission to consider circumstances of the offense, community view of the gravity of offense, public concern generated by the offense, and the current incidence of the offense); 28 U.S.C. § 994(d) (Commission to consider various offender characteristics). Thus, the guidelines may result in different punishments for seemingly similar crimes, such as embezzlement and tax evasion, or, in more limited instances, even for identical crimes committed by different types of offenders, for different motives, or under different circumstances.

Clause 3 signifies the Commission's cognizance of its obligation to incorporate knowledge regarding human behavior into the guidelines. Unfortunately, the limited time available has precluded development of an extensive system that relies heavily upon scientific investigation. The results of scientific research are reflected most clearly in the adjustments for criminal history in Chapter Three. The Commission plans further empirical inquiry and expects to refine the guidelines based upon analyses of the data collected to measure the impact of the guidelines, as well as information derived from other sources.

V. GENERAL RULES OF APPLICATION

Rule of Construction

The provisions of these guidelines shall be construed according to the fair meaning of their terms. When a provision is susceptible to different interpretations, it shall be interpreted in the manner that is most compatible with the Statement of Purpose and the relevant commentary.

Standard of Proof

In determining the appropriate sentence under these guidelines, the court may rely on any information produced at trial, in the presentence report, or at the sentencing hearing that the court finds is supported by a preponderance of the evidence. See 18 U.S.C. § 3577 (redesignated as 18 U.S.C. § 3661 effective November 1, 1987).

Burdens of Production and Persuasion

1. The court may find that an offense characteristic exists or an adjustment factor applies if a preponderance of the evidence supports such finding.
2. The burdens of production and persuasion as to the existence of an offense characteristic or an adjustment factor shall be on the government unless the offense characteristic or adjustment factor

mitigates the potential sentence in which case the burdens of production and persuasion shall be on the offender.

Commentary

The preponderance of the evidence standard is a less demanding standard than either the beyond a reasonable doubt standard used to determine the defendant's guilt or a clear and convincing evidence standard.

The use of the preponderance standard at sentencing was recently upheld in McMillan v. Pennsylvania, ___ U.S. ___, 106 S.Ct. 2411 (1986). In McMillan, the Court examined a Pennsylvania statute that permitted a judge to impose a mandatory minimum sentence of five years for specific felonies when the judge found by a preponderance of the evidence that the offender "visibly possessed a firearm."

The Court found that establishment of the preponderance standard was permissible under the Due Process clause, and noted that "sentencing courts have always operated without constitutionally imposed burdens of proof; embracing petitioners' suggestion that we apply the clear and convincing standard here would significantly alter criminal sentencing, for we see no way to distinguish the visible possession finding at issue here from a host of other express or implied findings sentencing judges typically make on the way to passing sentence." McMillan, supra, at 2420, n 8.

VI. APPLICATION INSTRUCTIONS

The guidelines are presented in numbered chapters, which are divided into alphabetical parts. The parts are subdivided into sections. Each section is identified by a letter and number that correspond to the part and chapter in which it is found. Section A412, for example, would be found in Part A of Chapter Four. A commentary is provided where necessary to explain the guideline in greater detail or to inform the reader of the statutory provisions governing the subject matter of a particular guideline.

The court should follow the steps set forth below to determine sentence:

1. Determine what statutes the offender has been convicted of violating.
2. Refer to the Statutory Index and determine which section of Chapter Two applies. If more than one section of Chapter Two is referenced, refer to each section and any applicable commentary to determine which is most appropriate to the offense before the court.
3. If the applicable section contains more than one base offense value, select the highest value that applies. Add special offense characteristics where applicable.
4. If the section contains a cross-reference to one or more other sections, refer to those sections and proceed as in step 3 above.

5. Repeat steps 3 and 4 for each offense of conviction.
6. When all offenses have been scored, total the offense value.
7. Refer to Chapter Three for applicable adjustments in offense value(s). After applying an adjustment, always round down to the nearest whole number.
8. Apply an adjustment for role in the offense (Chapter Three, Part A). If the offender is convicted of more than one offense and plays different roles in each offense, determine which offense values apply to which offenses and apply the adjustment separately to each. Total the offense values after they have been adjusted, rounding down to the nearest whole number.
9. Determine whether the offender is entitled to an adjustment for post-offense conduct (Chapter Three, Part B). If so, multiply the adjusted offense value from step 8 by the adjustment for post-offense conduct, rounding down to the nearest whole number.
10. Apply an adjustment for criminal history (Chapter Three, Part C) and multiply the adjusted offense value from step 9 by that adjustment, rounding down to the nearest whole number.
11. The new total is the offender's sanction unit score.
12. Refer to Chapter Four to determine the sentence.

VII. APPLICATION OF MODIFIED REAL OFFENSE SENTENCING

The preliminary guidelines operate under a system of modified real offense sentencing that requires a judge to identify all relevant offense characteristics. These include unlawful acts or omissions that were done in furtherance of the crime of conviction, as well as threatened, attempted, or completed injuries or harms that resulted therefrom. The guidelines, through a series of cross-references, tell the judge which particular characteristics to take into account.

The following offenses are excluded in determining an offender's sentence under the guidelines:

1. conduct for which the offender has already been fully sanctioned;
2. conduct for which further prosecution is barred.

* * * * *

Commentary

At the outset the Commission must decide whether to base its sentencing guidelines upon the real conduct in which the offender engaged or only the conduct for which the offender was convicted. The decision is fundamental, for it will shape both the form and the content of any guideline system. It will affect the plea negotiation process, prosecutorial decision-making, and the type and terms of the sentence. The decision is unusually difficult, because there are important advantages and disadvantages of each.

In essence, a real offense system considers all of the offender's relevant behavior while a charge of conviction offense system considers only those elements of behavior that formed part of the charge of which the offender was convicted. To understand the difference between these alternatives, consider the following examples. First, a man walks in a bank, hands a teller a shopping bag, pretends to have a gun, and passes a note that says, "I have a gun. Give me all your money." The teller puts \$1,500 in the shopping bag and the offender walks out. Second, a man walks up to a teller in a bank and points a loaded gun. The offender demands money. After the teller gives him \$1,500, he strikes her with the gun and demands that she collect money from elsewhere in the bank. He leaves the bank with \$20,000. Assume that the grand jury charges both these defendants with violations of the same statute, 18 U.S.C. § 2113(a), and that both are convicted. A guidelines sentencing system based solely upon offense of conviction treats these two offenders similarly. Both violated the same statute. The elements of the crimes for which they were convicted are the same (taking property by threat from a bank). The sentencing system would not take account of the differences in their behavior -- the amount of money received; the presence of the gun; the physical injury -- unless that behavior constituted an element of a separately charged offense. A real offense sentencing system, however, would take account of all the harms that the offender actually caused during the course of the conduct for which he was charged. Thus, a real offense system would punish the second man more severely in light of the gun, the extra money taken, and the physical injury caused.

In evaluating between these approaches, the Commission has considered the following six questions:

1. What standard of proof should a court use when deciding factual questions relevant to the sentencing determination?
2. To what extent should the Commission preserve the real offense sentencing system often used by the courts?
3. To what extent can the sentencing guidelines avoid problems arising from overly broad statutory definitions of offenses?
4. To what extent should power to influence the sentence vest in the prosecutor rather than the judge?
5. How can the Commission maintain justice and the appearance of justice for convicted offenders?

6. *To what extent can the Commission appropriately take account of the practical needs of a criminal justice system heavily dependent on guilty pleas?*

The present system of federal sentencing is largely a system of real or actual criminal conduct sentencing, although the covert nature of the process sometimes hides this fact. At present, a sentencing judge reads a presentence report prepared by a probation officer. That report tells the judge what the officer believes really occurred with respect to the crime. The judge then exercises broad discretionary power with those real facts in mind. Since the judge does not articulate the precise factors considered, nor how they weighed in the decision, the differential impact of the real conduct factors versus only those subsumed under the charge for which the offender was convicted is never known. Although the offender may challenge disputed statements of fact in the report, such challenges rarely affect the sentence because judges often avoid a hearing by stating that they will disregard the challenged portion, leaving offenders uncertain whether judges, in fact, can really do so.

Nevertheless, judges commonly consider the real criminal conduct. Thus, for example, judges sentence differently two offenders, both convicted of armed bank robbery under 18 U.S.C. § 2113(a), if Offender A was reported by the probation officer to have terrified hostages with games of Russian roulette at gunpoint, whereas Offender B was armed, but did not engage in this activity. Furthermore, after an offender is convicted and sentenced, the present parole guidelines system overtly relies on real criminal conduct, as determined by a hearing officer, in making release determinations. The standard of proof for sentencing facts that a judge or the Parole Board considers under this real criminal conduct system is often unclear, but it almost certainly does not rise to the ordinary criminal trial standard of proof beyond a reasonable doubt.

One might argue, in favoring a system that resembles the status quo, that the real offense feature of sentencing permits judges to mitigate the negative effects of inconsistent and overly broad offense-defining statutes. Two seemingly alike offenders, convicted under the identical statute, can be sentenced in a way that reflects differences in motive, the manner in which the crime was executed, the circumstances surrounding the offense, the degree of premeditation, the depth of their involvement, the injury to victims, and the like. Moreover, this flexibility allows judges to serve a critically important balancing function between society's needs for retribution, deterrence, and incapacitation and its administrative need to rely heavily on plea agreements for the disposition of criminal cases. Suppose, for example, an offender pleads guilty only to tax evasion, which was part of a drug distribution operation. The judge is bound by the statutory maximum for the tax evasion offense, but can, in selecting the exact sentence within the statutorily prescribed range, give a sentence that reflects the drug-related context of the offense.

On the other hand, there are several arguments against basing a guidelines system on real criminal conduct. First, there are arguments that focus on the problem of proof and the potential appearance of injustice. A jury will have found beyond a reasonable doubt that the offender committed those acts that make up the elements of the offense charged. But, what about the rest of the real conduct that the sentence takes into account? How will the sentencing judge learn, for example,

whether the offender stole \$100,000 or \$20,000 from the bank? (The offender, claiming he did not rob the bank at all, will not likely wish to engage in a dispute before the jury about the amount.) Unless special interrogatories are submitted to the jury, how will the judge decide whether the offender, charged with bank robbery, actually pistol whipped a teller in the course of the robbery since the jury's verdict will be a general one? While presently judges do not use the beyond a reasonable doubt standard of proof in finding facts considered in sentence determinations, that standard nonetheless sets a kind of ideal against which new proposals might be tested. Even if a preponderance of evidence standard increases procedural safeguards compared to the status quo, one may argue that this standard falls short of this ideal.

Second, there is a risk that real criminal conduct sentencing may present the appearance of injustice. A stark example might be a sentencing guidelines system that permits judges to consider factors the defendant thought mooted by agreement to the negotiated plea. Thus, a defendant indicted for drug trafficking and tax evasion who pleads guilty only to tax evasion might take umbrage at a guideline system that permitted the judge nonetheless to add to the sentence otherwise appropriate for tax evasion, an amount that reflects the drug-related context. This problem is exacerbated when the evidence of the drug-related conduct would have failed if put to a test of beyond a reasonable doubt, but passes the lesser preponderance standard. The more distinct this secondary conduct is from the offense charged and the more relaxed the standard of proof, the more a real offense procedure may appear unfair.

Third, a pure real offense system could require significant additional judicial resources. Since the judge would fix the sentence based on the offender's real conduct, an armed bank robber would not benefit from the government's agreement to allow a plea of guilty to a lesser unarmed robbery offense, since the offender would receive a higher armed robbery sentence. Of course, the judge could not impose more than the statutory maximum for the lesser charged offense. However, the new sentencing law means that the sentence given will, in fact, be served. A five-year sentence means five years in prison, roughly equivalent to a present sentence of fifteen years; thus, the statutory maximum will not often act as a serious constraint.

Since offenders would know in advance the likely sentence for the conduct at issue, and since bargaining could not readily affect the sentence, there may be less negotiation. Whether or not diminished opportunity for plea negotiations is desirable, is much debated. Does it produce unfair sentences, unrelated to actual conduct? Does the prosecutor face an inappropriate set of incentives? Would real offense sentencing create additional needed deterrence? Regardless of the theoretical advantages or disadvantages of plea negotiation, at present, the courts dispose of approximately ninety percent of all federal criminal cases through acceptance of guilty pleas. Thus, a change in sentencing practice that significantly raises the number of cases that must be tried would likely require a considerable increase in federal judicial resources.

Fourth, a pure real offense system, not bound by the conduct defined by the charge, must decide what additional conduct to take into account. This task may be far more difficult than at first appears. Consider the bank robbery example. Should the court take account not only of the money, the threat to the teller, the gun, and

the physical injury, but also of the trespass into the bank, the further trespass into a secured area behind the counter, the fright caused the bank's other employees or its customers, the unwanted physical contact caused patrons when the offender pushed past them on the way out, the offender's refusal to stop when ordered to do so by a security guard or policeman, the lunge that the offender might have made at the guard, the restraint on the teller's freedom when the offender ordered the teller to go to the back of the bank and get more money, and so forth. The decision about including or excluding much of this conduct is not obvious. Having a rule that takes all conduct into account does not solve the problem. Judges might define similar conduct differently. This would perpetuate a form of sentencing disparity and it threatens to raise a vast number of questions for resolution on appeal. Moreover, the bank robbery example is an unusually simple one.

The near opposite of a real offense system is a charge of conviction system. Its major advantages are that offenders receive maximum procedural protection, and that they would know their approximate sentencing exposure at the time of a plea agreement if they plead guilty. But there are several serious disadvantages.

First, many federal statutes, written with jurisdictional considerations in mind, are phrased in ways that make it particularly difficult to develop a charge of conviction system. Some statutes use highly general language that can encompass widely differing behavior. The Travel Act, 18 U.S.C. § 1952, for example, forbids travel "in interstate ... commerce ... with intent" to (among other things) "promote, manage, establish, carry on, or facilitate ... any unlawful activity." The Hobbs Act, 18 U.S.C. § 1951, forbids affecting commerce "by robbery or extortion" or threats of "physical violence to any person or property." Violations of the Hobbs Act or the Travel Act should not all be punished alike. Yet, given their broad language, the indictment may easily charge a violation of the statute while omitting much of the essential information relevant to sentencing. Other federal statutes use more specific language but still forbid a wide range of conduct of varying seriousness. *See, e.g.*, 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities), or 18 U.S.C. § 33 (destruction of motor vehicles or motor vehicle facilities). The charge alone in such cases is not necessarily indicative of the seriousness of the crime.

Second, even in the case of simply defined crimes, any fair sentencing system must take account of at least some real, uncharged elements. A bank robbery indictment, for example, need not state how much money the offender took, yet sentencing systems typically treat an offender who takes one million dollars more seriously than one who takes one thousand dollars. Similarly, although the statute penalizes any assault that takes place during the robbery, a sentencing system should treat an assault that results in physical injury differently than an assault that consists only of pretending to have a gun.

A pure charge of conviction sentencing system might mean that all persons convicted of the same offense, *e.g.*, tax evasion, would be given the same sentence, regardless of the tremendous variation that characterizes the nature and circumstances of the offense. This would be contrary to the mandate of the Sentencing Reform Act to treat like offenders alike while maintaining sufficient flexibility to permit warranted individualized sentences. An offender convicted of tax evasion where the amount of taxes evaded was \$250,000, and the motive was to conceal income from the distribution of drugs should not (under either just punishment or crime control theories of sentencing) receive the same sentence as an

offender convicted of tax evasion for \$10,000 where the motive was to pay for catastrophic family illness. Charge of conviction sentencing invites this kind of unwarranted similarity in sentences.

Third, the closer one comes to a pure charge of conviction system, the greater the transfer of influence to determine a sentence from the judge to the prosecutor. Imagine, for example, the frequently occurring circumstance of an offender's conduct violating many different federal laws, such as laws against false statements, drug conspiracy, mail fraud, etc. By carefully selecting the charges, the prosecutor would not (as now) simply determine the maximum statutory sentence, but, rather, the prosecutor could determine close to the exact sentence. (To use a simple example, if mail fraud carried a sentence of two months per \$1,000 stolen, by selecting exactly how many fraudulently sent letters to charge -- for example, ten out of 1,000 -- the prosecutor would determine a sentence of approximately 20 months). The defense attorney, of course, might affect the charges made through negotiation about the nature of the charges or the number of counts. The results of bargaining in many cases depend in part on a host of factors not related to the seriousness of the offender's conduct. The offender will also have little bargaining power where the charges can easily be proved. The likely increase in the amount of negotiation would likely mean increased discrepancy between the real seriousness of an offender's conduct and the sentence actually served. At a minimum, given the variation in United States Attorney practices, disparity (judged in relation to actual underlying conduct) could increase significantly. The Commission's statutory mandate, however, seeks to lessen disparity, not simply to transfer its source. Since one purpose of the Sentencing Reform Act is to structure the exercise of judicial sentencing discretion, it would seem counterproductive to do so by simply transferring it to another group.

All these considerations, some of which point toward real offense sentencing and some away from it, have led the Commission to tentatively develop a modified form of such sentencing embodying two basic compromises, one substantive and one procedural. The substantive compromise consists of what is referred to as a road map. Its objective is to include, for sentencing purposes, only those real elements (not necessarily found as elements of the crime charged) that are importantly bound up with the conduct that constitutes the crime charged. The system works as follows: Prior to sentencing an offender convicted of bank robbery, the judge will look up bank robbery in the guidelines. An explicit reference to the amount of money stolen and cross-references to those (aggravating) physical harms and conduct that typically accompany most bank robberies are given. The judge will not find any reference to conduct (e.g., drug trafficking) that is unusual in a bank robbery. The guidelines take account of those harms and conduct that it lists or cross-references. They do not take account of any other conduct. (Such other conduct will affect the sentence only if the offender is charged and convicted separately.)

The following examples demonstrate how modified real offense sentencing works under the preliminary guidelines:

1. The offense of conviction is unarmed bank robbery. At sentencing the judge finds by a preponderance of the evidence that the offender carried and pointed a firearm during the commission of the offense.

The offense value for using a dangerous weapon is added to the offense value for the robbery. The use of the weapon is related to and done in furtherance of the crime of conviction.

2. *The offense of conviction is armed bank robbery. The evidence at trial indicates that the offender's accomplice drove the getaway car at an extremely high rate of speed from the scene. At sentencing, additional evidence is presented that shows that a child was struck by the car two blocks from the bank and permanently paralyzed.*

The offense value for the child's injuries is added to that for the bank robbery. The operation of the vehicle is done in furtherance of the crime of conviction from which the injuries resulted.

3. *The offender is indicted for two separate bank robberies in a two-count indictment. The bank robberies are unrelated and are not in furtherance of a conspiracy. As part of a plea agreement, Count II is dismissed on the government's motion. The offender pleads to Count I.*

The offense value for the bank robbery in Count II is not added to the offense value for the bank robbery in Count I. Because the second bank robbery is not related to, resulting from, or done in furtherance of the first, it is not considered in sentencing the offender.

4. *The offense of conviction is distribution of cocaine. The sentencing judge finds by a preponderance of the evidence that the purchaser died of an overdose after ingesting a small quantity of the cocaine.*

The offense value for the death is added to the offense value for the drug distribution. The ingestion is related to and results from the sale of the drug.

5. *The offense of conviction is distribution of cocaine. Evidence at trial establishes that the offender used a twelve-year old child to transport the drugs.*

The offense value for distribution of cocaine is aggravated by the offense value for using a minor child as a conduit for distributing drugs. The involvement of the child is related to and is an act done in furtherance of the offense of conviction.

6. *The offense of conviction is distribution of cocaine. After the offender's arrest, officers execute a search warrant at the offender's apartment. The search reveals no other evidence linking the offender to other drug transactions. However, an illegal short-barreled shotgun is recovered. No indictment or conviction results from seizure of this weapon at the time of sentencing.*

The offense value for the shotgun is not, under these circumstances, added to the offense value for the drug distribution. The possession of the shotgun is not related to the offense of conviction.

7. *The offense of conviction is obstruction of justice (Count I of a two-count indictment). The second count in the indictment, assaulting a federal police officer (the means of obstruction) is dismissed pursuant to a plea agreement.*

The offense value for the assault in Count II is added to the offense value for the obstruction of justice in Count I. The assault is an act done in furtherance of the crime of conviction.

8. *The offense of conviction is conspiracy to steal and forge one social security check. At sentencing the judge finds by a preponderance of the evidence that the offender stole, forged, and cashed 20 checks.*

All of the offenses related to the 20 checks done in furtherance of the conspiracy, or that resulted therefrom, are used to calculate the total offense value for the conspiracy.

A guideline sentencing system might try to attain this same objective by promulgating a single rule, such as considering all real offense elements unless any such element constitutes a separate crime, in which case the government must charge that offense separately. However, the Commission does not believe this particular rule would work in the federal system, where the existence of separate crimes often depends upon the happenstance of factors creating federal jurisdiction.

A more promising possibility is the use of a rule that allows the sentencing judge to consider all conduct or harms (threatened or accomplished) committed in furtherance of the crime of conviction. However, this rule would prove to be unusually difficult because of the inherent problems in determining what conduct to consider. In order to simplify this process, the Commission has developed preliminary guidelines that rely on explicit cross-references to determine conduct the judge shall take into account.

The Commission requests comment on the use of the modified real offense sentencing system. The Commission also welcomes comments addressed specifically to the question of whether the guidelines should incorporate a specific rule of the sort just mentioned instead of, or in addition to, the explicit cross-references. The Commission also wishes comment addressed to the specific cross-references contained in the preliminary guidelines. The reader should review the preliminary guidelines with both real offense and charge of conviction problems in mind. The reader should decide whether cross-references sufficiently identify additional conduct that is often associated with the statutory elements charged in the indictment.

A related issue is procedural. Factual disputes are unlikely in the vast majority of cases, for the jury will have resolved some disputes and the presiding judge will be able to determine the presence of associated conduct from evidence produced during the course of the trial. Agreement among the parties, particularly when a guilty plea is entered, is likely to resolve most others. When a sentencing fact is disputed, the Commission proposes that the judge determine the fact using a preponderance of evidence standard. If a hearing is necessary, it will be less formal than a trial. The government will bear the burden of proof except if a mitigating factor is in issue. The parties will have the right to present and to cross-examine witnesses. The judge may admit all evidence that is relevant and reliable except for

evidence that barred by evidentiary rules. The hearing procedure produces a workable sentencing system that avoids full-fledged trials at the sentencing stage.

The Commission solicits the public's comments and suggestions on these issues.

CHAPTER TWO - OFFENSE CONDUCT

OVERVIEW

Chapter Two contains the offense conduct sections of the preliminary guidelines. The Chapter divides offenses into topical Parts, which are then sub-divided into related sections. The sections may cover one statute or many. Cross-references will guide the judge from the offense of conviction to other sections of the guidelines which may be applicable.

Because of time constraints and the need to solicit further advice on certain offenses, the preliminary guidelines do not address every offense that will be addressed in the final guidelines.

Parts addressing the following categories of offenses will be published for public comment as soon as possible: Inchoate Offenses; Treason, Sabotage, and Espionage; Atomic Energy; Foreign Relations; Obstruction of Government; Obstruction of Justice; Contempt of Court; Perjury; Corruption; Monetary Offenses; Public Health and Pollution; and General Regulatory Offenses. Comment is solicited on the manner in which Chapter Two organizes offenses.

The offenses listed in each section have a corresponding base offense value. There may also be one or more specific offense characteristics which raise or lower the base offense value. The number of these characteristics will vary according to the nature of the behavior involved. For instance, kidnapping has the potential aspects of abduction, ransom request, length of restraint, the nature of the victim, and physical and psychological injury.

When determining final offense values the Commission will consider the following: (1) the range of sentences contained in the relevant statutes, as a rough guide to Congressional intent; (2) actual present sentencing practice, as one indicator of current judicial judgments about appropriate sentences; (3) data relevant to crime control considerations, especially specific and general deterrence, recidivism and incapacitation; (4) data about the damage caused by various crimes; (5) data about the difficulty of detection and conviction for various crimes; (6) the parole guidelines; (7) systematic surveys designed to determine public judgments of the relative seriousness of crimes and the appropriateness of sentences; (8) analogous practices in states and other countries; and (9) written and oral testimony submitted to the Commission by knowledgeable groups and witnesses. Once final guidelines are implemented, factors that determine sentences under the guidelines will be monitored and revised. The Commission will continuously examine the administrative impact of sentences by testing their effect upon the workload of the courts and prison capacity.

The Commission has not yet completed the research necessary to set firm numerical values. However, extensive data collection and data analysis are ongoing. The Commission has assembled past practices data from several sources, including the FPSSIS data from the Administrative Office of the U.S. Courts. In addition, over 10,000 presentence investigation reports have been collected and are being coded. Further analysis will be extensive.

Because final offense values remain to be determined, and because no final decision has been made about methods for including mitigating and aggravating factors, impact analysis would be premature.

Offense values rest on preliminary research results and initial efforts to reflect appropriate sentences for different forms of criminal conduct. Due to the Commission's desire to obtain early comment, the published numerical values must be treated as highly tentative, preliminary, and subject to change.

Each section may also contain one or more cross-references. These references are the means of carrying out the scheme of Modified Real Offense Sentencing described earlier. Cross-references will refer the sentencing judge to sections of the guidelines to determine if the harms described there took place in addition to the base offense and, if so, how many additional points should be added to the base offense value.

The Commission is particularly interested in receiving comment directed toward the approach taken in these sections, the apparent ease or difficulty in applying them, and the appropriateness of the factors described therein. It would be useful, in particular, if judges, probation officers, and others would attempt to apply this draft to actual cases. The principal objective of that exercise would be to determine if the format used can be practically applied and if the factors chosen are the ones a judge would consider in an actual sentencing situation.

PART A - OFFENSES INVOLVING THE PERSON

1. HOMICIDE OFFENSES

18 U.S.C. § 113(a)

18 U.S.C. § 241

18 U.S.C. § 245(b)

18 U.S.C. § 351

18 U.S.C. § 1111

18 U.S.C. § 1112

18 U.S.C. § 1114

18 U.S.C. § 1751

49 U.S.C. § 1472(i)

Also See Statutory Index

INTRODUCTION

In all cases, the principal interest protected by federal laws against homicide is the physical security of the person. Laws prohibiting murder of certain officials and employees of the United States foster an additional interest: the ability of the government to function effectively and without disruption. This is accomplished by ensuring that individuals are protected from any enhanced dangers to which they may be subject as a result of their governmental position or employment. Murder of a foreign official within the United States creates a federal interest in the ability to effectively conduct foreign policy and foreign relations.

The homicide series of offenses is organized into five levels. Each level includes a list of specific aggravating factors and a cross-reference to the psychological injuries section for those cases in which the immediate family of the victim suffers a significant or extreme level of emotional harm due to the conduct of the offender. The offense values take into account the culpability of the offender, any unique characteristics of the victim, the residual harm done to the immediate family of the victim, and the effectiveness of imprisonment in protecting the interests enumerated above.

The guidelines place emphasis on the circumstances in which the life was taken rather than the statutory categories of homicide, because most federal statutes prohibiting the taking of human life do not focus on the usual common law circumstances. Statutes concerning civil rights, aircraft hijacking, the use of explosives, trainwrecking, and others do not differentiate among the various classes of homicide. They simply provide an aggravation of the maximum available penalty when "death results."

§A211. Homicide - Level One. If death resulted under any of the following circumstances, the sentence shall be life imprisonment, unless the penalty of death is imposed:

1. murder committed under any of the circumstances, other than jurisdictional circumstances, described as murder in the first degree in 18 U.S.C. § 1111;
2. death that resulted under such circumstances as would constitute murder and the victim was the President of the United States or the President-elect;
3. death that occurred as a result of an aircraft hijacking; or
4. murder that was motivated by the possibility of pecuniary gain or in order to enforce a political demand.

§A212. Homicide - Level Two. If death resulted under circumstances that would constitute murder, other than as described in §A211, the base offense value for each instance is 240.

a. **Specific Offense Characteristics**

1. If the victim was a government official or employee, other than a government official listed in §A211, killed in or because of the performance of official duties, add 36 to the base offense value. It is not necessary for the offender to have been aware of the official status of the victim.
2. If the victim was vulnerable due to age or mental or physical condition, add 24 to the base offense value.
3. If the conviction of murder was based on reckless conduct that rises to the level of malice, subtract 100 from the base offense value.

b. **Cross-References**

1. If any victim suffered psychological injury, add the appropriate offense value from §A251 (Psychological Injury). (See definition of victim in Commentary).
2. If the death occurred during the course of another offense, not included in 18 U.S.C. § 1111, consult the guideline relevant to that offense and add the appropriate offense value.

§A213. Homicide - Level Three. If death resulted under circumstances that would constitute voluntary manslaughter, the base offense value for each instance is 120.

a. Specific Offense Characteristics

1. If the victim was a government official or employee, other than a government official listed in §A211, killed in or because of the performance of official duties, add 36 to the base offense value. It is not necessary for the offender to have been aware of the official status of the victim.
2. If the victim was vulnerable due to age or mental or physical condition, add 24 to the base offense value.

b. Cross-References

1. If any victim suffered psychological injury, add the appropriate offense value from §A251 (Psychological Injury).
2. If the death occurred during the course of another offense, not included in 18 U.S.C. § 1111, consult the guideline relevant to that offense and add the appropriate offense value.

§A214. Homicide - Level Four. If death resulted by reason of the offender's reckless conduct not amounting to malice, the base offense value is 30.

a. Specific Offense Characteristics

1. If the death was caused because the offender was under the influence of any intoxicating substance, add 24 to the base offense value.
2. If the offender used a weapon or other dangerous device, add 12 to the base offense value.

b. Cross-References

1. If the death occurred during the course of another offense, not included in 18 U.S.C. § 1111, consult the guideline relevant to that offense and add the appropriate offense value.

§A215. Homicide - Level Five. If death resulted by reason of the offender's negligent conduct, the base offense value is 12.

a. Specific Offense Characteristics

1. If the offender was under the influence of any intoxicating substance, add 12 to the base offense value.
2. If the offender used a weapon or other dangerous device, add 6 to the base offense value.

§A216. Assault with Intent to Kill (Attempted Murder). See Assault and Battery, §§A221-A225.

Commentary

Homicide level one offenses involving death provide for mandatory life imprisonment in a limited number of cases. (The availability of the death penalty is a matter of Congressional and judicial determination.) These include first degree murder (premeditated murder and some felony murders) now subject to the mandatory maximum penalty of life imprisonment under 18 U.S.C. § 1111. While persons convicted under that provision presently are entitled to consideration for early release on parole, the abolition of parole will effectively convert their punishment into life imprisonment. 18 U.S.C. § 4205 providing for parole eligibility after ten years in life terms will be repealed effective with the implementation of guidelines. Other categories of offenses subject to the life imprisonment provision include: assassination of the President or President-elect, death occurring during an aircraft hijacking, and murder-for-hire. The risk of death during an aircraft hijacking is so great that if any life is lost the appropriate penalty should be the maximum allowed by law.

Homicide level two offenses provide substantial punishment for those who cause death under circumstances not described in the first level but under circumstances that would constitute murder. These penalties are further enhanced if the victim was vulnerable due to age or physical or mental condition, or the victim was a federal, state, local, or foreign government official, including a law enforcement or correctional officer, killed in or because of performance of official duties. Further aggravation of the penalty at this level is possible if the victim's immediate family suffered psychological injury as a result, or if the death took place during the course of another offense. In the latter case, the offense value for the underlying offense is added to the base offense value for the death. As a practical matter, an offender who knowingly causes a death during the course of a serious felony will be subject to life imprisonment, whether or not the felony is included in the list of felony murder predicates found in 18 U.S.C. § 1111. Persons involved in lesser predicate offenses will be punished at proportionally lower levels. Under §A212, if murder is based on reckless conduct that supports a finding that the offender acted with malice, the offense value is reduced to provide a distinction between this and intentional conduct.

Homicide level three offenses provide a base offense value for voluntary manslaughter. The statutory recognition that this offense should not be punished as severely as murder is reflected in the offense value. However, the same factors that increase a murder sentence also apply to voluntary manslaughter.

Homicide level four offenses establish a base offense value for reckless homicide. In recognition of the need to properly punish and deter individuals from operating a vehicle while intoxicated, an aggravating factor is included to punish drunk drivers. If the reckless conduct rises to the level of malice, consult §A212.

Homicide level five offenses cover negligent homicide. The emphasis on motive and victim are removed since the offender has no motive and is indifferent to the victim's identity. As with reckless homicide, intoxicated offenders are treated at a higher level because their conduct is inherently more dangerous.

Assault with intent to kill is treated under Part A, Section 2, Assault and Battery.

In crimes of violence, the base offense values reflect the assumption that at least a minimal level of psychological injury occurred. The offense value for the lowest level of such injury has therefore been factored into the base offense value for offenses involving the person. In instances in which psychological injury has been significant or extreme, an appropriate increase in the penalty will result.

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2. ASSAULT AND BATTERY

18 U.S.C. § 111

18 U.S.C. § 112

18 U.S.C. § 113

18 U.S.C. § 114

18 U.S.C. § 351

Also See Statutory Index

INTRODUCTION

The same interests protected by federal laws involving homicide, physical security, and the ability of the government to function effectively and without disruption are fostered by federal laws concerning physical injury. Physical injuries are defined in the Commentary. The specific aggravating factors focus on the nature of the victim, the use of weapons and the motivation of the offender. These items are also cross-referenced by a number of other guideline sections (e.g., civil rights, criminal sexual conduct, kidnapping, and loansharking). The sections cross-referencing the physical injury provisions are those in which physical injury is likely to accompany the underlying offense.

§A221. Assault and Battery. The base offense value is 6.

a. **Specific Offense Characteristics**

1. If the victim was the President of the United States or the President-elect, add 60 to the base offense value.
2. If the offender used any deadly or dangerous weapon or device during and in relation to any crime of violence or drug trafficking crime, add 60 to the base offense value.

3. If the offender used a bomb or explosive, a short-barreled shotgun or short-barreled rifle, acid, or other especially dangerous weapon or substance with the intent of injuring, add 60 to the base offense value.
4. If the victim was a government official or employee, other than named in 1 above, assaulted in or because of the performance of official duties, add 36 to the base offense value.
5. If the assault was motivated to enforce a political demand, add 30 to the base offense value.
6. If the offender discharged a firearm or used any dangerous weapon or device other than listed in 2 above with the intent of injuring, add 24 to the base offense value.
7. If the victim was vulnerable due to age or mental or physical condition, add 12 to the base offense value.
8. If the offender discharged or displayed a firearm or other dangerous weapon or device with the intent of threatening, add 12 to the base offense value.

b. **Cross-References**

1. If the victim suffered physical injury, add the base offense value from §§A222-A225 (Assault and Battery).
2. If any victim suffered psychological injury, add the appropriate offense value from §A251 (Psychological Injury).
3. If property was damaged, destroyed, or taken, add the appropriate offense value from Part B, Offenses Involving Property.

§A222. Severe Bodily Injury. The base offense value is 120.

§A223. Permanent Bodily Injury. The base offense value is 96.

§A224. Serious Bodily Injury. The base offense value is 60.

§A225. Bodily Injury. The base offense value is 20.

Commentary

Section A221a.2 and 3 satisfy the Congressional mandate of 18 U.S.C. § 924(c).

Assaults represent a danger to personal safety whether or not bodily injury results to the intended victim. The base offense value of 6 reflects the potential seriousness of any behavior that evidences a disregard for the physical security of others. The penalty is increased when the conduct or the instrument used in the assault poses special additional danger to personal security. Therefore, the use of instruments or materials that are potentially life threatening, but are generally not criminalized elsewhere, results in an add-on of 24. The use of firearms, explosives, or similar devices results in an add-on of 60, consistent with the related provisions in Part K, Offenses Involving Public Order and Safety. However, when applying §A221, additional add-ons for the use of weapons under Part K are not appropriate.

An aggravating factor could be provided for cases of family violence. This factor has not been included in this preliminary draft. The Commission solicits comment on the subject.

The Commission has not resolved the issue of how to treat inchoate crimes in general. Such resolution may affect the section on Assault and Battery as it relates to crimes such as attempted murder.

The levels of physical injury are:

1. Severe Bodily Injury. Severe bodily injury means that the victim suffered the loss, or long-term or permanent impairment of more than one bodily function.
2. Permanent Bodily Injury. Permanent bodily injury means that the victim suffered the loss, or long-term or permanent impairment of a bodily function.
3. Serious Bodily Injury. Serious bodily injury means that the victim received an injury that required medical intervention, such as surgery, hospitalization, or physical rehabilitation or that caused the temporary loss of a bodily function.
4. Bodily Injury. Bodily injury is any other physical injury.

* * * * *

3. CRIMINAL SEXUAL CONDUCT

18 U.S.C. § 113(a)
18 U.S.C. § 1153
18 U.S.C. § 1203
18 U.S.C. § 2031
18 U.S.C. § 2032
Assimilative Crimes
Also See Statutory Index

INTRODUCTION

The interest protected in guidelines for unlawful sexual acts is the physical security of the person. A number of the cases involving such acts enter federal jurisdiction under assimilative crimes provisions. Although the federal provisions governing these acts are framed in the traditional (and narrower) language of rape, statutory rape, and sodomy, in recent years there have been many developments in reforms of existing law. For purposes of sentencing, the guidelines have therefore adopted broader categories of offender conduct to more easily include violations under the assimilative crimes provision. These categories are inclusive of traditional federal offenses and address those circumstances and factors that the Commission has concluded warrant additional consideration in sentencing the sex offender.

For purposes of this section, *Criminal Sexual Conduct* means a sexual act accomplished by means of aggravated force or coercion, or by such other means as are set forth herein. A *Sexual Act* means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes, or where otherwise authorized by law. *Aggravated Force* means that the offender used actual force of an aggravated nature to overcome the victim or threatened death or used a deadly weapon. Force of an aggravated nature is defined as any degree of violence above a simple assault and battery. *Coercion* means that the offender threatened to use actual force or physical violence to overcome the victim or threatened to retaliate in the future by actual force or physical violence or by kidnapping the victim or another person. *Criminal Sexual Conduct with a Minor* means a sexual act with a person under the age of sixteen years old, and not by means of aggravated force or aggravated coercion.

§A231. Criminal Sexual Conduct by Aggravated Force or Coercion. The base offense value is 150.

a. Specific Offense Characteristics

1. If the victim was under age 16, add 60 to the base offense value.

2. If the victim was in the custody, care, or control of the offender, add 36 to the base offense value.
3. If the victim was vulnerable due to advanced age or mental or physical condition, or was a corrections officer, add 12 to the base offense value.

b. **Cross-References**

1. If the victim suffered physical injury, add the appropriate offense value from §§A222-A225 (Assault and Battery).
2. If the victim suffered an unlawful restraint beyond that involved in and incidental to the commission of a sexual battery, add the appropriate offense value from §§A241-A242 (Unlawful Restraint).
3. If any victim suffered psychological injury, add the appropriate offense value from §A251 (Psychological Injury).

Commentary

Sexual offenses addressed in this section are crimes of violence. The primary factors that differentiate such offenses for sentencing are the circumstances or means by which the act is accomplished and the vulnerability of the victim. Thus, the greatest sentence should be imposed for a sexual offense that is accomplished under circumstances of violence, where a weapon is used, and where such conduct is directed to a victim, particularly vulnerable to both the conduct and its foreseeable results.

Although actual force of an aggravated nature is a primary consideration in determining seriousness of conduct, the threat of death or use of a deadly weapon poses a danger to the victim that is similar to physical violence. Such conduct is therefore punished to the same extent as the actual use of force.

When physical injury, additional restraint, or psychological injury result from the conduct, these factors should be reflected in the sentence imposed. Consequently, these are identified by cross-references.

§A232. Criminal Sexual Conduct by Other Means. The base offense value is 48.

a. **Specific Offense Characteristics**

1. If the victim was under age 16, add 60 to the base offense value.
2. If the victim was in the custody, care, or control of the offender, add 36 to the base offense value.

3. If the victim was vulnerable due to advanced age or mental or physical condition, add 12 to the base offense value.

b. Cross-References

1. If the victim suffered physical injury, add the appropriate offense value from §§A222-A225 (Assault and Battery).
2. If the victim suffered an unlawful restraint beyond that involved in and incidental to the commission of a sexual battery, add the appropriate offense value from §§A241-A242 (Unlawful Restraint).
3. If any victim suffered psychological injury, add the appropriate offense value from §A251 (Psychological Injury).

Commentary

This section applies to sexual conduct that occurs without the presence of aggravated force or coercion. This would include the use of force that would equate to simple assault and battery or when drugs, intoxicants, or similar substances are used to initiate the commission of the offense. Physical injury, additional restraint, or psychological injury that result from the conduct should be reflected in the sentence imposed. Consequently, these are identified by cross-references.

§A233. Criminal Sexual Conduct with a Minor (Including Statutory Rape). If the offender committed criminal sexual conduct with a minor, absent circumstances of any force or coercion, the base offense value is 12.

a. Specific Offense Characteristics

1. If the victim was under age 12 or the offender was more than three years older than the victim, add 60 to the base offense value.
2. If the victim was in the custody, care, or control of the offender, add 48 to the base offense value.
3. If the victim was otherwise vulnerable due to mental or physical condition, add 12 to the base offense value.

b. Cross-References

1. If the victim suffered physical injury, add the appropriate offense value from §§A222-A225 (Assault and Battery).
2. If any victim suffered psychological injury, add the appropriate offense value from §A251 (Psychological Injury).

3. If the offense involved the prostitution, recruiting for prostitution, transportation for prostitution, or transportation for sexual exploitation of a minor, add the appropriate offense value from Part E, Offenses Involving Criminal Enterprises.
4. If the offense involved exploitation of a minor by production of sexually explicit visual or printed material, or by prostitution, add the appropriate offense value from Part E, Offenses Involving Criminal Enterprises.

Commentary

Although the federal provision dealing with statutory rape, 18 U.S.C. § 2032, prohibits only relations with a female under sixteen, the trend in reform of such laws has recognized gradations based upon the youthfulness of the victim as well as the age of the offender. Under such reforms, increased severity of sanctions has resulted when it should be obvious to the offender that the victim is an adolescent, and where the offender is considerably older than the victim.

§A234. Attempts and Assaults with Intent. If the offender attempted to commit or assaulted with the intent to commit any act of criminal sexual conduct hereinabove, the base offense value is the offense value applicable if the act had been completed.

Commentary

Attempts pose significant danger and trauma. Since the legal distinction between an attempt and the completed act hinges on the occurrence of slight intrusion, no justification exists to mitigate an attempt.

§A235. Unlawful Sexual Contacts. If the offender engaged in or attempted to engage in unlawful sexual contacts that are not within the definition of criminal sexual conduct, the base offense value is 6.

a. **Specific Offense Characteristics**

1. If the victim was under age 12, or the offender was more than four years older than the victim, add 12 to the base offense value.
2. If the victim was otherwise vulnerable due to age or mental or physical condition, add 12 to the base offense value.
3. If the victim was in the custody, care or control of the offender, add 24 to the base offense value.

b. Cross-References

1. If the victim suffered physical injury, add the appropriate offense value from §§A222-A225 (Assault and Battery).
2. If the victim suffered an unlawful restraint beyond that involved in and incidental to the commission of a sexual act, add the appropriate offense value from §§A241-A242 (Unlawful Restraint).
3. If any victim suffered psychological injury, add the appropriate offense value from §A251 (Psychological Injury).

Commentary

Unlawful sexual contacts deal with improper touching or fondling. If any intrusion occurs, consult the appropriate section above. Since circumstances under which this conduct occurs can vary greatly, it is difficult to capture all the various distinctions in the Specific Offense Characteristics.

The Commission solicits comment regarding the distinctions that should be made for this offense, and guidance for the circumstances in which it would be appropriate for the judge to deviate from the guideline.

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4. ABDUCTION OR UNLAWFUL RESTRAINT

18 U.S.C. § 351
18 U.S.C. § 1201
18 U.S.C. § 1202
18 U.S.C. § 1751
18 U.S.C. § 2422
18 U.S.C. § 2423
See Also Statutory Index

INTRODUCTION

As with other offenses involving the person, the principal interests protected by federal laws against unlawful restraint are the physical security of the person and the ability of the government to function effectively and without disruption. The unlawful restraint provisions take into account three general factors: the nature of the victim; the duration of the abduction; and the motivation of the offender.

The victim categories parallel those in other parts of Part A. The age or vulnerability of the victim is considered as well as the official

status of the victim. The latter consideration allows enhanced treatment of terrorist acts, as does the provision aggravating the offense if a political demand is made.

§A241. Abduction or Unlawful Restraint of the President. If any victim was the President of the United States or the President-elect, the base offense value is life imprisonment.

§A242. Abduction or Unlawful Restraint. If any victim, other than the President or President-elect was abducted or unlawfully restrained, the base offense value is 60.

a. Specific Offense Characteristics

1. If a monetary or political demand was made, add 60 to the base offense value.
2. If the victim was a government official or employee victimized in or because of the performance of official duties (other than those described in §A241) or was vulnerable due to age or mental or physical condition, add 36 to the base offense value.
3. If the abduction lasted more than one hour, add 24 to the base offense value.

b. Cross-References

1. If the victim suffered physical injury or was the victim of criminal sexual conduct, add the appropriate value from §§A222-A225 (Assault and Battery) or §§A231-A235 (Criminal Sexual Conduct).
2. If any victim suffered psychological injury, add the appropriate offense value from §A251 (Psychological Injury).

§A243. Ransom Money. The base offense value is 60 unless the victim was a person identified in §A241, in which case the base offense value is 72. (18 U.S.C. § 1202)

Commentary

The durational aspect of an unlawful restraint is significant for purposes of sentencing. While it is possible to conceive of short term abductions that are as serious, if not more serious, than some long term abductions, in general, extended duration is a serious aggravator of the offense. A short term abduction will be aggravated if it took place during some other offense, the offense value of which may be added to the base offense value.

A life sentence is imposed if the President or President-elect is abducted, because of the significant effect on the operation of government. Because government officials may be especially vulnerable due to their official duties, there is an aggravating factor for these types of potential victims.

Cross-references are made to the physical injury, criminal sexual conduct, and psychological injury provisions for further aggravation.

Section A243 specifically includes conduct prohibited by 18 U.S.C. § 1202.

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5. PSYCHOLOGICAL INJURY

§A251. Psychological Injury

a. Offenses Involving the Person

1. If the court determines that a victim suffered extreme psychological injury, add 48 to the base offense value.
2. If the court determines that a victim suffered significant psychological injury, add 24 to the base offense value.

b. Other Offenses

If the court determines that a victim of the offense suffered extreme or significant psychological injury, add 12 to the base offense value.

The levels of psychological injury are:

1. Extreme Psychological Injury. Extreme psychological injury means a substantial impairment of the intellectual, psychological, or emotional capacity of a victim that is likely to be of extended and continuous duration or to last for a period in excess of 120 days, that manifests itself by physical symptoms or changes in behavioral patterns that are capable of objective diagnosis, and that is established by a preponderance of the evidence by expert testimony.
2. Significant Psychological Injury. Significant psychological injury means a significant impairment of the intellectual, psychological, or emotional capacity of a victim that is likely to be temporary or intermittent and that is established by a preponderance of the evidence by any competent testimony.

Commentary

"Victim of the offense," for the purposes of §A251, includes the victim and a member of the victim's immediate family who can demonstrate significant or extreme psychological injury as the result of the offense against the victim, e.g., a parent of a homicide victim.

Although there is no provision of the federal criminal law that specifically punishes the infliction of emotional or psychological injury, such harm often results from the offender's conduct. Definitions are drawn from language developed in the civil tort of "outrage" or "infliction of emotional distress," as modified in the context of criminal law and procedure.

Offense Against the Person. If the court finds that the degree of psychological harm is much greater than that typically experienced by other victims of the same type of offense, it shall add 24 or 48 to the base offense value for the offense, depending on the level of psychological harm found to exist.

Other Offenses. An additional offense value of 12 is appropriate in nonviolent offenses where credible evidence shows that the victim suffered at least significant psychological injury as a result of the offender's conduct.

While the Commission believes that sentencing judges often consider psychological injuries, it recognizes that such harm is often difficult to quantify. Comment on the appropriateness of including such harm is invited.

PART B - OFFENSES INVOLVING PROPERTY

1. THEFT AND PROPERTY DESTRUCTION

18 U.S.C. § 641
18 U.S.C. § 657
18 U.S.C. § 659
18 U.S.C. § 661
18 U.S.C. § 656
18 U.S.C. § 1703
18 U.S.C. § 1708
18 U.S.C. § 2118
18 U.S.C. § 2113(b)
18 U.S.C. § 2314
Also See Statutory Index

§B211. Theft. The base offense value is 2 plus the offense value from §B251 (Property Table).

a. Specific Offense Characteristics

1. If the property stolen was a firearm, explosive, or destructive device, add 12 to the base offense value.
2. If the property stolen was a controlled substance, add 12 to the base offense value.
3. If the offender embezzled money, property, services, or any thing of value, add 6 to the base offense value.
4. If the property stolen was undelivered United States mail, add 6 to the base offense value.

§B212. Receiving Stolen Property. The base offense value is 2 plus the offense value from §B251 (Property Table).

a. Specific Offense Characteristics

1. If the property was for resale or included a firearm, explosive, or destructive device, add 12 to the base offense value.

§B213. Property Damage or Destruction. The base offense value is 2 plus the offense value from §B251 (Property Table).

a. **Specific Offense Characteristics**

1. If the offender used fire, an explosive, a dangerous device, or a firearm to damage a residence, building, vehicle, or other structure or place where persons were present or were likely to be present, add 60 to the base offense value.
2. If the offender used fire, an explosive, a dangerous device, or a firearm to damage property, other than one described in 1 above, add 24 to the base offense value.
3. If the offender damaged a public facility, and thereby caused a significant impairment of any function of a public facility, add 24 to the base offense value.
4. If the property destroyed was undelivered United States mail, add 6 to the base offense value.

b. **Cross-References**

1. If a victim suffered death, physical injury, or psychological injury, add the appropriate offense value from Part A, Offenses Involving the Person.

Commentary

This subpart contains three sections involving the simplest forms of property offenses, theft, embezzlement, transactions in stolen goods, and damage or destruction of property.

Section B211 addresses theft offenses. The primary emphasis is placed on the amount of property taken. The sentencing court is referred to a Property Table, §B251, which provides a point score based on the value of the property taken. To ensure that even minor thefts receive some level of punishment, the base offense value will always be at least 6.

Some property cannot be readily valued in a dollar amount. It has significance or worth beyond the monetary value, such as in those instances where a family heirloom is stolen or destroyed. Recognizing that value in such instances is difficult to determine, the Commission foresees that a sentence outside the guideline range may be appropriate when the court is faced with this issue.

The penalty for theft or destruction of mail is aggravated because theft from the mails disrupts the integrity of a public function. Therefore, it deserves a sanction that is higher than would be accorded the dollar loss alone.

Cases of embezzlement receive added punishment beyond the value of the property. This reflects the injury inflicted upon the victim as well as the greater opportunity for theft in such instances, and the resulting need to deter such conduct.

The theft of firearms or destructive devices also receives additional punishment in an effort to further purposes of deterrence and incapacitation of those involved in this type of criminal activity.

Receiving stolen property, §B212, is treated like theft offenses. An aggravating factor is included to address the professional fence, a person who receives stolen property for resale, and a person who deals in stolen firearms. By providing an illegal market for stolen property, such persons provide an incentive for theft. As such, deterrence considerations support a significant additional sanction beyond that applied to the person who purchased stolen property for personal use.

The third section of property offenses, §B213, addresses property damage or destruction. As in cases of theft, to ensure that even minor damage to property receives some level of punishment, the base offense value will always be at least 6.

The use of fire, explosives, dangerous devices, or firearms to damage property where persons are likely to be present receives an additional offense value of 60, consistent with the specific aggravating factors found in related provisions of Part K, Offenses Involving Public Order and Safety. To avoid double counting, there is no further cross-reference to Part K.

The offense value for damage to property in cases where persons are not likely to be injured (e.g., destruction of a mailbox or a barn that has been deserted for years) is still increased if the damage is caused by fire, an explosive, a dangerous device, or firearm, in recognition of the inherent threat of additional injury or harm arising from the criminal use of such devices or weapons.

In cases of property damage involving more extensive public disruptions, the monetary value of property damaged or destroyed may not alone reflect the injury inflicted. For example, the destruction of a \$500 telephone line may cause a significant interruption in services to thousands of people.

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2. BURGLARY AND TRESPASS

18 U.S.C. § 1382
18 U.S.C. § 2113(a)
18 U.S.C. § 2115
Also See Statutory Index

§B221. Burglary. The base offense value is 24.

a. Specific Offense Characteristics

1. If the building was a dwelling occupied during the offense, add 40 to the base offense value.

2. If the building was a dwelling unoccupied during the offense, add 30 to the base offense value.

b. Cross-References

1. If any victim suffered death, physical injury, or psychological injury, add the appropriate offense value from Part A, Offenses Involving the Person.
2. If any property was stolen or destroyed, add the appropriate value from §B211 (Theft) or §B213 (Property Damage) to the base offense value.

§B222. Trespass. The base offense value is 6.

a. Specific Offense Characteristics

1. If on the premises of a highly secured government facility or a nuclear energy facility, add 6 to the base offense value.
2. If on the premises of a dwelling, add 12 to the base offense value.

b. Cross-References

1. If any victim suffered death, physical injury, or psychological injury, add the appropriate offense value from Part A, Offenses Involving the Person.
2. If any property was stolen or destroyed, add the appropriate value from §B211 (Theft) or §B213 (Property Damage) to the base offense value.

Commentary

Burglary and trespass often are incidental to other offenses. The intent to commit further crimes and the risk to other persons are reasons for the severity of the punishment for burglary. This is especially true when a dwelling is involved. The guidelines reflect these factors in determining an appropriate sentence. Actual injuries to persons and property are reflected in the cross-references.

Most trespasses punishable under federal law involve federal lands or property. The trespass section includes two specific offense characteristics. The first deals with trespasses on highly secured facilities and nuclear energy facilities, where there is a significant federal interest to protect.

Additionally, a sentence enhancement is provided for trespass in a dwelling. There is obviously a greater danger of personal injury in such a trespass as well as a greater actual harm through loss of personal security to the owner.

3. ROBBERY, EXTORTION AND BLACKMAIL

18 U.S.C. § 1951
18 U.S.C. § 1952
18 U.S.C. § 2113
18 U.S.C. § 2114
18 U.S.C. § 2118
Also See Statutory Index

§B231. Robbery. The base offense value is 36.

a. Specific Offense Characteristics

1. If the offender used a dangerous weapon or device, add 60 to the base offense value.
2. If the robbery was attempted or accomplished by more than one offender using force or threats of force to take control over any facility or any persons in the facility, add 36 to the base offense value.
3. If the offender robbed a financial institution or a federal facility or institution, add 24 to the base offense value.
4. If the property stolen was a controlled substance, add 12 to the base offense value.

b. Cross-References

1. For the property stolen, add the appropriate value from §B211 (Theft) to the base offense value.
2. If any property was destroyed, add the appropriate value from §B213 (Property Damage) to the base offense value.
3. If any victim suffered physical injury or psychological injury resulted, add the appropriate value from Part A, Offenses Involving the Person, to the base offense value.
4. If a hostage was taken during the robbery, add the appropriate value from Part A, Offenses Involving the Person, to the base offense value.

Commentary

The use of a dangerous weapon or device constitutes the most serious aggravating characteristic of a robbery.

A "take-over" robbery of a facility presents a high degree of planning and danger to human safety. Such robberies are often committed by gangs or experienced robbers. Considerations of incapacitation, deterrence and just punishment warrant the enhancement of a sentence for robberies committed under "take-over" circumstances.

Drugs or other controlled substances are often the motive for robberies of a Veterans Administration Hospital, a pharmacy on a military base or a similar facility. The specific offense characteristic for this type of robbery takes into consideration the dangers and security problems presented and satisfies Congressional intent.

If a robbery is aggravated by actual personal injury, the taking of a hostage, or loss or destruction of property, reference is made to other sections of the guidelines.

§B232. Extortion. Reserved.

§B233. Blackmail. Reserved.

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4. COUNTERFEITING AND FORGERY

18 U.S.C. § 471
18 U.S.C. § 472
18 U.S.C. § 473
18 U.S.C. § 495
18 U.S.C. § 500
18 U.S.C. § 501
18 U.S.C. § 510
18 U.S.C. § 1003
18 U.S.C. § 2314
18 U.S.C. § 2315
Also See Statutory Index

§B241. Counterfeiting and Forgery. If the offender committed any offense involving counterfeiting, forgery, or uttering, the base offense value is 6 or, if the face value (if any) of the counterfeit, forged, altered, or fraudulently endorsed item exceeds \$2,000, use the base offense value from §B251 (Property Table).

a. **Specific Offense Characteristics**

1. If the offender possessed or had custody or control over counterfeiting devices and materials for use in illegally printing or coining any currency, obligation, or security of the United States, add 24 to the base offense value.
2. If the offense involved more than ten falsely made, forged, counterfeit, or altered currency bills, obligations, or securities of the United States, add 12 to the base offense value.
3. If the offense involved ten or fewer falsely made, forged, counterfeit, or altered currency bills, obligations, or securities of the United States, add 6 to the base offense value.

Commentary

The base offense value applies to a wide range of statutes dealing with forgery and counterfeiting, a variety of items protected by federal law, such as food stamps, postage stamps, foreign bank notes, military discharge papers, and automobile identification numbers. The more serious offenses will be appropriately aggravated by application of the property table to reflect the face value (if any) of the forged item.

Obligations and securities of the United States are treated as an aggravated subject of forgery, alteration, and counterfeiting. The offender who passes an altered or counterfeit \$20 bill would be subject to a total offense value of 12, while an offender who possessed \$5,000 in counterfeit \$20 bills would be subject to a total offense value of 20, by application of the property table. Similarly, an offender who possesses or has control over counterfeiting devices and materials is viewed as the most culpable, because of the sophistication and planning involved in manufacturing counterfeit obligations and securities.

An offender who both forges and utters a check is treated the same as an offender who only forges or utters it.

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5. PROPERTY TABLE

§B251. Property Table.

| <u>Monetary Value</u> | <u>Offense Value</u> |
|---------------------------|----------------------|
| up to \$1,000 | 4 |
| \$1,001 - \$2,000 | 6 |
| \$2,001 - \$5,000 | 8 |
| \$5,001 - \$10,000 | 12 |
| \$10,001 - \$25,000 | 16 |
| \$25,001 - \$50,000 | 20 |
| \$50,001 - \$100,000 | 24 |
| \$100,001 - \$200,000 | 30 |
| \$200,001 - \$500,000 | 36 |
| \$500,001 - \$1,000,000 | 42 |
| \$1,000,001 - \$2,000,000 | 48 |
| \$2,000,001 - \$5,000,000 | 54 |
| over \$5,000,000 | 60 |

Commentary

In punishing property offenses, the underlying principle is that an offender's sanction should increase with the dollar amount of property involved in the offense. There are ten categories in this table. Some cases may fall at the low end of a monetary grouping or the top of the next grouping. In those close cases, the sentencing court may adjust the sentence within the applicable discretionary guideline range to compensate for any concern that category range was too high or low for the particular offense involved.

PART C - OFFENSES INVOLVING TAXATION

1. OFFENSES INVOLVING INCOME TAXES

- 26 U.S.C. § 7201
- 26 U.S.C. § 7202
- 26 U.S.C. § 7203
- 26 U.S.C. § 7204
- 26 U.S.C. § 7205
- 26 U.S.C. § 7206
- 26 U.S.C. § 7207
- 26 U.S.C. § 7215

§C211. Tax Evasion. The base offense value is determined by the table below. Application of the table is to be based upon the tax deficiency, *i.e.*, the total amount of tax that the taxpayer evaded or attempted to evade. The deficiency does not include any interest or penalties. If multiple counts are involved, *e.g.*, when the taxpayer evaded taxes in several years, the deficiencies should be added. If the offense involved an attempt to evade taxes that, as of the time of the offense had not yet become due, compute the deficiency using a tax rate of 30%.

| <u>deficiency</u> | <u>base offense value</u> |
|---------------------------|---------------------------|
| up to \$1,000 | 10 |
| \$1,001 - \$5,000 | 12 |
| \$5,001 - \$10,000 | 14 |
| \$10,001 - \$20,000 | 16 |
| \$20,001 - \$35,000 | 18 |
| \$35,001 - \$70,000 | 22 |
| \$70,001 - \$120,000 | 26 |
| \$120,001 - \$200,000 | 30 |
| \$200,001 - \$350,000 | 36 |
| \$350,001 - \$600,000 | 42 |
| \$600,001 - \$1,000,000 | 48 |
| \$1,000,001 - \$2,000,000 | 54 |
| over \$2,000,000 | 60 |

a. Specific Offense Characteristics

1. If all or part of the taxpayer's income was obtained unlawfully, application of the table is to be based upon the deficiency plus the amount of any unreported unlawfully-obtained income. Unreported income is presumed to have been obtained unlawfully, unless otherwise established by the offender. Example: Suppose that the offender's tax deficiency is \$25,000 and the amount of unreported income is \$60,000. Unless it is established that the unreported income was obtained lawfully, the deficiency

for purposes of applying the table would be \$85,000, and the offense value would be 26 rather than 18.

b. Cross-References

1. If the offense occurred in connection with a course of conduct in which the offender aided, assisted, procured, counseled, or advised another to violate the internal revenue laws (other than in respect to the taxes that are involved in the instant tax evasion offense), whether through fraud or otherwise, add the offense value from §C214.

§C212. Willful Failure to File Return, Supply Information or Pay Tax. The base offense value is 80% of the offense value for Tax Evasion specified in §C211.

a. Specific Offense Characteristics

1. If the offense involved only a failure to pay tax when due, the base offense value is 50% of the base offense value specified in §C211 (Tax Evasion).
2. If the offense involved only a failure to file a return or supply required information, i.e., no tax was due, the base offense value is 6.

b. Cross-References

1. If the offense occurred in connection with a course of conduct in which the offender aided, assisted, procured, counseled, or advised another to violate the internal revenue laws (other than with respect to the taxes that are involved in the instant tax evasion offense), whether through fraud or otherwise, add the offense value from §C214.

§C213. Fraud and False Statements (Under Penalty of Perjury). The base offense value is 10.

a. Cross-References

1. If the offense occurred in connection with a course of conduct in which the offender aided, assisted, procured, counseled, or advised another to violate the internal revenue laws (other than with respect to the taxes that are involved in the instant offense), whether through fraud or otherwise, add the offense value from §C214.
2. If the conduct was in furtherance of an effort to evade payment of a tax, including a plan to evade a tax that, at the time of

the offense had not yet become due, the offense value is the offense value for §C211 (Tax Evasion).

§C214. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud. The base offense value is 10.

a. Specific Offense Characteristics

1. If the conduct occurred in connection with an effort to evade a specific tax obligation, the base offense value is that for evasion of tax by the principal from §C211 (Tax Evasion). Use a tax rate of 30% to compute the deficiency.
2. If the offender was in the business of preparing or assisting in the preparation of tax returns or the provision of documentation for the substantiation of tax returns, or if the conduct was in furtherance of an organized movement to encourage others to violate the internal revenue laws, add 6.

§C215. Fraudulent Returns, Statements, or Other Documents. The base offense value is 8.

§C216. Failing to Collect or Truthfully Account For and Pay Over Tax. The base offense value is from §C211 (Tax Evasion).

a. Specific Offense Characteristics

1. If the employer untruthfully accounted to his/her employees for any taxes withheld, add 4.

§C217. Failing to Deposit Collected Taxes in Trust Account as Required after Notice. The base offense value is 6, or 25% of the offense value from §C211 (Tax Evasion), whichever is greater.

§C218. Failing to Furnish an Employee a True Statement Regarding a Tax Withheld from the Employee. The base offense value is 6.

§C219. Furnishing False Information to an Employer in a Withholding Exemption Certificate, or Failing to Supply Information that Would Require an Increase in the Tax to be Withheld. The base offense value is 4.

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2. OFFENSES INVOLVING ALCOHOL AND TOBACCO TAXES

26 U.S.C. § 5601

26 U.S.C. § 5604

26 U.S.C. § 5662

26 U.S.C. § 5686

Also See Statutory Index

§C221. Offenses Involving Non-Payment of Taxes. The base offense value is the base offense value from §C211 (Tax Evasion). The deficiency is the amount of unpaid taxes, or the taxes that the offender attempted to evade.

§C222. Regulatory Offenses. The base offense value is 8.

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3. OFFENSES INVOLVING CUSTOMS

18 U.S.C. § 542

18 U.S.C. § 545

18 U.S.C. § 549

Also See Statutory Index

§C231. Evading Import Duties or Restrictions (Smuggling). The base offense value is determined by applying the table in §C211 (Tax Evasion) to the amount of the duty evaded.

a. Specific Offense Characteristics

1. If entry of the object is prohibited, restricted, or limited, then in lieu of the duty evaded, use (a) 25% of the fair market value of the object in the United States, or (b) the difference between the fair market value of the object in the United States and the fair market value of the object in the country of origin, or (c) the actual duty evaded, whichever is largest, in applying the table in §C211 (Tax Evasion).
2. If the duty evaded (as defined in a.1, if applicable) is less than \$500, and the object is for the personal use of the offender rather than resale, the offense value is 6.

§C232. Receiving or Trafficking in Smuggled Property. The base offense value is the offense value from §C231 (Smuggling) with respect to the smuggled object.

Commentary

1. Offenses Involving Income Taxes

This part deals with criminal violations of the internal revenue laws. The offense values have been set independently of those for offenses such as fraud or theft because the collection of taxes involves a unique governmental interest and estimates of the level of evasion are extremely high.

§C211. Tax Evasion

This section deals with conduct proscribed by 26 U.S.C. § 7201, which is entitled "Attempt to evade or defeat tax." In order for there to be a violation of 26 U.S.C. § 7201, there must be an affirmative act in furtherance of the evasion of taxes. If there is no affirmative act another section may apply, e.g. if the taxpayer did not pay the tax and did not file a return, see §C212.

If the tax obligation involved is not the offender's (in which case this guideline may be applied by cross-reference), the offender will be liable only for the amount of the taxes that he/she aided, abetted, or caused the taxpayer to attempt to evade. The enhancement for unreported unlawfully obtained income applies to the extent that the offender was aware or should have been aware that the income was unlawfully obtained. A question has been raised over whether an employee who is required by his/her employer to prepare fraudulent returns for the purpose of evasion should be treated less severely than the principal, but the Commission tentatively has elected not to attempt to make that distinction.

False statements in furtherance of the evasion (see §C213, §C215 and §C219) are considered part of tax evasion, and should not be treated as separate or additional offenses unless they occur in connection with taxes other than those that the offender is charged with evading or attempting to evade.

This guideline does not provide a lower penalty for an unsuccessful attempt. Such attempts generally involve fully completed acts that, but for fortuitous circumstances such as action by the I.R.S., would result in the evasion. The statute makes no distinction in punishment between an attempt and a completed offense; indeed, the offense is denominated an attempt.

In addition to reducing disparity, this guideline should result in a significant increase in average sentence length for large-scale evasions. Under current practices the sentence lengths tend to be relatively unrelated to the amount of tax evaded. The guideline should result in moderate increases for the great majority of cases that involve less than \$100,000 in tax evaded. The most significant change is that fewer cases will result in probation or fines without any imprisonment.

Factors considered for incorporation into the guidelines included: (1) the amount of tax evaded, (2) whether the income on which the tax was evaded was unlawfully obtained, (3) the proportion of the tax evaded to the total tax due, (4) the number of years of evasion, (5) whether there was careful planning, (6) whether the offender encouraged others to evade taxes, and (7) whether the offender assisted others to evade taxes.

Only factors 1, 2, and 7 were expressly incorporated.

Factor 1 (the amount of tax that the offender evaded or attempted to evade). This is the most important factor, since the primary injury is loss of revenue.

Factor 2 (whether the income was lawfully or unlawfully obtained). Assigning a higher offense value to evasion of tax on income obtained unlawfully involves some complexity. Nonetheless, because such income is generally unreported, making its existence especially difficult to prove, this factor is sufficiently important for deterrence purposes to require inclusion. Use of this factor requires the court to determine, in addition to the amount of tax evaded, whether and how much income was obtained unlawfully. One can imagine contentions as to the source of the income, e.g., that it was derived from gambling activity, that would be complex to resolve. Because of this, and also because unreported income is probably the most difficult to detect and prove, the guidelines specify that it shall be presumed that unreported income was not obtained lawfully unless credible evidence to the contrary is produced.

Factors 3 (the proportion of the tax due that was evaded) and 4 (the number of years of evasion). Factor 3 raises issues as to whether it is more serious to evade, for example, \$20,000 in tax when it is 40% of the tax due, or \$20,000 in tax when that is 70% of the tax due. Factor 4 relates to whether it is more serious to evade \$20,000 in tax during one year or spread out over three years. These factors appear less important than 1 and 2 for sentencing purposes. To include either of them would significantly increase the complexity of the guidelines without an adequate corresponding benefit. These factors might be taken into consideration within the guideline range.

Factor 5 (careful planning). It is difficult to commit tax evasion without planning. To the extent that this factor denotes unusual efforts to prevent detection (such as the use of off-shore bank accounts), it may be dealt with through a general aggravating factor applicable to most crimes, or might be taken into account as a factor warranting a sentence at the high end of the guideline range.

Factor 6 (encouraging others to evade taxes). Frequently, this factor will rise to the level of advising or assisting others to violate the internal revenue laws, in which case it will result in an adjustment to the total offense value. Otherwise, this factor might assist the court in setting a sentence within the guideline range.

Factor 7 (advising or assisting others to evade taxes). This factor, which usually constitutes a violation of 26 U.S.C. § 7206(2), significantly increases the risk of revenue loss and therefore has been expressly included as an aggravating factor.

§C212. Willful Failure to File Return, Supply Information or Pay Tax

This section refers to violations of 26 U.S.C. § 7203. Such violations are usually serious misdemeanors that are similar to tax evasion, except that there need be no affirmative act in support of the offense. Three types of violations are distinguished. The most frequently prosecuted case involves both a failure to file and a failure to pay the tax; but for the lack of the requisite affirmative act, it would constitute tax evasion. It therefore receives a relatively high punishment that is tied to the amount of unpaid tax. If the offender files a return and supplies the

necessary information but nonetheless willfully fails to pay the tax when due, the offense is treated as less serious because it is easy to detect and does not violate as many of the taxpayer's duties. Cases in which the offender owes no tax but fails to file a return pose a relatively minor threat to the tax-collection system and therefore have been assigned a low offense value. If failure to file is part of a larger scheme, the offense value for that larger offense will be applicable under the "modified real offense" sentencing approach adopted by the guidelines.

§C213 and §C214. Fraud and False Statements; Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

§C213 refers primarily to conduct proscribed by 26 U.S.C. § 7206(1), but also applies to 26 U.S.C. § 7206(3)-(5).

§C214 applies to conduct proscribed by 26 U.S.C. § 7206(2). In addition, as an aggravating factor referred to in other guidelines, it applies to any conduct where the offender aids, assists, procures, counsels or advises another to violate the internal revenue laws, whether or not the method of violation amounts to fraud.

Together, these guidelines cover the wide variety of conduct prohibited by 26 U.S.C. § 7206, which generally amounts to actual or attempted tax evasion (subdivision 1), or assisting in tax evasion (subdivision 2). Accordingly, the guidelines treat the offenses as tax evasion. The amount of the deficiency is the amount of tax that the conduct was intended to evade or assist in evading. If multiple tax obligations are involved, the deficiencies should be added.

In instances where the offender is setting the groundwork for future tax evasion, he/she may make false statements that state net income but, as of the time of conviction, may not yet have resulted in a tax deficiency. In those cases, the deficiency is to be computed using a rate of 30% -- an approximation to the maximum under the new tax laws. The same rate is used when the taxes of another person are involved, so as to avoid complex problems of proof and invasion of privacy. Misreporting by the principal, which the offender facilitated, would still have to be established.

In certain instances, such as promotion of a tax shelter scheme, the offender may advise other persons to violate their tax obligations through filing returns that find no support in the tax laws. If this type of conduct is shown to have resulted in the filing of identifiable false returns (regardless of whether the principals were aware of their falsity), it will be treated as evasion of the approximate amount (computed by using a tax rate of 30%) by which the returns understate the taxes due; otherwise, the offense value is set at 6. A more severe punishment is specified for the tax preparers because their misconduct poses a greater risk of revenue loss and is more clearly willful. The same is true for tax protesters.

Currently, 26 U.S.C. § 7206(1) is sometimes used to prosecute persons who, without attempting to evade taxes, misrepresent the source of their income. In such cases, the offender generally is seeking to disguise the unlawful source, such as drug dealing, presumably to avoid attracting the attention of law-enforcement authorities. Such offenses have been assigned a base offense value of 10. An alternative approach would tie the punishment to the source and amount of the income, resulting in larger penalties when serious criminal activity or large sums of money are

involved. The Commission invites comment on whether such an approach would be preferable, and, if so, how it should be implemented.

§C215. Fraudulent Returns, Statements, or Other Documents

This section refers to conduct proscribed by 26 U.S.C. § 7207, a misdemeanor. It is to be distinguished from 26 U.S.C. § 7206(1) (§C213), a felony, an element of which is a false statement made under penalty of perjury.

§C216. Willfully Failing to Collect or Account for and Pay Over Tax

This section refers to conduct proscribed by 26 U.S.C. § 7202. The failure to collect or truthfully account for the tax must be willful, as must the failure to pay.

This offense is a felony that is prosecuted infrequently. Where no effort is made to cheat the employee, the offense is a pure form of tax evasion, and is treated as such in the guidelines. In the event that the employer not only fails to account to the IRS and pay over the tax, but also collects the tax from the employees and does not account to them for it, it is both a form of embezzlement and a form of tax evasion. To cover such instances, an aggravating adjustment has been provided.

§C217. Failing to Deposit Collected Taxes as Required After Notice

This section refers to conduct proscribed by 26 U.S.C. §§ 7215, 7512(b).

This offense is a misdemeanor that does not require any intent to evade taxes, nor even that the taxes have not been paid. The more serious felony is 26 U.S.C. § 7202 (*see* §C216).

This offense is likely to be relatively easy to detect and fines may be a feasible punishment. Accordingly, it has been graded considerably lower than tax evasion, although some effort has been made to tie the offense value to the level of taxes that were not deposited. The deficiency is the amount of tax that was not deposited. If funds are deposited and withdrawn without being paid to the IRS, they should be treated as never having been deposited. A fine that is a percentage of the funds not deposited is suggested.

§C218. Willfully Failing to Furnish an Employee a True Statement Regarding a Tax Withheld from the Employee's Remuneration

This section refers to conduct proscribed by 26 U.S.C. § 7204, a relatively minor misdemeanor that is infrequently prosecuted.

§C219. Willfully Furnishing False Information to an Employer in a Withholding Exemption Certificate, or Failing to Supply Information that Would Require an Increase in the Tax to be Withheld

This section refers to conduct proscribed by 26 U.S.C. § 7205.

Unless it is part of a tax-evasion scheme, this offense is not serious. Although the extent to which the employee claimed unwarranted deductions is probably significant for sentencing purposes, it was not incorporated into the guidelines because the range of judicial discretion permitted is adequate to deal with the factor.

2. Offenses Involving Alcohol and Tobacco Taxes

This part deals with 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5697, and 5762, where the essence of the conduct is tax evasion or a regulatory violation. Because such offenses are no longer a major enforcement priority, no effort has been made to provide a section-by-section set of guidelines. Rather, the conduct is dealt with functionally, dividing it into two broad categories: tax evasion offenses and regulatory offenses.

§C221. Offenses Involving Non-payment of Taxes

The most frequently prosecuted conduct violating this section is operating an illegal still (26 U.S.C. § 5601(a)(1)). Offenses in this subsection are treated as equivalent to income tax evasion offenses. The tax deficiency is the total amount of all unpaid taxes that were due on the alcohol or tobacco.

Certain of these statutes deal with conduct that, in some instances, might more properly be characterized as theft. For example, 26 U.S.C. § 5601(a)(12) proscribes "removing . . . any distilled spirits on which the tax has not been paid or determined." If the offender is not the owner of the spirits, in which case primary objective may be to steal, the guideline section for theft should be applied. If the offender also failed to pay taxes on the stolen spirits, the offense value for Tax Evasion would apply in addition.

§C222. Regulatory Offenses

For offenses where there is no effort to evade taxes, such as record-keeping violations, the offense value is set at 8. Prosecutions for these offenses are infrequent.

3. Offenses Involving Customs

This part deals with violations of 18 U.S.C. §§ 541-545, 547, 1915 and 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b). These guidelines are primarily aimed at offenses that thwart revenue collection or trade regulation. They are not intended to deal with the importation of contraband, such as drugs, or other items such as obscene material or firearms, importation of which is prohibited or restricted for non-economic reasons and as to which other, more specific legislation applies.

§C231. Evading Import Duties or Restrictions (Smuggling)

This offense is treated as equivalent to tax evasion. There are two exceptions: (1) A lower offense value, 6, is set for cases involving small amounts of customs duties evaded by tourists. Such conduct currently is rarely prosecuted. (2) Special

provisions result in a higher offense value for certain items whose entry is prohibited, limited or restricted. Especially when protective quotas are in effect, the duties evaded on such items may not adequately reflect the economic harm resulting from their importation. Accordingly, an alternative measure of the "duty" evaded based upon the items' fair market value is provided. The rate of 25% was selected because it is considered an intermediate-range protective tariff. Although the increase in market value due to importation provides an even better estimate of the harm, it may be difficult to measure.

§C232. Receiving or Trafficking in Smuggled Property

This offense, which is encompassed by 18 U.S.C. § 545, is treated as equivalent to smuggling. Note that the reduced offense value for small tourist-type cases literally does not, and is not intended to, apply to traffickers. This reflects a judgment that a professional trafficker who is caught with even a small amount of merchandise should be treated more seriously than a person who merely acquires goods for personal own use.

PART D - OFFENSES INVOLVING DRUGS

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

21 U.S.C. § 841
21 U.S.C. § 843
21 U.S.C. § 845
21 U.S.C. § 845a
21 U.S.C. § 848
21 U.S.C. § 952
21 U.S.C. § 953
21 U.S.C. § 955
21 U.S.C. § 957
21 U.S.C. § 959

Also See Statutory Index

INTRODUCTION

For any controlled substance not specifically defined below, any reference to a particular controlled substance is also meant to include in that reference the substance and any analogous substances including, all salts, isomers, and salts of isomers. For example, the reference to PCP also includes its analogs PHP and TCP.

"Narcotic" is defined as in 21 U.S.C. § 802(17) and includes the following substances whether produced by extraction, chemical synthesis, or any other method: opium and opiates (or their derivatives); poppy straw and concentrate of poppy straw; coca leaves and their extracts that contain cocaine or ecgonine; all isomers, esters, ethers, salts, and salts of isomers, esters, and ethers of the foregoing as applicable (21 U.S.C. § 802(17)); or any compound mixture or preparation which contains any quantity of any of these substances.

"Opiate" is defined as in 21 U.S.C. § 802(18) to mean any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having such addiction-forming or addiction-sustaining liability.

"Traffic" means (a) to sell, pledge, transfer, distribute, dispense, or otherwise dispose of to another person; or (b) to buy, receive, possess, or obtain control of with intent to do any of the foregoing, or to otherwise knowingly aid or assist in any manner in any part of the distribution or sale.

"Marijuana" means all parts of the plant *Cannabis sativa* L, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufactured salt, derivative, mixture, or preparation of such plant, its seeds, or its resin. 21 U.S.C. § 802(16).

The offense values assigned to offenses involving controlled substances depend on the type and amount of the controlled substance (see §D211, A-D), and the presence of aggravating factors such as selling to minors and use of weapons (see §§D211a and b).

Other factors being equal, offenses involving substances that present a similar danger are treated similarly. The guidelines were set so as to assure that larger quantities of a controlled substance considered to be less harmful are needed to achieve the same offense value as smaller amounts of a substance considered more harmful.

The drug offense tables measure the scale of the offense. The best evidence of the scale of the offense is normally the quantity of the controlled substance seized in the illegal transaction. For convenience in application, the tables provide the offense values for designated amounts of certain controlled substances that either are the subject of numerous prosecutions or have been specifically identified by statute. Equivalency conversion tables for other controlled substances are reserved for later publication.

Scale amounts for heroin and other schedule I-II opiates, cocaine, and marijuana and other cannabis products refer to the total weight of the controlled substance. If any mixture contains any detectable amount of a controlled substance, the entire amount of the mixture shall be considered in measuring the quantity. If a mixture contains a detectable amount of more than one controlled substance, the more serious controlled substance, as determined by its schedule classification, shall determine the name affixed to the entire quantity. Other substances are measured in terms of the number of doses. A pill, tablet, capsule, or other single unit of user packaging is considered a dose. Tables to convert bulk amounts into doses are reserved for later publication.

§D211. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession With Intent to Commit Any of the Above Offenses)

(A) If the substance is heroin or another Schedule I-II opiate*, the base offense value is that determined from the following table.

| <u>Amounts</u> | <u>Base Offense Value</u> |
|---|---------------------------|
| 1 kg. or more heroin or equivalent amount of other Schedule I-II opiate | 180 |
| 500 to < 1,000 gms. heroin or equivalent amount of other Schedule I-II opiate | 168 |
| 250 to < 500 gms. heroin or equivalent amount of other Schedule I-II opiate | 144 |
| 100 to < 250 gms. heroin or equivalent amount of other Schedule I-II opiate | 132 |
| 25 to < 100 gms. heroin or equivalent amount of other Schedule I-II opiate | 72 |
| 10 to < 25 gms. heroin or equivalent amount of other Schedule I-II opiate | 66 |
| <10 gms. heroin or equivalent amount of other Schedule I-II opiate | 48 |

*A heroin equivalency table relating to other opiates is reserved for later publication.

(B) If the substance is cocaine, the base offense value is that determined from the following table.

| <u>Amount</u> | <u>Base Offense Value</u> |
|-----------------------------|---------------------------|
| 2 kg. or more cocaine | 180 |
| 1 kg to < 2 kg. cocaine | 168 |
| 500 gms. to < 1 kg. cocaine | 144 |
| 250 to < 500 gms. cocaine | 132 |
| 100 to < 250 gms. cocaine | 72 |
| 25 to < 100 gms. cocaine | 66 |
| 10 to < 25 gms. cocaine | 48 |
| < 10 gms. cocaine | 28 |

(C) If the substance is any other Schedule I-V controlled substance, except marijuana, the base offense value for the dose amounts* is determined from the following table.

| <u>Amount</u> | <u>Offense Value</u> | | |
|----------------------------|----------------------|--|----------------------|
| | <u>PCP/LSD</u> | <u>Other Schedule I-III (except Marijuana)</u> | <u>Schedule IV-V</u> |
| 200,000 or more doses | 204 | 168 | 84 |
| 100,000 to < 200,000 doses | 192 | 144 | 72 |
| 50,000 to < 100,000 doses | 180 | 132 | 60 |
| 25,000 to < 50,000 doses | 168 | 120 | 52 |
| 10,000 to < 25,000 doses | 156 | 60 | 48 |
| 2,500 to < 10,000 doses | 144 | 42 | 38 |
| 1,000 to < 2,500 doses | 126 | 30 | 22 |
| 100 to < 1,000 doses | 96 | 18 | 14 |
| < 100 doses | 48 | 12 | 12 |

* A dose is equal to one pill, tablet, capsule, or other single unit.

(D) If the substance is marijuana or other cannabis product*, the offense value is that determined from the following table.

| <u>Amount</u> | <u>Base Offense Value</u> |
|--|---------------------------|
| 20,000 lbs. or more marijuana or equivalent | 108 |
| 2,000 to < 20,000 lbs. marijuana or equivalent | 72 |
| 200 to < 2,000 lbs. marijuana or equivalent | 48 |
| 50 to < 200 lbs. marijuana or equivalent | 32 |
| 10 to < 50 lbs. marijuana or equivalent | 24 |
| 1 to < 10 lbs. marijuana or equivalent | 18 |
| < 1 lb. marijuana or equivalent | 12 |

*A marijuana equivalency table relating to other cannabis products is reserved for later publication.

a. Specific Offense Characteristics

1. If the offender is at least 18 years of age and distributes any portion of a controlled substance to a person who is less than 18 years of age, or if the transaction takes place within 1,000 feet of an elementary or secondary school, add 18 to the base offense value.
2. If the offender is at least 18 years of age and uses a person who is less than 18 years of age to assist or in any way facilitate the commission of the offense, add 18 to the base offense value.

b. Cross-References

1. If a firearm was in the possession or under the control of the offender or an accomplice during the commission of the offense, add the appropriate offense value from Part K, Offenses Involving Public Order and Safety.
2. If the offender caused physical injury, add the appropriate offense value from Part A, Offenses Involving the Person.
3. If the offender used a special skill, trade, training, education, or position with a financial or other institution or public office to significantly assist or facilitate the commission of the offense, the offender's role in the offense shall be presumed to be at least at the level defined in Chapter Three, Part A, Role In The Offense, which requires the sentencing judge to multiply the total offense value by 1.2.
4. If the offender has one or more final prior convictions for an offense described in §D211, the base offense value is doubled.

§D212. Continuing Criminal Enterprise

For a first conviction for engaging in a continuing criminal enterprise the base offense value is 120, or the total of the offense value(s) applicable to the predicate offenses, whichever is greater.

In determining the total offense value for engaging in a continuing criminal enterprise:

1. If any of the predicate offenses have resulted in the imposition of a final sentence prior to sentencing for the current offense, do not add the offense value for the conduct covered by such sentence.

However, any sentence imposed under a continuing criminal enterprise conviction shall be consecutive to such other sentence.

2. If any of the predicate offenses have been established initially during the prosecution under a continuing criminal enterprise charge by either special verdict of the jury, or by findings of the court subsequent to a general verdict or plea of guilty, then the base offense value shall be added to the offense value(s) for such predicate offenses.

For a second and subsequent conviction for engaging in a continuing criminal enterprise, the base offense value is 240, or the total of the offense value(s) applicable to the predicate offenses, whichever is greater.

a. **Specific Offense Characteristics**

1. If the offender used a person who is less than 18 years of age to assist or in any way facilitate the commission of the offense, add 18 to the base offense value.

b. **Cross-References**

1. If a firearm was used by the offender or an accomplice in relation to or in furtherance of the offense, add the appropriate offense value from Part K, Offenses Involving Public Order and Safety.
2. If the offender caused death or physical injury add the appropriate offense value from Part A, Offenses Involving the Person.

Commentary

Section D212 refers to conduct proscribed by 21 U.S.C. § 848.

As in Part E, Offenses Involving Criminal Enterprises, §E211, which refers to violations of 18 U.S.C. § 1962 (Racketeer Influenced and Corrupt Organizations offenses), emphasis is placed on the predicate offenses required for conviction. To avoid double-counting, the method for determining the total offense value that is used under §E211 is also used under §D212. The assigned offense value reflects the Congressional intent to provide a mandatory minimum term of imprisonment for the leaders of large-scale drug enterprises.

When sentencing for convictions under 21 U.S.C. § 848, it is especially important that the sentence reflect the offender's role in the enterprise. A conviction will have already established that the offender controlled and exercised decision-making authority over one of the most serious forms of ongoing criminal activity. Therefore, attention is specifically directed to Chapter Three, Part A, Role in the Offense, and the Commentary thereunder, which expressly provides that a conviction under 21 U.S.C. § 848 "automatically establishes the applicability of a multiplier of 2" to the base offense value.

§D213. Attempts and Conspiracies. If any offender enters into a conspiracy or attempts to commit any offense involving a controlled substance, the offense value shall be the same as if the object(s) of the conspiracy or attempt had been completed. All applicable specific offense characteristics and cross-references shall be used in calculating the total offense value.

§D214. Determining Amount When No Seizure Occurs. If there is no drug seizure or the amount seized does not reflect the actual scale of the offense, the sentencing judge shall determine the quantity of the controlled substance by a preponderance of the evidence. The government's burden of proof may be met by any competent evidence including, but not limited to the following:

1. the quantity associated with known price and market value;
2. financial or other records;
3. testimony concerning the offender's similar transactions, including testimony as to the quantities involved in previous transactions for controlled substance offenses;
4. if a laboratory was involved, testimony regarding the size and capability of the laboratory; or
5. testimony concerning other reliable facts for determining quantity.

Commentary

Violations of laws that prohibit the use or distribution of controlled substances represent a serious harm to individuals and to society. Illegal drug transactions in many instances fund the coffers of organized crime. Evidence increasingly has established a correlation between drug abuse and other crimes and additional resultant harms. Therefore, the controlling principles in formulating these guidelines were deterrence and incapacitation. Drug offenders at every level show a high rate of recidivism. Those who have not been deterred should be incapacitated.

The aggravating factors recognize the increased culpability for offenders who distribute to or use a minor to violate the drug laws. If the violator was also a minor, no aggravating factor is imposed. The possession of dangerous weapons or infliction of physical injury is not uncommon in drug violations. Weapons pose an additional danger not only to offenders but to undercover officers and the public at large. An aggravating factor was included to deter such conduct.

Certain types of offenders are essential to drug violations. These include but are not limited to pilots, boat captains, accountants, bankers, financiers, lawyers, doctors, laboratory technicians, public officials, and others who have a special skill, trade, profession, or position that is used to significantly facilitate the commission of a drug offense. An aggravating factor is included to enhance the punishment in an attempt to deter these individuals from criminal activity.

Recidivists should be dealt with more severely in recognition of the need to incapacitate those who repeatedly fail to obey the law.

While it is not necessary to have seized all or any of the controlled substances involved in a drug transaction to establish guilt, it is often difficult to establish the quantity. The intent of §D214 is to allow for appropriate punishment for offenders by recognizing that the sentencing judge may determine the quantity involved even though there was no seizure.

If the offender is convicted of an offense involving negotiations to distribute a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount, provided that the government establishes by a preponderance of the evidence that the offender was reasonably capable of providing the amount of the controlled substance under negotiation.

If the offender is convicted of a conspiracy that includes transactions in controlled substances in addition to those which are the subject of substantive counts of conviction, each conspiracy transaction shall be included with those of the substantive counts of conviction to determine scale. However, the same transaction shall not be subject to sanction under both a conspiracy count and a substantive count of conviction.

* * * * *

2. UNLAWFUL POSSESSION

21 U.S.C. § 844
Also See Statutory Index

§D221. Unlawful Possession

- (a) If the substance is heroin or any Schedule I-II opiate, the base offense value is 18.
 - (b) If the substance is cocaine, PCP, or LSD, the base offense value is 16.
 - (c) If the substance is any other controlled substance, the base offense value is 12.
- a. **Specific Offense Characteristics**
- 1. If a firearm was in the possession or under the control of the offender or an accomplice during the commission of the offense, add 24 to the base offense value.
 - 2. If a victim suffered physical injury, add the appropriate offense value from Part A, Offenses Involving the Person.

3. If the offender has one or more final prior convictions for an offense(s) involving a controlled substance, the base offense value shall be twice the base offense value shown above.

Commentary

The controlling principles are deterrence and incapacitation. Possession is a crime. The demand for unlawful drugs is a major part of the overall problem the drug laws attempt to address.

As with other drug violations, the possession of a weapon or infliction of physical injury are aggravating factors. Recidivists should be dealt with more severely in recognition of the need to incapacitate those who repeatedly fail to obey the law.

§D222. Acquiring a Controlled Substance by Forgery, Fraud, Deception, or Subterfuge (21 U.S.C. § 843(a)(3)). The base offense value is 12.

Commentary

This violation is infrequently prosecuted in federal court. The controlling consideration is deterrence.

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3. REGULATORY VIOLATIONS

§D231. Violations of 21 U.S.C. § 843(a). The base offense value is 6.

§D232. Violations of 21 U.S. C. §§ 842(a) or (b) (Prosecuted Under 21 U.S.C. § 842(c)(2)). The base offense value is 6.

§D233. Violations of 21 U.S.C. § 954 (Prosecuted under 21 U.S.C. § 961(2)). The base offense value is 6.

Commentary

These violations are less frequently prosecuted in federal court. Again, deterrence is the controlling principle involved in formulating the preliminary guidelines.

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PART E - OFFENSES INVOLVING CRIMINAL ENTERPRISES

1. RACKETEERING

18 U.S.C. § 1951
18 U.S.C. § 1952
18 U.S.C. § 1952A
18 U.S.C. § 1952B
18 U.S.C. § 1962
Also See Statutory Index

§E211. Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations. The base offense value is 12 plus the offense value applicable to the underlying racketeering activity.

In determining the total offense value for RICO violations:

1. If any of the underlying racketeering activity has resulted in the imposition of a final sentence prior to sentencing for the current offense, do not add the offense value for the conduct covered by such sentence. However, any sentence imposed under RICO shall be consecutive to such other sentence.
2. If any of the underlying racketeering activity has been established initially during the prosecution under RICO by either special verdict of the jury or by findings of the court subsequent to a general verdict or plea of guilty, then the offense value(s) for such activity shall be added to the base RICO offense value (12).

§E212. Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise. The base offense value is the offense value applicable to a) any crime of violence that was the purpose of the travel or transportation, or b) any other unlawful activity, as defined in 18 U.S.C. § 1952(b), in pursuance or furtherance of which the travel or transportation was undertaken.

§E213. Interfering with Commerce by Threats or Violence (18 U.S.C. § 1951); Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire;(18 U.S.C. § 1952A); Violent Crimes in Aid of Racketeering Activity;(18 U.S.C. § 1952B). The base offense value is the offense value applicable to the underlying unlawful conduct done, caused, or intended.

Commentary

The federal racketeering offenses cover a wide variety of criminal activity, normally prosecuted as state offenses. The federal interest derives from conduct that affects interstate or foreign commerce or violates a federal law. Thus, while the conduct may be described in jurisdictional terms (e.g., engaging in a pattern of racketeering activity), the real evil addressed is the underlying conduct. These sections, therefore, give primary emphasis to the underlying conduct.

When sentencing for racketeering offenses, it is especially important that the sentence reflect the offender's role in the racketeering scheme. Therefore, attention is specifically directed to Chapter Three, Part A, Role in the Offense, for the application of any appropriate adjustment to the offense values(s) determined under Chapter Two.

In §E211, the underlying conduct is scored for sentencing purposes, and 12 offense value points are added. The additional RICO offense value reflects a recognition by the Commission that these offenses typically involve a pattern of illegal conduct often caused or supported by organized crime, with a high probability of continued illegal conduct; therefore, an enhanced sanction is both deserved and necessary for crime control purposes.

If the underlying activity has already been punished, it is not given a double count, but a sentence under this provision will be consecutive to any other such sentence.

Sections E212 and E213 deal with more specific offenses akin to racketeering conduct. All derive their offense values strictly from the underlying conduct, with no offense value attributable to the conduct that provides the federal jurisdiction nexus (e.g., interstate travel or use of the mail). Unlike the previous section, there is no additional criminal conduct (e.g., pattern of racketeering activity) for which a sentencing value need be added to the offense value assignable to the underlying illegal activity.

Section E212 refers to "Travel Act" offenses proscribed by 18 U.S.C. § 1952, a jurisdictional statute that reaches a broad variety of underlying unlawful conduct preceded by or involving interstate or foreign commerce travel, or use of commerce facilities.

Section E213 refers to "Hobbs Act" offenses proscribed by 18 U.S.C. § 1951, a jurisdictional statute that reaches a broad variety of underlying criminal conduct involving interference with commerce or industry through robbery, extortion, or physical violence. This section also covers the "murder-for-hire" offense proscribed by 18 U.S.C. § 1952A (Section 1002(a) of the Comprehensive Crime Control Act of 1984). That statute is jurisdictional, reaching the underlying conduct of murder or intended murder committed for pecuniary gain, with the requisite federal nexus provided by interstate or foreign commerce travel, use of commerce facilities, or use of the mail. Section E213 relates to violent crimes in aid of racketeering activity proscribed by 18 U.S.C. § 1952B (Section 1002(b) of the Comprehensive Crime Control Act of 1984). That statute is jurisdictional, reaching the underlying conduct of contract murder and other violent crimes committed by organized crime figures. The requisite federal nexus is provided by involvement of an "enterprise" (as defined in

18 U.S.C. § 1952B(b)(2)) engaged in "racketeering activity" (as defined in 18 U.S.C. § 1961).

* * * * *

2. EXTORTIONATE EXTENSION OF CREDIT OFFENSES

18 U.S.C. § 892
18 U.S.C. § 893
18 U.S.C. § 894

§E221. Making, Financing, or Collecting an Extortionate Extension of Credit. The base offense value is 24, or the offense value from the property table, Part B, Offenses Involving Property, whichever is greater. For purposes of the guidelines, application of the property table is to be based on 5x the amount of money loaned.

a. Specific Offense Characteristics

1. If the offense involved an illegal debt, add 12 to the base offense value.

b. Cross-References

1. If the conduct involved death or physical injury, add the applicable offense value from Part A, Offenses Involving the Person.
2. If any victim suffered psychological injury, add the appropriate offense value from Part A, Offenses Involving the Person, (Psychological Injury).
3. If property was damaged, destroyed, or taken, add the appropriate offense value from Part B, Offenses Involving Property.

Commentary

This section refers to offenses involving the making or financing of extortionate extensions of credit, or the collection of loans by extortionate means. Because these "loan-sharking" offenses typically involve violence or threats of violence and provide economic support for organized crime, they are considered a serious threat to public welfare, and the Commission has assigned offense values with these considerations in mind. For purposes of applying the table in Part B, Offenses Involving Property, a figure equivalent to five times the measurable amount of money loaned is a fair approximation of the real harm involved in such an offense.

If the evidence establishes that actual violence or damage to property was associated with the extortionate extension of credit, then reference should be made to Part A, Offenses Involving the Person, and Part B, Offenses Involving Property, and the appropriate offense values added. However, no additional offense value should be assigned for threats of violence or other harm, since threatening conduct is inherent in the offense and subsumed in the base offense value.

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3. GAMBLING OFFENSES

15 U.S.C. § 1172
15 U.S.C. § 1173
15 U.S.C. § 1174
15 U.S.C. § 1175
18 U.S.C. § 1082
18 U.S.C. § 1084
18 U.S.C. § 1301
18 U.S.C. § 1302
18 U.S.C. § 1303
18 U.S.C. § 1304
18 U.S.C. § 1306
18 U.S.C. § 1511
18 U.S.C. § 1953
18 U.S.C. § 1955
Also See Statutory Index

§E231. Engaging in a Gambling Business. The base offense value is the offense value determined below, relative to the scale of the gambling enterprise. If the scale of the enterprise cannot be determined directly from the examples provided, it may be determined by analogy with the examples.

1. If a very large scale enterprise (e.g., a sports book with an average daily gross of more than \$18,000; a horse book with an average daily gross of more than \$4,800; a numbers banker with an average daily gross of more than \$2,400; a dice or card game with an average daily 'house cut' of more than \$1,200; or video gambling involving eight or more machines), the base offense value is 24.
2. If a large scale enterprise (e.g., a sports book with an average daily gross of \$4501-\$18,000; a horse book with an average daily gross of \$1,201-\$4,800; a numbers banker with an average daily gross of \$601-\$2,400; a dice or card game with an average daily "house cut" of \$301-\$1200, or video gambling involving four-seven machines), the base offense value is 18.

3. If a medium scale enterprise (e.g., a sports book with an average daily gross of \$1500-\$4500; a horse book with an average daily gross of \$400-\$1,200; a numbers banker with an average daily gross of \$200-\$600; a dice or card game with an average daily "house cut" of \$100-\$300; or video gambling involving two-three machines), the base offense value is 12.
4. If a small scale enterprise (e.g., a sports book with an average daily gross of less than \$1500; a horse book with an average daily gross of less than \$400; a numbers banker with an average daily gross of less than \$200; a dice or card game with an average daily "house cut" of less than \$100; or video gambling involving one machine), then the base offense value is 6.

§E232. Transmission of Wagering Information. The base offense value is that applicable to §E231 (Engaging in a Gambling Business).

§E233. Interstate Transportation of Wagering Paraphernalia. The base offense value is 6.

a. Specific Offense Characteristics

1. If the paraphernalia was intended for use in a gambling business, the base offense value is that applicable to §E231 (Engaging in a Gambling Business).

§E234. Unlawful Conduct Relating to Gambling Ships. The base offense value is that applicable to §E231 (Engaging in a Gambling Business).

§E235. Unlawful Conduct Relating to Lottery Tickets or Related Matter. The base offense value is 6.

a. Specific Offense Characteristics

1. If the lottery tickets were intended for engaging in or for use in a gambling business, the base offense value is that applicable to §E231 (Engaging in a Gambling Business).

§E236. Unlawful Conduct Relating to Slot Machines or Other Gambling Devices. The base offense value is 6.

a. Specific Offense Characteristics

1. If the offense involved trafficking in devices for use in a gambling business, the base offense value is that applicable to §E231 (Engaging in a Gambling Business).

Commentary

When gambling offenses are part of a criminal enterprise they often provide economic support for organized crime. With these considerations in mind, the Commission has set a minimal base offense value for isolated gambling transactions and a higher base offense value for gambling enterprise violations. In regard to the latter, the offense value is to be enhanced according to the scope of the criminal enterprise, using the examples in §E231.

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4. OBSCENITY OFFENSES

- 18 U.S.C. § 1461
- 18 U.S.C. § 1462
- 18 U.S.C. § 1463
- 18 U.S.C. § 1464
- 18 U.S.C. § 1465
- 18 U.S.C. § 2252
- Also See Statutory Index

§E241. Importing, Mailing, or Transporting Obscene Matter. The base offense value is 6.

a. Specific Offense Characteristics

1. If the offense involved distribution for pecuniary profit, the base offense value is from the following table. Application of the following table is to be based on the retail value of the material if it can be determined. If the retail value of the material cannot be determined, application of the following table is to be based on the gross revenue derived from the obscene matter, or on a value of \$10 per discrete book, pamphlet, film, thing, or device; whichever is greater.

| Retail Value of Material | Offense Value |
|--------------------------|---------------|
| \$1000 or less | 6 |
| \$1001 - \$10,000 | 8 |
| \$10,001-\$25,000 | 12 |
| \$25,001-\$50,000 | 18 |
| \$50,001-\$100,000 | 24 |
| \$100,001 or more | 30 |

2. If the offense involved distribution for pecuniary profit to any person less than sixteen years of age, add 12 to the base offense value.

b. Cross-References

1. If the conduct involved material relating to the sexual exploitation of a minor, apply §E242 (Transporting, Receiving, or Distributing Material Involving the Sexual Exploitation of a Minor) rather than this section.

§E242. Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor. The base offense value is 24, or 12 plus the offense value applicable to §E241 (Importing, Mailing, or Transporting Obscene Matter), whichever is greater.

a. Specific Offense Characteristics

1. If the offense involved trafficking in or transporting material that depicts a minor under age twelve, add 12 to the base offense value.

b. Cross-References

1. If the conduct involved the sexual exploitation of a minor by production of sexually explicit visual or printed material, add the appropriate value from §E261 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material).

§E243. Broadcasting Obscene Language. The base offense value is 3.

a. Specific Offense Characteristics

1. If the offense was committed using, or on a communications frequency used by, a commercial broadcasting station, add 3 to the base offense value.

Commentary

Section E241 refers to offenses involving the mailing, importation, and interstate transportation for sale or distribution of obscene materials. The base offense value reflects a judgment that these types of offenses pose a threat to accepted moral standards and values and often provide economic support for organized crime. When the obscenity distribution offense is part of a for-profit enterprise, the sanction is enhanced according to the scope of the criminal scheme, as determined by the estimated retail value of pornographic materials involved.

If the evidence establishes distribution for profit to a minor under age 12, the sanction is further enhanced. The additional sanction reflects a judgment that minors are more impressionable and vulnerable purchaser-victims of obscenity purveyors. It is not necessary to establish that the offender knew the purchaser was under age 12.

If the offense involves the distribution of material that includes the visual depiction of a minor engaging in sexually explicit conduct, refer to guideline §E242 for the determination of the base offense value.

Section E242 refers to the distribution of materials that visually depict a minor or minors engaging in sexually explicit conduct. The base offense value is substantially higher than the base value applicable to the distribution of obscene materials not involving the visual depiction of minors engaging in such conduct. The severity of the sanction reflects a Commission and Congressional judgment (See preamble to the Child Protection Act of 1984, Pub. L. No. 98-292) that child pornography is a serious crime problem in which minors, particularly runaway and homeless youth, are exploited. Such exploitation of minors is harmful to the wellbeing of the children involved and society.

This section also reflects a Commission judgment that the distribution and sale of such material is generally more serious than the ultimate purchase or receipt by a customer. Nevertheless, the receipt of this material is deemed more serious than the ordinary customer purchase of obscene materials because these purchases supply the economic motive for exploitation of children.

The sanction is to be enhanced according to the scope of the child pornography enterprise, based on the retail value of the distributed materials and applicable offense values in §E241. If the offense involves depiction of a minor or minors under age 12, a higher offense value is assigned.

If the conduct involves the production of child pornography (as opposed to its distribution, sale, or purchase), guideline §E261 should be applied. Frequently, the unlawful conduct will involve both the production and distribution of child pornography, in which case both §E261 and §E242 should be applied.

Radio broadcasting of obscene language, 18 U.S.C. § 1464, is generally considered a less serious offense than the distribution of obscene printed matter, which has greater permanence and typically involves an organized business enterprise. If the obscene or profane broadcasting occurs over a commercial radio station, as opposed to a citizens' band or other limited transmission, the sanction is more severe because of the generally wider audience affected by the broadcast and its commercial nature.

* * * * *

5. PROSTITUTION OFFENSES

18 U.S.C. § 2421

18 U.S.C. § 2422

18 U.S.C. § 2423

Also See Statutory Index

§E251. Owning or Operating a Prostitution Business. The base offense value is 12.

a. Specific Offense Characteristics

1. If the conduct involved the prostitution or recruiting for prostitution of a person less than sixteen years of age, the base offense value is 36.
2. If the conduct involved the prostitution or recruiting for prostitution of a person at least sixteen years but less than eighteen years of age, the base offense value is 24.

b. Cross-References

1. If the violation involved death or physical injury, add the appropriate offense value from Part A, Offenses Involving the Person.
2. If any victim suffered psychological injury, add the appropriate offense value from Part A, Offenses Involving the Person (Psychological Injury).
3. If the offense involved criminal sexual conduct with a minor, add the appropriate offense value from Part A, Offenses Involving the Person.

§E252. Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct. The base offense value is 6.

a. Specific Offense Characteristics

1. If the conduct was for the purpose of prostitution, the offense value is that from §E251 (Owning or Operating a Prostitution Business).
2. If the conduct was for the purpose of the sexual exploitation of a minor, the offense value is that for §E261 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material).

§E253. Engaging in Prostitution. The base offense value is 4.

Commentary

Guidelines §E251, §E252 and §E253 refer to prostitution offenses within federal jurisdiction.

Reflecting a concern for the exploitation of minors, particularly runaway and homeless youth, the Commission has enhanced the offense value when one or more minors are involved in a prostitution enterprise. The offense value is further enhanced if a minor under age 16 is involved.

If the conduct involves personal injury (death, bodily injury, or psychological injury) or a threat of personal injury to an individual involved in a prostitution enterprise or other person, then reference should be made to the applicable guidelines in Part A and the offense value from those applicable guidelines added.

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6. SEXUAL EXPLOITATION OF A MINOR

§E261. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material. The base offense value is 36.

a. Specific Offense Characteristics

1. If the person exploited was under age 12 at the time of the exploitation, add 12 to the base offense value.

b. Cross-References

1. If the conduct involved a physical injury described in Part A, Offenses Involving the Person, add the appropriate offense value.
2. If any victim suffered psychological injury, add the appropriate offense value from Part A, Offenses Involving the Person (Psychological Injury).
3. If the conduct involved an offense described in §E242 (Transportation, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor), add the appropriate offense value.
4. If the offense involved criminal sexual conduct with a minor, add the appropriate offense value from Part A, Offenses Involving the Person.

Commentary

This offense commonly involves the production source or base of a child pornography enterprise. Because the offense directly involves the exploitation of a minor or minors under age 18, the base offense value is higher than for the distribution of the sexually explicit material after production. Since offenders of this section frequently commit the conduct described in §E242, cross-reference is made to that section. If the conduct involves the exploitation of a minor under age 12, the offense value is further enhanced. Additionally, if the exploitation involves personal or psychological injury to a minor, or the threat of such injury, reference should be made to Part A and the applicable offense value(s) from that Part should be added to the offense value determined under this guideline. Each minor child exploited shall be considered a separate offense.

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7. TRAFFICKING IN CONTRABAND CIGARETTES

18 U.S.C. § 2342(a)

§E271. Unlawful Conduct Relating to Contraband Cigarettes. The base offense value is 6, or the offense value from the tax evasion table, Part C, Offenses Involving Taxation, whichever is greater.

1. Application of the Tax Evasion Table is to be based upon the amount of tax that is the object of evasion.

Commentary

This offense generally involves evasion of state excise taxes and becomes a federal matter only upon the establishment of minimum quantities transported in interstate commerce or by use of interstate communications. The size of operations giving rise to federal jurisdiction typically suggests the involvement of criminal organizations. Since this offense is basically a tax matter, the other element considered, in addition to the nature of the offense arising under these statutes, is the amount of tax that is the object of evasion.

The section sets a base offense value reflecting the nature of the offense. The base value is to be used only where it is higher than the offense value established under the Tax Evasion Table.

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8. CORRUPTION IN EMPLOYEE WELFARE OR PENSION BENEFIT PLANS

18 U.S.C. § 1954

- §E281. Unlawfully Offering, Accepting, or Soliciting Anything of Value to Influence the Operation of an Employee Welfare or Pension Benefit Plan. The base offense value is 9, or the offense value from the property table in Part B, Offenses Involving Property, whichever is greater. Application of the property table is to be based upon the value of the unlawful gratuity or the value of the action to be taken or affected in return for the unlawful gratuity, whichever is greater.

Commentary

This offense proscribes solicitation or receipt of kickbacks and other illegal gratuities involving employee welfare or pension benefit plans. The base offense value reflects a concern for safeguarding employee funds covered under the Employee Retirement Income Security Act against those who would mismanage such funds for their own financial gain. The Commission recognizes that this offense may involve organized crime, particularly when large sums of money from pension plans are transacted in response to the kickback, or when the illegal gratuity is itself large. Hence, the base offense value is to be enhanced as appropriate through application of the property table, based upon the value of the unlawful gratuity or the value of the action to be taken or affected in return for the unlawful gratuity, whichever is greater. For example, if a benefit plan officer receives a \$10,000 kickback for approving a \$1,000,000 loan from a benefit plan, then the amount of money to be equated to a offense value in the property table would be \$1,000,000, the value of the loan, rather than \$10,000, the amount of the kickback.

PART F - OFFENSES INVOLVING FRAUD AND DECEPTION

18 U.S.C. §§ 285 - 291
18 U.S.C. § 371
18 U.S.C. §§ 656, 659
18 U.S.C. §§ 1001 - 1030
18 U.S.C. §§ 1341 - 1344
Also See Statutory Index

INTRODUCTION

The base offense value for the fraud guidelines is determined by fundamental variables relating to single or multiple transactions and victims. Specific offense characteristics are then applied to reflect aggravated deceptive and fraudulent conduct and victim impact.

The fraud section does not link offense characteristics to specific statutes. Most fraud statutes contain general language that applies to a broad range of offenses of widely varying severity. For example, the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, apply to any person who devises or intends to devise a scheme or artifice to defraud by use of false or fraudulent pretenses, representations, or promises in order to obtain money or property. By application of the statute, a mail order scheme to defraud an individual of \$50 would constitute the same violation or offense as a multi-million dollar false billing scheme victimizing businesses nationwide. In order to differentiate among fraud offenses, the guidelines specify characteristics of the conduct and impact of these offenses on victims. For example, a violation of the mail fraud statute might be covered under a combination of several specific offense characteristics.

Some of the statutes to which Part F applies are referred to in the commentary on specific offense characteristics. While these guidelines are designed primarily for the fraud statutes, they may also relate to fraud involving specific statutory violations addressed elsewhere in the guidelines, such as securities and taxation.

Property Table for Fraud Offenses. Part F includes a table for property gained or lost through fraud offenses. The cumulative property loss or gain (whichever is higher) associated with the offense is treated as a general aggravating characteristic to be added to the base offense value. The table has been structured to add minimal offense values where the gain or loss is relatively low. The increasing offense values for losses or gains exceeding \$20,000 recognize increased financial injury to the victim or victims and the higher level of planning and sophistication generally involved in financially successful fraudulent conduct.

The property table is based on actual gain or loss only. Many fraud schemes have a greater potential impact than the actual loss or gain. However, the guidelines partially compensate for this by using higher offense values for more aggravated conduct.

Multiple-Count Indictments. Ongoing fraud usually results in multiple count indictments. For example, mail and wire fraud schemes, check kiting, misapplication of bank funds, credit card fraud, and government program fraud generally involve multiple transactions. By using a modified real offense sentencing approach, aggravated criminal conduct and victim impact are captured without aggregating offense values for each count. However, the cumulative loss or gain produced by a common scheme or course of conduct shall be used in applying the Property Table for Fraud Offenses.

If the offender was convicted of other criminal offenses committed in the course of a fraudulent scheme, the offense values generated by those offenses are governed by the guidelines relating to the other criminal conduct. The offense values generated by other criminal offenses shall be added to the offense values for the fraud. For example, if the offender engaged in a scheme to defraud an insurance company by burning an insured building, the offense values flowing from the arson would be added to those generated by the mail fraud scheme. If the offender was convicted of failure to report income from a fraudulent scheme on a federal tax return, the applicable guideline provisions for offenses involving taxation would be applied to determine the offense value to be added to that generated by the fraud itself.

If, in the same case, the offender was convicted of other fraud offenses that were not part of an ongoing scheme or course of conduct, the offense values generated by the other fraudulent offenses would be treated cumulatively. For example, if a bank officer or teller embezzled money from two prior employer-banks, the sanction units for the separate series of transactions would be treated cumulatively. If an offender engaged in a boiler room fraud by selling non-existent shares in precious metals futures, and was also convicted of submitting a fraudulent loan application to a federally insured bank, the offense values flowing from these fraudulent schemes would be treated cumulatively and added together.

§F211. Fraud and Deception. The base offense value for criminal conduct constituting fraud or deception is determined as follows:

1. If the fraud consisted of a single occurrence or transaction and did not involve more than one victim, the base offense value is 6.
2. If the fraud consisted of more than one transaction or occurrence and did not involve more than one victim, the base offense value is 8.
3. If the fraud consisted of a scheme or artifice to defraud more than one victim, the base offense value is 12.

a. Specific Offense Characteristics

1. If the offender obtained money, property, services, or any other thing of value, by falsely representing that he/she was acting on behalf of a charitable, educational, or religious cause or organization, or on behalf of a government or law enforcement agency, add 4 to the base offense value.
2. If the offense involved the concealment of illicit gains or transactions by use of accounts or transactions outside the United States, add 6 to the base offense value.
3. If the offender knowingly violated a judicial or administrative order or decree by the fraudulent conduct, add 6 to the base offense value.
4. If the offender defrauded a victim or victims knowing that the victim or victims were vulnerable to the offense because of age, physical or mental condition, or similar characteristics, add 8 to the base offense value.
5. If the offense caused one or more victims to sustain a substantial loss relative to income or assets, add 8 to the base offense value.
6. If the offense potentially endangered the health or safety of a person or the general public, add 10 to the base offense value.
7. If the offense involved a breach of a fiduciary duty or professional trust, add 10 to the base offense value.
8. If the offense involved a breach of a public trust, add 12 to the base offense value.
9. If the offense involved property loss to the victim(s) or gain to the offender, then refer to the Property Table for Fraud Offenses and add the offense value for the loss or gain, whichever is greater, to the total offense value for the fraudulent conduct.

b. Cross-References

1. If any victim suffered psychological injury as a direct result of the offender's conduct, add the appropriate offense value from Part A, Offenses Involving the Person.

PROPERTY TABLE FOR FRAUD OFFENSES

| <u>Dollar Loss or Gain</u> | <u>Base Offense Value</u> |
|----------------------------|---------------------------|
| \$5,000 or less | 2 |
| \$5,001 - \$10,000 | 4 |
| \$10,001 - \$15,000 | 5 |
| \$15,001 - \$20,000 | 6 |
| \$20,001 - \$50,000 | 8 |
| \$50,001 - \$100,000 | 10 |
| \$100,001 - \$250,000 | 14 |
| \$250,001 - \$1,000,000 | 18 |
| \$1,000,001 - \$2,000,000 | 24 |
| \$2,000,001 - \$5,000,000 | 36 |
| \$5,000,001 - \$25,000,000 | 48 |
| over \$25,000,000 | 60 |

Commentary

Base Offense Value

Overview. The base offense values distinguish between fraud offenses involving single and multiple transactions or occurrences and victims. These alternative base offense values are mutually exclusive. The provision that most accurately describes the offense shall be applied as the base offense value. All additional specific offense characteristics and cross-referenced aggravating factors are added to the appropriate base offense value.

For purposes of the fraud guidelines, a "transaction" is a fraudulent act, such as making a misleading or false statement or using a false pretense. The commission of a jurisdictional act, such as a mailing or an interstate telephone call, is not a "transaction."

1. Single Transaction. The lowest offense value level for the fraud guidelines is attributed to fraud involving a single occurrence or transaction that does not involve multiple victims. This low base line value would be applied to conduct such as the following:

- a. An offender knowingly makes false statements on an application for a federally guaranteed student loan (18 U.S.C. § 1001).
- b. An applicant knowingly makes a false or inflated claim for benefits under a federal program (18 U.S.C. § 287).
- c. An offender uses a counterfeit or altered certificate of deposit to pledge as collateral for a loan from a federally insured savings and loan institution (18 U.S.C. § 1014).

2. Multiple Transactions. This factor applies to two or more transactions that do not involve multiple victims. A minimal increase in base offense value is given the offender who engages in multiple transactions. While repeated fraudulent conduct warrants some increase in the offense value, the application of specific offense characteristics captures the aggravating characteristics and victim impact of the offense. This approach takes into consideration the possibility that an offender who engages in only one offense may be far more culpable and cause more significant harm than an offender who engages in several fraudulent transactions of a relatively insignificant nature. The following is an example of the conduct to which this factor applies:

A testing laboratory provides the offender, a defense contractor, with a certification falsely representing that voltage regulators manufactured by the contractor conform to government specifications. The defense contractor thereafter uses the fraudulent certification to obtain contracts and to provide defective, substandard voltage regulators to various United States and foreign military agencies (18 U.S.C. §§ 371, 1001, 1341).

3. Multiple Victims. The guidelines specify higher offense values for all multiple victim offenses without creating distinctions based upon the numbers of victims involved. Aggravated victim impact and property loss factors reflect the scale of the offense and its cumulative impact on victims.

Examples of the conduct to which this factor applies include the following:

- a. An offender conducts a deceptive advertising campaign that induces victims to send money for non-existent goods or services (18 U.S.C. § 1341).
- b. An offender conducts a "boiler room" operation by making interstate telephone calls inducing victims to invest in non-existent commodities futures (18 U.S.C. § 1343).

Specific Offense Characteristics

1. False pretenses involving charitable causes and government agencies. This factor applies to offenders who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, offenders who exploit victims' charitable impulses or trust in government create particular harm.

Examples of conduct to which this factor applies include the following:

- a. A group of offenders solicit by mail contributions to a non-existent famine relief organization (18 U.S.C. § 1341).
- b. An offender diverts donations for a religiously affiliated school by mail solicitations to church members in which she falsely claims to be a fundraiser for the school (18 U.S.C. § 1341).

- c. *Three offenders conduct a land swindle in which one offender misrepresents to victims that he/she is an employee of the Tennessee Valley Authority and that the victim's land is to be seized by eminent domain so that T.V.A. can dam a nearby river. Shortly thereafter, a co-conspirator approaches the victim and offers to buy the land at a distress price. The victim agrees to sell, and the third offender assists in conducting the transaction. Some of the arrangements for the sale are made by mail (18 U.S.C. § 1341).*
- d. *An offender gains access to a federal agency's records. Posing as a federal debt collection agent, he/she mails notices to the victim threatening legal action if a substantial payment is not made immediately. The offender then appears in person to collect payment (18 U.S.C. §§ 912, 1341).*

2. Transactions and accounts outside the United States. *Offenses that involve manipulation of transactions or accounts outside the United States to conceal illicit profits and criminal conduct entail a particularly high level of sophistication and complexity. These offenses are difficult to detect, and require costly investigations and complex prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. The offense value reflects the need to deter and punish this form of sophisticated conduct.*

Examples of conduct to which this factor applies include the following:

- a. *A bank officer conceals the proceeds of unsecured loans that he/she has fraudulently diverted to himself by transferring the funds under an assumed name to accounts in the Cayman Islands (18 U.S.C. §§ 656, 1343).*
- b. *A party official deposits illegal campaign contributions in Swiss bank accounts to conceal the source and amount of money a public figure receives from a narcotics organization (18 U.S.C. §§ 371, 1001, 1343, 1952).*
- c. *A brokerage house computer programmer transfers funds diverted from a pension fund investment account to a Canadian bank account in a relative's name (18 U.S.C. §§ 1030, 1343, 2314).*

3. Violation of judicial or administrative order or decree. *The offender who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies. If it is established that an entity the offender controlled was a party and the offender had knowledge of the prior decree or order, this provision applies even if the offender was not a specifically named party in that prior. For example, an offender whose business had been previously enjoined from selling a dangerous product, but who was engaged in fraudulent conduct to sell the product anyway, would be subject to this provision.*

4. Vulnerable victims. This factor applies to offenders who intentionally exploit vulnerable victims. The offense value reflects the higher degree of moral culpability involved. This factor applies only if the characteristic rendered a victim vulnerable to the specific offense.

Examples of the conduct to which this factor applies include the following:

- a. Offenders sell bogus cures for cancer to terminally ill victims (18 U.S.C. § 1341).
- b. A salesperson sells multiple insurance policies to victims who are not able to understand the terms of their policies (18 U.S.C. § 1341).
- c. An offender solicits advance employment fees from poor or unemployed victims for non-existent jobs (18 U.S.C. §§ 1341, 1343).

5. Substantial loss. This factor applies to any offense in which a victim's assets or income were substantially affected by the fraudulent conduct. Application of this factor does not require that a victim become insolvent or be forced into bankruptcy as a direct result of the offender's conduct. Examples of substantial loss would include the loss of a major portion of the victim's savings, loss of equity in a residence due to a second mortgage, or the incurring of indebtedness as a direct result of the offender's fraud.

This factor also recognizes that fraud offenses may have a substantial impact on organizational or institutional victims, such as causing a business to become insolvent or a bank to fail.

6. Risk to health or safety. This characteristic applies to fraud that creates a danger to the health and safety of individuals or the general public.

Examples of offenses to which this factor applies include:

- a. A businessman hires someone to commit arson for profit in an insurance fraud scheme. The lives of occupants of neighboring buildings are placed at risk and two firefighters are seriously hurt in the fire (18 U.S.C. § 1341).
- b. A defense contractor fraudulently provides the Air Force with defective parachute cord not conforming to government and contract specifications (18 U.S.C. §§ 1001, 1341).
- c. A chemical manufacturer fails to disclose to the Food and Drug Administration the carcinogenic effects of a drug in tests on laboratory animals (18 U.S.C. §§ 1001, 1341).
- d. A cardiologist perpetrates a Medicare fraud scheme, receiving kickbacks from a medical supply manufacturer for using that company's pacemakers and performs unnecessary pacemaker implants (18 U.S.C. §§ 371, 1341).

This factor also applies to mail frauds involving medical or cosmetic products where use is dangerous to health, such as "cures" for cancer that delay the victim's seeking appropriate medical care, treatments for baldness causing serious skin damage, or health-threatening diet products (18 U.S.C. § 1341).

Physical injury need not actually occur for application of this special offense characteristic. However, physical injury does occasionally result from fraudulent conduct. The Commission cannot adequately consider or predicate guidelines based upon such unique cases. Therefore, a sentence exceeding the guidelines may be warranted in these unusual cases.

7. Breach of professional trust or fiduciary duty. Many of the most serious fraud offenses are facilitated by a breach of a fiduciary or professional trust. Exploiting a confidential or fiduciary relationship to defraud others is treated as a relatively severe aggravating factor because of the basic public policy and societal interests involved. Deterrence and just punishment are important considerations in sentencing an offender who abuses a position of trust.

Examples of conduct subject to this provision are:

- a. An executor of an estate converts liquid assets of the estate to his own use by transfers to his personal investment account in another state (18 U.S.C. § 1343).
- b. An attorney advises a client to invest in an out of state recreational land development project, but the attorney conceals from the client his own financial interest in the project and that most of the client's "investment" will go directly to an out of state business controlled by the attorney (18 U.S.C. § 1341).

8. Breach of public trust. Corruption by a public official is a substantial aggravating factor because of the harm done to the integrity of public institutions and the loss of public confidence that results.

An example of conduct subject to this provision is:

- a. A municipal court judge signs bail release forms that are then mailed to attorneys who give the judge cash payments from the released bail money (18 U.S.C. § 1341).

Cross-References

Psychological injury. Fraud can cause significant psychological injury to victims, both because of the sense of personal betrayal that accompanies many crimes against individuals and because of stress resulting from financial difficulties. This provision is applicable to conduct that causes psychological injury as defined in Part A, Offenses Involving the Person.

The following is an example of the aggravated psychological stress to which this factor applies:

- a. *In an advance fee scheme, an offender fraudulently obtains money by promising to file reparations claims against the Federal Republic of Germany on behalf of Nazi concentration camp survivors. The offender requires the victims to prepare and submit chronologies of their experiences in concentration camps, including physical abuse, medical experimentation and the murder of family members (18 U.S.C. § 1341).*

PART H - OFFENSES INVOLVING INDIVIDUAL RIGHTS

1. OFFENSES INVOLVING CIVIL RIGHTS

18 U.S.C. § 241
18 U.S.C. § 242
18 U.S.C. § 245
18 U.S.C. § 246
18 U.S.C. § 1231
42 U.S.C. § 3631
Also See Statutory Index

§H211. Interfering with Civil Rights. The base offense value is 6.

a. Specific Offense Characteristics

1. If the offender conspired to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any civil right, add 12 to the base offense value.
2. If the offender and at least one other person went in disguise on the highway or on the premises of another with intent to prevent or hinder the exercise of any civil right, add 12 to the base offense value.
3. If the offender acted under color of law but not in a conspiracy with others, add 6 to the base offense value.

b. Cross-References

1. If the violation involved death or physical injury, add the appropriate offense value from Part A, Offenses Involving the Person.
2. If any victim suffered psychological injury, add the appropriate offense value from Part A, Offenses Involving the Person (Psychological Injury).
3. If the violation involved damage to or taking of property, add the appropriate offense value from Part B, Offenses Involving Property.

Commentary

This section refers to violations of civil rights or privileges secured under the Constitution or laws of the United States proscribed by 18 U.S.C. §§ 241, 242, 245, and 246, and 42 U.S.C. § 3631. For offenses involving political rights, see Subpart 2 of this Part. Often, a violation of this provision will include an offense from Part A

(Offenses Involving the Person) or Part B (Offenses Involving Property). If so, consult those sections and add the applicable offense values.

These offenses may involve property damage, assaults, and homicides. Such underlying conduct is so serious that it must be considered as the most significant factor in punishing the offender. Yet the fact that a person's civil rights have been violated is something more than a jurisdictional issue. Federal constitutional and statutory rights have real value, although it is a difficult task to quantify or distinguish among them for sentencing purposes.

The specific offense characteristics represent Congressional intent to punish more seriously those civil rights violators who act in concert with others or wear a disguise. In addition, a violation committed by an offender acting under color of law should be aggravated.

§H212. Transporting Strikebreakers. The base offense value is 6.

a. Cross-References

1. If the violation involved death or physical injury, add the appropriate offense value from Part A, Offenses Involving the Person.
2. If any victim suffered psychological injury, add the appropriate offense value from Part A, Offenses Involving the Person (Psychological Injury).
3. If the violation involved damage to or taking of property, add the appropriate offense value from Part B, Offenses Involving Property.

Commentary

This section refers to the offense of transporting strikebreakers or interstate traveling of strikebreakers, conduct proscribed by 18 U.S.C. § 1231.

This offense is treated under Part H, Offenses Involving Individual Rights, because the right to strike is a federally protected right.

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2. POLITICAL RIGHTS OFFENSES

2 U.S.C. § 437g(d)
18 U.S.C. § 241
18 U.S.C. § 242
18 U.S.C. § 597
18 U.S.C. § 601
42 U.S.C. § 1973i
Also See Statutory Index

§H221. Obstructing an Election or Registration. The base offense value is that determined below.

1. If the obstruction occurred by use or threat of force against person or property, the base offense value is 18.
2. If the obstruction occurred by forgery, fraud, theft, or deceit (except as provided in 4), the base offense value is 12.
3. If the obstruction occurred by offering, giving, or agreeing to give anything of value to another person, or a member of that other person's immediate family, for or because of that person's voting, refraining from voting, voting for or against a particular candidate, or registering to vote, the base offense value is 12.
4. If the offender a) solicited, demanded, accepted, or agreed to accept anything of value for or because of his or her voting, refraining from voting, voting for or against a particular candidate, or registering to vote, b) gave information that he/she knows to be false, to establish his or her eligibility to vote, or c) voting more than once in a federal election, the base offense value is 6.
 - a. **Specific Offense Characteristics**
 1. If the offense involved 20 or more voters, ballots, or registrations, add 6.
 2. If the offense involved giving information that the offender knows is false to an election examiner or hearing officer, or knowingly and willfully concealing a material fact from an election examiner or hearing officer, add 6.
 - b. **Cross-References**
 1. If the violation involved death or physical injury, add the appropriate offense value from Part A, Offenses Involving the Person.
 2. If any victim suffered psychological injury, add the appropriate offense value from Part A, Offenses Involving the Person (Psychological Injury).

3. If the violation involved damage to or taking of property, add the appropriate offense value from Part B, Offenses Involving Property.

Commentary

This section refers to conduct proscribed by 18 U.S.C. §§ 241, 242, 245(b)(1)(A), 592, 593, 594 and 597, and 42 U.S.C. §§ 1973 i(c), 1973i(d) and 1973i(e).

Sections H221-H229 deal with violations of political rights. These sections are different from the conduct involved in §H211 in that, while the underlying conduct here may appear to be quite trivial and harmless, the interference with political process is significant. For instance, the registrar of voting may deliberately deprive an individual of his or her right to vote by "losing" a piece of paper. While some emphasis is given to the manner in which the right is deprived, a somewhat greater emphasis is given to the scope of the scheme. Evidence of unlawful conduct involving 20 or more voters is indicative of a very widespread scheme, warranting significant enhancement of the offense value.

Aggravating factors also are provided for three major ways of obstructing an election: by force, by deceptive or dishonest conduct, or by bribery, with the most severe sanction being applied to use of force. If the use of force results in personal injury or property damage, the applicable sections should be consulted and appropriate offense values added.

A distinction is made between those who are seeking to obstruct an election and those who are allowing their individual votes to be corrupted. While the latter conduct is illegal, it may be viewed as the lesser of wrongs and may be less deterrable. Persons who direct others to engage in corruptive conduct will have their sentences further enhanced by reference to the provisions in Chapter Three, Part A, Role in the Offense.

§H222. Interfering with a Federal Benefit for a Political Purpose. The base offense value is 6.

a. Specific Offense Characteristics

1. If the conduct involved 20 or more votes, ballots, or registrations, add 6.

Commentary

This section refers to conduct proscribed by 18 U.S.C. §§ 595 and 598.

The section follows the general scheme of the previous section by placing special emphasis on the scope of the scheme. There are no special aggravating factors for the means used to implement the scheme since the means themselves are very limited and described by the underlying statutes.

§H223. Misusing Authority Over Personnel for a Political Purpose. The base offense value is 6.

a. Cross-references

1. If the conduct adversely affected an individual in his/her employment, add 6 to the base offense value.

Commentary

This section refers to conduct proscribed by 18 U.S.C. § 606.

The section aggravates the offense value in a case where the misuse of personnel involves an actual loss of employment, compensation, or position. A promise of promotion, actual promotion, or mere threat of adverse action are treated less severely.

§H224. Unlawfully Soliciting a Political Contribution or Making an Unlawful Political Contribution as a Federal Public Servant, or Soliciting or Receiving a Political Contribution in a Federal Building. The base offense value is that determined below.

a. Specific Offense Characteristics

1. If the offender was a public servant who unlawfully solicited a political contribution from another person known to be a public servant or soliciting a political contribution in a federal building, the base offense value is 4.
2. If the offender was a public servant who unlawfully made a political contribution, the base offense value is 3.
3. If the offender unlawfully received a political contribution in a federal building, the base offense value is 2.

§H225. Making, Receiving, or Failing to Report an Excess or Otherwise Unlawful Campaign Contribution or Expenditure. The base offense value is 6.

Commentary

These two sections (§H224 and §H225) refer to basically regulatory offenses. Guideline §H224 covers conduct proscribed by 18 U.S.C. §§ 602, 603 and 607. These statutes are primarily intended to protect the federal civil service from on-the-job political pressures. Minor distinctions are made in the guideline between civil servants who solicit other civil servants (the form most likely to be coercive), civil servants who make a contribution in a forbidden place, and other persons who collect the contribution in the wrong place.

Guideline §H225 pertains to knowing and willful conduct proscribed by 2 U.S.C. § 437g(d), regulatory offenses under the Federal Election Campaign Act.

§H226. Polling Armed Forces. The base offense value is 6.

Commentary

This section refers to conduct proscribed by 18 U.S.C. § 596. The purpose of the statute is to protect the right to vote by secret ballot among members of the Armed Forces.

§H227. Promise of Appointment, Employment, or Other Benefit for Political Activity. The base offense value is 6.

Commentary

This section refers to conduct proscribed by 18 U.S.C. §§ 599 and 600. The purpose of the statutes is to prevent the "buying" of votes or political support through promises of future federal employment, appointment, or other federal benefit.

§H228. Deprivation of Employment or Other Benefit for Political Contribution. The base offense value is 6.

Commentary

This section refers to conduct proscribed by 18 U.S.C. § 601.

The converse of §H228, this guideline covers the deprivation of or threat to deprive federal employment or other federal benefits in order to gain a political contribution.

§H229. Solicitation From, or Disclosure of Names of, Persons on Relief. The base offense value is 6.

Commentary

This section refers to conduct proscribed by 18 U.S.C. §§ 604 and 605. The purpose of the statutes is to protect recipients of federal unemployment, welfare, and similar benefits from the solicitation of political contributions.

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3. PRIVACY AND EAVESDROPPING OFFENSES

18 U.S.C. § 1702
18 U.S.C. § 1905
18 U.S.C. § 2511
18 U.S.C. § 2512
18 U.S.C. § 331
21 U.S.C. § 842
47 U.S.C. § 605

§H231. Eavesdropping. The base offense value is 6.

a. Specific Offense Characteristics

1. If the purpose of the conduct was to facilitate another offense, add 6, or the offense value from the applicable section for the conduct attempted or completed, whichever is greater.
2. If the purpose of the conduct was political gain, or economic gain other than in a domestic dispute, and is not covered by a.1. above, add 6 to the base offense value.

§H232. Manufacturing or Trafficking in an Eavesdropping Device. The base offense value is 6.

a. Specific Offense Characteristics

1. If the offense involved more than 25 eavesdropping devices, add 12 to the base offense value.
2. If the offense involved more than six but not more than twenty-five eavesdropping devices, add 6 to the base offense value.

§H233. Possessing an Eavesdropping Device. The base offense value is 4.

Commentary

These three sections refer to eavesdropping or conduct that facilitates eavesdropping.

If the offense involves actual eavesdropping, emphasis is given to the motivation behind the eavesdropping. The motivation may range from attempts to obtain information in domestic disputes to attempts at espionage. Obviously a range of sanctions is appropriate. The distinctions made, aggravating preparatory criminal conduct, and conduct motivated by the expectation of economic or political gain, cover a reasonable portion of the sentencing range.

Section H231 refers to conduct proscribed by 18 U.S.C. § 2511 and 47 U.S.C. § 605. If the conduct is intended to facilitate the commission of another offense, the base offense value is increased by 6 or the offense value applicable to the other offense committed or attempted, whichever is greater. If the purpose of the conduct is political or economic gain but the conduct does not amount to the facilitation of another offense, then the base offense value is 12. Otherwise, a base offense value of 6 is assigned this conduct.

Section H232 refers to conduct proscribed by 18 U.S.C. § 2512 covering the making and selling of illegal eavesdropping devices. The offense value is enhanced according to the scope of the scheme. The person who makes a device at home and sells it to a neighbor receives a lesser sanction than an offender who is in the business of manufacturing or selling illegal eavesdropping devices.

Section H233 is the least serious offense in this series. It is merely preparatory to eavesdropping and represents no offense other than a potential one. Thus, it is assigned a lower offense value.

§H234. Obstructing Correspondence. The base offense value is 6.

a. Cross-References

1. If the purpose of the conduct is to facilitate the commission of another offense, consult the corresponding guideline section and add the appropriate offense value.

§H235. Revealing Private Information Submitted for a Government Purpose. The base offense value is 6.

a. Specific Offense Characteristics

1. If the offense was committed for political or economic gain or for the purpose of obstructing a governmental function, add 6 to the base offense value.

Commentary

Sections H234 and H235 involve additional privacy protections and related criminal conduct.

Section H234 pertains to the unlawful intercepting of correspondence, conduct proscribed by 18 U.S.C. §1702. While this conduct often involves theft from the mails, it is not necessary that theft be involved. Misrouting or other forms of delaying delivery are also covered. In addition, the underlying statute specifically criminalizes efforts to pry into the secrets of others. The offense value is enhanced when the purpose of the offense is to aid in the commission of another offense.

Section H235 refers to conduct proscribed by numerous statutes, including: 18 U.S.C. §§ 1902, 1904, 1905, 1906, 1907, 1908; 7 U.S.C. §§ 472, 608(d), 2105, 2157, 2276, 2619, 2623, 2706(c), 2904, 3204, 4307, 4504(k), 4534(c), 4810(c), 4908(c); 13 U.S.C. § 214; 21 U.S.C. § 842; 26 U.S.C. § 7213(a)(1); 42 U.S.C. §§ 2000g-2, 2181.

Section H235 deals with a sensitive area. Valuable information (trade secrets, crop reports, and so forth) is given to the government with an understanding that it will be kept confidential. This information is often vital to the operation of the government and business. In order to protect the flow of such information, it is necessary to punish and deter unlawful disclosures. While the base offense value is 6, if the aggravating factor of monetary or political gain is present, the conduct will be punished at a higher level.

PART K - OFFENSES INVOLVING PUBLIC ORDER AND SAFETY

1. EXPLOSIVES OFFENSES

18 U.S.C. § 32
18 U.S.C. § 34
18 U.S.C. § 35
18 U.S.C. § 842
18 U.S.C. § 844
26 U.S.C. § 5685

§K211. Failure to Report Theft of Explosives

a. Cross-References

1. Treat this violation as a false statement and use the appropriate offense value from Part F, Offenses Involving Fraud and Deception.

Commentary

This section refers to conduct proscribed by 18 U.S.C. § 842(k). Conduct involved is generally in the nature of a regulatory violation.

§K212. Improper Storage of Explosives. The base offense value is 6.

a. Cross-References

1. If the violation resulted in death or physical injury, add the appropriate offense value from Part A, Offenses Involving the Person.
2. If the property of another was damaged or destroyed, add the appropriate offense value from Part B, Offenses Involving Property.
3. If the violation involved stolen explosives, add the appropriate offense value from Part B, Offenses Involving Property.
4. If the violation involved a false statement or document, add the appropriate offense value from Part F, Offenses Involving Fraud and Deception.

Commentary

This section refers to conduct proscribed by 18 U.S.C. § 842(j).

Although the conduct involved is generally in the nature of a regulatory violation, where death or damage to property results from improper storage of explosive materials, such injuries are cross-referenced. (In such cases, the offense of conviction will usually be based upon the resultant injuries rather than a violation of 18 U.S.C. § 842(j). However, the regulatory violation would be appropriate for sentencing consideration.)

In cases in which a false statement or record is used to conceal a theft of explosives, the conduct is cross-referenced to Part F, Offenses Involving Fraud and Deception.

§K213. Unlawfully Trafficking In, Receiving, or Transporting Explosives. The base offense value is 6.

a. Specific Offense Characteristics

1. If the offender was a person prohibited by federal, state, or local law from possessing explosives, or if the offender knowingly distributed explosives to such person, add 24 to the base offense value.

b. Cross-References

1. If the violation involved stolen explosives, add the appropriate offense value from Part B, Offenses Involving Property.
2. If the violation involved a false statement or document, add the appropriate offense value from Part F, Offenses Involving Fraud and Deception.

Commentary

This section refers to various forms of conduct proscribed by 18 U.S.C. § 842.

Many of the violations involved are in the nature of regulatory violations pertaining to licensees, or persons otherwise lawfully involved in transactions. Such persons are a potential source for explosive materials and represent a substantial danger to public safety in instances where they knowingly supply explosives to prohibited persons, or offer a market in stolen materials. Therefore, the base penalty in such instances is substantially enhanced. By the terms of 18 U.S.C. § 842, the knowledge of offenders may be actual or constructive.

§K214. Threats Involving Explosives. If the violation involved a threat or a maliciously false communication, the base offense value is 12.

Commentary

This section refers to conduct proscribed by 18 U.S.C. § 844(e). Threats involving explosives are, by their nature, likely to be treated with seriousness and may interfere with or impair public or private activities. Under 18 U.S.C. § 844(e), the potential maximum penalty for threats is five years, one-half the potential maximum ten-year penalty where the act is attempted or completed. The base offense value for such threats is set at one-half the minimum offense value determined in Part B, Offenses Involving Property, where property is actually destroyed by fire or explosives.

§K215. Unlawfully Possessing an Explosive in a Government Building. The base offense value is 12.

a. Cross-References

1. If the violation involved stolen explosives, add the appropriate offense value from Part B, Offenses Involving Property.

Commentary

This section refers to conduct proscribed by 18 U.S.C. § 844(g).

Possession of explosives in a government building can rarely be inadvertent or for reasons of personal security. The Commission considers this violation to constitute a substantial danger to public safety even though the statutory maximum prison term is one year.

§K216. Carrying or Attempting to Carry, or Placing an Explosive or Destructive Device, Firearm, or Dangerous Weapon Aboard an Aircraft

If the conduct involved:

1. an explosive, destructive device, or incendiary device, the base offense value is 24.
2. a loaded firearm or an unloaded firearm and ammunition for such firearm, the base offense value is 12.

3. any other firearm or other dangerous weapon, the base offense value is 6.

- a. **Specific Offense Characteristics**

1. If the violation was committed willfully and without regard, or with reckless disregard for human life, and the conduct involved:
 - A. an explosive or destructive device, add 48 to the base offense value.
 - B. a loaded firearm or an unloaded firearm and ammunition for such firearm, add 36 to the base offense value.
 - C. any other firearm or dangerous weapon, add 24 to the base offense value.

- b. **Cross-References**

1. If the violation resulted in death or physical injury, add the appropriate offense value from Part A, Offenses Involving the Person.
2. If any victim suffered psychological injury, add the appropriate offense value from Part A, Offenses Involving the Person (Psychological Injury).
3. If property was damaged, destroyed, or taken, add the appropriate offense value from Part B, Offenses Involving Property.
4. If the violation involved stolen explosives, firearms, or destructive or incendiary devices, add the appropriate offense value from Part B, Offenses Involving Property.

Commentary

This section refers to conduct proscribed by 18 U.S.C. §§ 32, 33, and 49 U.S.C. § 1472(l).

The possession of explosives or destructive or incendiary devices while aboard or attempting to board an aircraft can never be justified. Possession of such items constitutes a substantial danger to public safety and to commerce. A base penalty is therefore established to serve purposes of deterrence and incapacitation. In contrast to explosives, firearms are more likely to be possessed for purposes of personal security. Nevertheless, concerns for public safety, as well as the notice that is routinely provided to potential violators, warrant substantial penalties.

§K217. Shipping, Transporting or Receiving an Explosive with Knowledge or Intent that it be Used to Injure Persons or Property. If the felonious purpose was completed, the base offense value is the value for such completed conduct. Otherwise, the base offense value is 18.

a. Cross-References

1. If the violation involved stolen explosives, add the appropriate offense value from Part B, Offenses Involving Property.

Commentary

This section refers to conduct proscribed by 18 U.S.C. § 844(d).

Conduct under this section may involve cases in which offenders use explosives feloniously, in which instances there should not be a double counting with the offense value under §K218. Conduct under this section may also involve cases in which offenders knowingly aid, abet or otherwise assist in the felonious use of explosives through transportation to or for others, in which instances the conduct will be punished the same as for the actual use.

§K218. Using or Carrying Explosives During or in Relation to Certain Crimes. If the offender used or carried an explosive to commit:

1. a crime of violence or drug trafficking crime, as defined by 18 U.S.C. § 924, as amended, the base offense value is 60;
2. a felony described in 1 above, the base offense value is 12.

a. Specific Offense Characteristics

If the offender has previously been convicted under 18 U.S.C. § 844(h), add 60.

b. Cross-References

1. If the violation resulted in death or physical injury, add the appropriate value from Part A, Offenses Involving the Person.
2. If any victim suffered psychological injury, add the appropriate offense value from Part A, Offenses Involving the Person (Psychological Injury).
3. If property was damaged, destroyed, or taken, add the appropriate value from Part B, Offenses Involving Property.
4. If the violation involved stolen explosives, add the appropriate offense value from Part B, Offenses Involving Property.

Commentary

This section refers to conduct proscribed by 18 U.S.C. § 844(h) and 26 U.S.C. § 5685. The danger presented by explosives when used or carried in a violent or drug trafficking crime is reflected by a substantial penalty in such cases.

* * * * *

2. FIREARMS AND DESTRUCTIVE DEVICES.

18 U.S.C. § 922
18 U.S.C. § 923
18 U.S.C. § 924
18 U.S.C. § 949
26 U.S.C. § 5861
26 U.S.C. § 5871
Also See Statutory Index

§K221. Violations Involving the Manufacture, Receipt, Transportation, Distribution, Shipment or Possession of a Firearm, Destructive Device, Firearms Silencing or Muffling Device, or Ammunition. The base offense value is 6.

a. Specific Offense Characteristics

1. If more than one weapon or device was involved, add the offense value from the following table. For the purpose of the following table, each weapon or device (not including the weapon or device used to establish the base offense value above) is to be converted to units as follows: one rifle = 1; one handgun = 3; one machine gun, short-barreled shotgun, short-barreled rifle, or firearm muffling or silencing device = 10; one destructive device = 20.

| <u>Units</u> | <u>Additional Offense Value</u> |
|--------------|---------------------------------|
| 2-3 | 1 |
| 4-9 | 3 |
| 10-20 | 12 |
| 21-40 | 18 |
| 41 or more | 36 |

2. If the violation involved a machine gun, short-barreled shotgun, short-barreled rifle, destructive device, or firearm muffling or silencing device, add 12 to the base offense value.
3. If the offender possessed, received or transported a firearm while in the employ of any person prohibited by federal, state, or local law from possessing a firearm, with knowledge of such prohibition, add 6 to the base offense value.

4. If the offender was a person prohibited by federal, state, or local law from possessing firearms, or if the offender knowingly distributed firearms to such person, add 6 to the base offense value.
5. If the violation involved any firearm that had the importer's or manufacturer's serial number removed, obliterated, or altered, add 6 to the base offense value.
6. If the violation involved a handgun, add 3 to the base offense value.

b. Cross-References

1. If the violation involved a stolen firearm or destructive device, add the appropriate offense value from Part B, Offenses Involving Property.

Commentary

This section refers to various forms of conduct proscribed by 18 U.S.C. §§ 922, 923, and 924, and 26 U.S.C. §§ 5861, 5871.

The conduct involved is often in the nature of a regulatory violation. However, where additional offenses are involved, the appropriate penalties are added. The specific offense characteristics address conduct that by law constitute a particular danger to public safety. Many of those weapons addressed are either of particular concern to public safety, or contribute substantially to other criminal activity.

§K222. Shipping, Transporting or Receiving a Firearm with Knowledge or Intent that it be Used to Commit a Felony. If the felonious use that was the object of the shipping, transportation, or receipt was completed, the base offense value is the value for such completed conduct. Otherwise, the base offense value is 18.

a. Cross-References

1. If the violation involved a stolen firearm or destructive device, add the appropriate offense value from Part B, Offenses Involving Property.

Commentary

This section refers to conduct proscribed by 18 U.S.C. § 924(b).

The base offense value is the same as the penalty provided for completed felonious use of firearms. Conduct under this section may involve cases in which offenders use firearms feloniously, in which instances there should not be a double counting with the offense value under Section K223 below. Conduct under this

section may also involve cases in which offenders knowingly aid, abet or otherwise assist in the felonious use of firearms through transportation to or for others, in which instances the conduct will be punished the same as for the actual use.

§K223. Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes. If the offender used or carried a firearm during and in relation to any crime of violence, or drug trafficking or federal liquor law offense, the base offense value is 60.

a. Specific Offense Characteristics

1. If the offender used or carried a machine gun or a firearm equipped with a firearm silencer or firearm muffler during and in relation to the commission of a crime of violence or drug trafficking offense, add 60 to the base offense value.
2. If the offender used or carried a firearm loaded with armor-piercing ammunition during and in relation to the commission of a crime of violence, add 60 to the base offense value.
3. If the violation is the offender's second conviction under 18 U.S.C. § 924(c), add 60 to the base offense value.
4. If the violation is the offender's second conviction under 18 U.S.C. § 924(c), and involved a machine gun or a firearm silencer or firearm muffler, add 120 to the base offense value.

b. Cross-References

1. If the violation resulted in death or physical injury, add the appropriate value from Part A, Offenses Involving the Person.
2. If any victim suffered psychological injury, add the appropriate value from Part A, Offenses Involving the Person (Psychological Injury).
3. If property was damaged or destroyed, add the appropriate value from Part B, Offenses Involving Property (Property Table).

Commentary

This section refers to conduct proscribed by 18 U.S.C. §§ 924(c) and 929(a).

Specific offense characteristics reflect statutory mandatory minimum terms of incarceration. The seriousness of the conduct involved warrants substantial punishment for these offenders. In cases in which other injuries to persons or property result, there is a cross-reference to the guidelines specifically addressing those injuries.

3. TRANSPORTATION OF HAZARDOUS MATERIALS

49 U.S.C. § 1472(h)(2)
49 U.S.C. § 1809(b)

§K231. Unlawfully Transporting Hazardous Material Aboard an Aircraft. The base offense value is 6.

a. Specific Offense Characteristics

1. If the offender willfully and with intent to commit another crime, delivered the material or caused it to be delivered for transportation, add 42.
2. If the offender willfully, but without intent to commit another crime, delivered the material or caused it to be delivered for transportation, add 12.

b. Cross-References

1. If the violation resulted in death or physical injury, add the appropriate offense value from Part A, Offenses Involving the Person.
2. If property was damaged or destroyed, add the appropriate offense value from Part B, Offenses Involving Property.

Commentary

This section refers to conduct proscribed by 49 U.S.C. § 1472(h)(2).

A distinction is made for sentencing purposes between those who recklessly violate 49 U.S.C. § 1472(h)(2), those who do so with intent to commit another crime, and those who do so willfully but without other criminal intent.

§K232. Unlawfully Transporting Hazardous Material in Commerce. The base offense value is 20.

a. Cross-References

1. If the violation resulted in death or physical injury, add the appropriate offense value from Part A, Offenses Involving the Person.
2. If property was damaged or destroyed, add the appropriate offense value from Part B, Offenses Involving Property.

Commentary

This section refers to conduct proscribed by 49 U.S.C. § 1809(b).

The base offense value reflects the danger posed to public safety by unlawful transportation of hazardous materials.

* * * * *

4. RIOTING

18 U.S.C. § 231
18 U.S.C. § 1792
Also See Statutory Index

§K241. Engaging In, Inciting, or Attempting to Incite a Riot. The base offense value is 6.

a. Cross-References

1. If the offender's conduct resulted in death or physical injury, add the appropriate offense value from Part A, Offenses Involving the Person.
2. If any victim suffered psychological injury, add the appropriate offense value from Part A, Offenses Involving the Person (Psychological Injury).
3. If the offender's conduct resulted in the destruction, damage, or theft of property, add the appropriate offense value from Part B, Offenses Involving Property.

§K242. Engaging In, Inciting, or Attempting to Incite a Riot Involving Persons in a Facility for Official Detention. The base offense value is 24.

a. Cross-References

1. If the offender's conduct resulted in death or physical injury, add the appropriate offense value from Part A, Offenses Involving the Person.
2. If any victim suffered psychological injury, add the appropriate offense value from Part A, Offenses Involving the Person (Psychological Injury).
3. If the offender's conduct resulted in the destruction, damage, or theft of property, add the appropriate offense value from Part B, Offenses Involving Property.

Commentary

The base offense value for rioting reflects the danger posed to public safety by such conduct, and its potential effects upon personal and societal interests. In a prison environment, the danger to corrections officers as well as to other prisoners is substantial. When sentencing for rioting offenses, it is especially important that the sentence reflect the offender's role in the offense. Therefore, attention is specifically directed to Chapter Three, Part A, Role in the Offense.

* * * * *

5. MISCELLANEOUS OFFENSES

18 U.S.C. § 13

§K251. Driving While Impaired. The base offense value is 3.

a. Specific Offense Characteristics

If the violation involved other moving traffic violations, add 1 point for each.

b. Cross-References

1. If the violation resulted in death or physical injury, add the appropriate offense value from Part A, Offenses Involving the Person.
2. If any victim suffered psychological injury, add the appropriate offense value from Part A, Offenses Involving the Person (Psychological Injury).

§K252. Disorderly Conduct. The base offense value is 2.

§K253. Public Intoxication. The base offense value is 1.

Commentary

These violations are prosecuted in federal courts as assimilated crimes under 18 U.S.C. § 13.

PART L - OFFENSES INVOLVING IMMIGRATION, NATURALIZATION,
AND PASSPORTS

1. IMMIGRATION

8 U.S.C. § 1324
8 U.S.C. § 1325
8 U.S.C. § 1326
8 U.S.C. § 1327
8 U.S.C. § 1328
29 U.S.C. § 1816
Also See Statutory Index

Immigration offenses constitute a significant concern for federal authorities. The interests protected are: maintaining the integrity of the borders; safeguarding a policy of controlled immigration; and excluding certain undesirable aliens. The highest sanctions in these sections are reserved for those who aid or solicit others to enter the United States illegally.

§L211. Smuggling or Transporting an Unlawful Alien. The base offense value is that determined below.

a. Specific Offense Characteristics

1. If the offender received anything of value directly for engaging in the conduct, then the base offense value is as follows:

| <u>Number of Unlawful Aliens</u> | <u>Base Offense Value</u> |
|----------------------------------|---------------------------|
| 1-4 | 12 |
| 5-10 | 16 |
| 11-25 | 20 |
| 26-50 | 26 |
| 51 or more | 32 |

2. If the offender had knowledge that one or more of the aliens was a member of the class of aliens that is excludable from the United States under 8 U.S.C. §§ 1182(a)(27), (28), or (29), relating to the exclusion of aliens classified as subversives, the base offense value is the offense value from the table in subsection a.1 above, plus 2.
3. Otherwise, the base offense value is 50% of the offense value from the table in subsection a.1 above.
4. If the offender was armed with a firearm or other dangerous weapon during the commission of the offense, add 6 to the base offense value.

Commentary

This section refers to conduct proscribed by 8 U.S.C. §§ 1324(a)(1), (2), and (4), 1327, 1328.

This section concerns the most serious immigration offenses and considers three main factors.

First, consideration is given to the motivation of the offender in aiding the entry of illegal immigrants. Those operating with a monetary motivation are given twice the sanction of those who act for other (e.g. family) reasons. Those who violate immigration laws for monetary reasons pose the greatest problem since they are the ones most likely to engage in continuing activity.

Second, consideration is given to the scope of the scheme. While the number of illegal immigrants involved in the current offense will not always be an accurate barometer of the overall scope of the offender's involvement in immigration violations, it is a useful indicator.

Third, persons assisting the entry of aliens who are otherwise specifically excludable receive an additional penalty.

Consideration was given to adding an aggravating factor if the basic offense was one where one or more of the illegal immigrants had previously been deported. However, this type of provision would present problems of proof disproportionate to the benefits of any specific level of aggravation.

Being armed during the commission of the offense is treated as an aggravating factor because armed offenders pose a greater danger to law enforcement officers.

While no cross-reference is specifically listed for offenses involving the person, the Commission is aware that such harms do occur as a result of immigration offenses. The sentencing court in such cases may choose to go outside the guidelines.

§L212. Unlawfully Entering or Remaining in the United States as an Alien. The base offense value is 6.

a. Specific Offense Characteristics

1. If the conduct included fraudulently acquiring or improperly using evidence of citizenship, add 6 to the base offense value.

Commentary

This section refers to conduct proscribed by 8 U.S.C. §§ 1325 and 1326.

Where the conduct included the improper use of evidence of citizenship, an offense value of 12 is assigned. Otherwise, the offense value is 6. Whether the offender was previously deported was not included in the offense characteristics; it

is included as an offender characteristic only to the extent that it resulted in previous convictions.

§L213. Harboring an Alien Unlawfully in the United States. The base offense value is the value from §L211 (Smuggling or Transporting an Unlawful Alien).

Commentary

This section refers to conduct proscribed by 8 U.S.C. § 1324(a)(3).

This offense is treated the same as smuggling an unlawful alien (§L211). Thus, the number of aliens and a profit motive are the primary determining factors.

The Commission is aware that harboring illegal aliens is sometimes motivated by political or humanitarian concerns. No distinction based on such motives has been included. Comment on the advisability of doing so is solicited.

§L214. Unlawful Employment of an Alien by a Farm Labor Contractor. The base offense value is 3.

a. Specific Offense Characteristics

1. If the contractor did not have a valid certificate of registration, add 9.

Commentary

This section refers to conduct proscribed by 29 U.S.C. § 1816.

An aggravating factor based on the number of aliens employed was considered but not included. It is expected that this offense will generally involve employment of multiple aliens. The offense value is substantially enhanced if the conduct (unlawful employment of illegal aliens) is by a farm labor contractor who is not properly registered with the U.S. Department of Labor.

* * * * *

2. NATURALIZATION AND PASSPORTS

- 18 U.S.C. § 1423
- 18 U.S.C. § 1424
- 18 U.S.C. § 1425
- 18 U.S.C. § 1426
- 18 U.S.C. § 1427
- 18 U.S.C. § 1428
- 18 U.S.C. § 1542
- 18 U.S.C. § 1543
- 18 U.S.C. § 1544
- 18 U.S.C. § 1546

§L221. Trafficking in Evidence of Citizenship and Documents Authorizing Entry.
The base offense value is that determined below.

a. Specific Offense Characteristics

1. If the offense was committed for pecuniary gain, the base offense value is that determined below:

| <u>Number of Sets of Documents</u> | <u>Offense Value</u> |
|--|----------------------|
| 1 | 12 |
| 2-10 | 16 |
| 11-25 | 20 |
| 26-50 | 26 |
| 51 or more | 32 |

2. Otherwise, the base offense value is 12, or 50% of the offense value applicable from the table in subsection a.1 above, whichever is greater.

Commentary

This section refers to conduct proscribed by 18 U.S.C. §§ 1425, 1426, 1427, and 1546.

This offense is assigned an offense value according to the scale of the conduct consistent with that of smuggling, transporting, or harboring an illegal alien.

The term "number of sets of documents" refers to the number of different identities that the documents provide, or, in the case of duplicate documents, the number of duplicate sets of documents.

§L222. Fraudulently Acquiring Evidence of Citizenship and Documents Authorizing Entry for Own Use. The base offense value is 12.

Commentary

This section refers to conduct proscribed by 18 U.S.C. §§ 1423, 1424, 1425, and 1546.

This offense is assigned an offense value consistent with unlawfully entering the United States by improper use of evidence of citizenship. Where both offenses occur, only the highest value should be considered.

§L223. Trafficking in a United States Passport. The base offense value is determined by the following table:

| <u>Number of Passports</u> | <u>Base Offense Value</u> |
|----------------------------|---------------------------|
| 1 | 14 |
| 2-10 | 22 |
| 11-25 | 26 |
| 26-50 | 32 |
| 51 or more | 38 |

Commentary

This section refers to conduct proscribed by 18 U.S.C. §§ 1542, 1543, and 1544.

This offense is assigned an offense value according to the scale of the conduct, and at a higher level than the conduct of trafficking in evidence of citizenship. Passports provide a means of identification that is widely accepted. But in addition to their use as a means of illegal entry, they may also serve to hide the identity or aid the escape of a person engaging in other forms of illegal activity. For these reasons, the Commission has assigned this conduct a higher offense value.

§L224. Fraudulently Acquiring or Improperly Using a United States Passport. If the conduct involved:

1. Fraudulently acquiring a passport, or using a false, forged, or altered passport, or using a passport issued to another person, the base offense value is 14.
2. Violating a condition or restriction pertaining to the passport, or a travel restriction, the base offense value is 6.

Commentary

This section refers to conduct proscribed by 18 U.S.C. §§ 1543 and 1544.

Fraudulently acquiring a passport, or using a false, forged, or altered passport, or a passport issued to another, is assigned a base offense value of 14, which results

in a mandatory minimum prison term of two months. A lower base offense value of 6 is assigned to violating a passport or travel restriction with an otherwise valid passport.

§L225. Failure to Surrender Canceled Naturalization Certificate. The base offense value is 6.

Commentary

This section refers to conduct proscribed by 18 U.S.C. § 1428.

§L226. Neglect or Refusal to Answer Subpoena. The base offense value is 6.

Commentary

This section refers to conduct proscribed by 18 U.S.C. § 1429.

PART R - ANTITRUST OFFENSES

15 U.S.C. § 1
15 U.S.C. § 2
15 U.S.C. § 3

INTRODUCTION

These guidelines deal with violations of the antitrust laws, 15 U.S.C. §§ 1, 2, 3. Although they are not unlawful in all countries, there is near-universal agreement that restrictive agreements among competitors, such as bid rigging, horizontal price fixing or horizontal market allocation, can cause serious economic harm. However, there is little agreement about the harmfulness of other types of antitrust violations; the law involving them is frequently unsettled and criminal prosecutions are infrequent. Consequently, the guidelines divide antitrust offenses into two categories: Restrictive Pricing or Marketing Agreements Among Competitors (§R211), and all other antitrust violations (§R212).

§R211. Restrictive Pricing or Marketing Agreements Among Competitors

The base offense value is determined by the table below:

| <u>dollar-value of commerce</u> | <u>base offense value</u> |
|---------------------------------|---------------------------|
| up to \$1,000,000 | 14 |
| \$1,000,001 - \$3,000,000 | 16 |
| \$3,000,001 - \$10,000,000 | 18 |
| \$10,000,001 - \$25,000,000 | 21 |
| \$25,000,000 - \$50,000,000 | 24 |
| over \$50,000,000 | 30 |

a. Specific Offense Characteristics

1. If the offender was previously convicted of an antitrust violation, add 12 to the base offense value. (Prior convictions for antitrust offenses should not be counted in calculating the Chapter Three adjustment for prior record. Instead, use this specific adjustment and compute the general adjustment for prior record ignoring antitrust convictions.)

For purposes of applying the foregoing table, the volume of commerce attributable to any one participant in a conspiracy is the total volume of commerce done by all conspiring enterprises in the goods or services affected during the course of the conspiracy divided by the number of such participants, or the volume of commerce actually done by the individual offender or his/her principal, whichever is greater.

For sentencing purposes only, a conspiracy involving a fixed group of participants and a single type of product or service should be treated as a

single violation, regardless of whether there are multiple agreements or meetings in furtherance of the conspiracy that might result in multiple indictments. For example, if four construction contractors meet on several occasions to rig bids on paving projects, the offense should be treated as a single conspiracy with the volume of the commerce determined by the total value of the paving contracts on which they rigged bids.

Subject to statutory limitations, large fines are suggested in addition to imprisonment. The recommended fine for an individual conspirator is 10% of the volume of commerce; for an organization, it is 50% of the volume of commerce. One hundred sixty hours of unpaid community service is suggested as an alternative to each \$5,000 of fine only when it appears that the individual offender will not, over a reasonable period of time, be able to pay the fine.

Commentary

The Commission believes that the best way to deter individuals from committing this type of economic crime is through prison sentences of short to moderate length, coupled with large fines. The guideline is designed with that purpose in mind. Mandatory minimum prison sentences will be two months in the smallest cases and longer in large cases. Of course, considerably longer sentences will be possible. For cases involving repeat offenders, the guideline sentences to imprisonment can reach the statutory maximum of three years. These imprisonment terms represent a substantial change in present practice, where only 15% of all offenders convicted of antitrust violations are imprisoned and the average time served by those who are sentenced to a term of imprisonment is less than four months.

The offense values are not based on the amount of damage caused by the violation because damages are difficult and time-consuming to prove. The volume of commerce is a reasonable substitute for gauging the seriousness of the offense. The overlapping offense value categories are intended to reduce problems with accurate estimation of the value of commerce.

Substantial fines are an important part of the sanction. It is estimated that the average additional profit attributable to price fixing is 10% of the selling price. Because of the low probability of detection, the Commission has recommended that a fine equal to that amount be imposed on individual offenders, and a fine of five times that amount be imposed on organizations. Additional monetary penalties can be provided through private treble damage actions. When several individuals participate in a conspiracy on behalf of one employer, the sentencing court should consider apportioning the fine.

No increase in the sanction is provided for offenders who initiate an antitrust conspiracy, since such persons generally engage in a larger volume of commerce and therefore will receive a larger punishment without such an adjustment.

§R212. Antitrust Violations Not Involving Restrictive Pricing or Marketing Agreements Among Competitors. The offense value is 10.

Commentary

The offense value for antitrust offenses that do not involve restrictive agreements among competitors has been set at the level of 10 because there is considerable debate over whether such offenses cause significant harm. Historically, the Department of Justice has given little emphasis to criminal prosecution of this type of antitrust violation. In addition, the law as to what constitutes a criminal violation in these areas is unsettled. Consequently, mandating imprisonment would be unfair. In any event, sentences in excess of six months would rarely be necessary. The civil system, which allows for private treble damage actions and injunctive relief, may provide a sufficient deterrent and remedial effect, particularly because non-horizontal practices generally are relatively difficult to conceal.

PART S - SECURITIES OFFENSES

15 U.S.C. §§ 77a - 80b-17

INTRODUCTION

The federal securities laws provide a regulatory framework that is primarily enforced through administrative proceedings. Criminal prosecutions generally focus on cases involving intentional deception, insider trading, or other willful misconduct that causes actual harm to the public. In addition, the securities laws contain numerous similar provisions that differ only in regard to the specific type of securities or the technical context in which the conduct occurs. For these reasons, this part of the guidelines is organized according to the functional characterization of the conduct rather than the specific code section that it may violate.

Because violations of the securities laws, although criminal, most frequently result in administrative sanctions, the guidelines provide for enhancements for offenders who have been subjected to previous administrative sanctions, in addition to the more general enhancements for prior criminal convictions.

§S211. Securities Fraud. If the offender, in connection with the offer or sale of a security, made representations or omissions that are materially false or misleading, and the offender knew such representations or omissions to be false or misleading or acted with reckless disregard as to their truth or falsity, then the base offense value is as follows:

| <u>amount of loss to investors</u> | <u>base offense value</u> |
|------------------------------------|---------------------------|
| up to \$30,000 | 14 |
| \$30,001 - \$100,000 | 16 |
| \$100,001 - \$300,000 | 18 |
| \$300,001 - \$500,000 | 22 |
| \$500,001 - \$1,000,000 | 26 |
| \$1,000,001 - \$3,000,000 | 30 |
| \$3,000,001 - \$5,000,000 | 34 |
| \$5,000,001 - \$10,000,000 | 40 |
| \$10,000,001 - \$25,000,000 | 46 |
| over \$25,000,000 | 52 |

Special Minimum Value for Loss: The amount of loss to be utilized in applying the table is 10% of the total offering price of the securities, or the actual loss to investors, whichever is larger.

a. Specific Offense Characteristics

1. If the security was unregistered and registration was required, add 3.
2. If the conduct violated an injunction or consent decree entered against the offender in an S.E.C. or state securities enforcement or administrative proceeding, add 6.
3. If an injunction or consent decree previously was entered against the offender in an S.E.C. or state securities enforcement proceeding relating to fraudulent or deceptive practices, add 3.

b. Cross-References

1. If the offender obtained or attempted to obtain something of value from another person by selling or offering to sell such person a security, with the intention of causing such person to lose that investment, or without the intention of investing the funds substantially as disclosed, the offense value is that specified in Part F, Offenses Involving Fraud and Deception.
2. If the offender obstructed administrative proceedings or an investigation relating to the offense, add the offense value from §S215 (Obstructing an S.E.C. Proceeding or Investigation).

Commentary

This guideline deals with certain conduct that violates 15 U.S.C. §§ 77q, 78j or 80b-6. It also applies to convictions under 15 U.S.C. § 78e (sale of unregistered securities) and 15 U.S.C. § 77x (false statements in a registration statement) that involve an actual or attempted fraud. This guideline does not apply to insider trading, which is dealt with in §S212.

Attempts to defraud that are unsuccessful (i.e., offers that do not result in sales) or only partially successful should be punished in accordance with the provision entitled "Special Minimum Value for Loss," which scales the punishment to the size of the offering. The same provision ensures that offenders who make a fraudulent offering will be punished according to the size of the offering even if the investment results in no loss to investors. A lesser punishment is specified for offers that do not result in sales because the sale of the security would not necessarily result in injury to investors. Moreover, the inability to market the offering suggests that disclosure adequate to dissuade investors was made or there was compliance with other regulations sufficient to enable the S.E.C. to stop the offering.

The securities laws prohibit a variety of conduct that would not necessarily have been unlawful at common law. However, many of the securities frauds that are prosecuted, including "boiler-room" operations and other offerings of what are essentially non-existent securities are as a practical matter no different from ordinary frauds. Such frauds, which involve a deliberate intent to steal, result in a

complete waste of resources, rather than merely a misallocation of investment funds due to misinformation. They are more harmful, more culpable, and more difficult to deter, and are therefore punished more severely by means of a cross-reference to the guidelines for *Offense Involving Fraud and Deception*.

This guideline provides for a mandatory minimum prison sentence of at least two months.

Because securities law violations most often result in administrative rather than criminal sanctions, the offender's record of criminal convictions does not adequately capture prior conduct. Accordingly, enhanced punishments are provided for offenders who previously have been adjudicated in an administrative proceeding to have violated the securities laws.

Because the requirement of registering securities is intended to provide some protection to investors, increased punishment is provided when the offering is unregistered. This adjustment does not apply when this guideline is applied by cross-reference to an offense that does not involve the offer of a security.

§S212. Insider Trading. The base offense value is that specified below.

| <u>amount of gain to offender and persons to whom offender knowingly provided inside information</u> | <u>base offense value</u> |
|--|---------------------------|
| up to \$10,000 | 12 |
| \$10,001 - \$30,000 | 14 |
| \$30,001 - \$100,000 | 16 |
| \$100,001 - \$300,000 | 18 |
| \$300,001 - \$500,000 | 22 |
| \$500,001 - \$1,000,000 | 26 |
| \$1,000,001 - \$3,000,000 | 30 |
| \$3,000,001 - \$5,000,000 | 34 |
| \$5,000,001 - \$10,000,000 | 40 |
| \$10,000,001 - \$25,000,000 | 46 |
| over \$25,000,000 | 52 |

a. **Specific Offense Characteristics**

1. If the offender was not an officer, director, or employee of, or attorney, auditor or investment banker for, a company in the securities of which he/she traded, or an acquiring or target company, and the offender was not expressly obligated by contract to keep the information confidential, subtract 3.
2. If the conduct violated an injunction or consent decree entered against the offender in an S.E.C. or state securities enforcement or administrative proceeding, add 6.
3. If an injunction or consent decree previously was entered against the offender in an S.E.C. or state securities enforcement proceeding relating to fraudulent or deceptive practices, add 3.

b. Cross-References

1. If the offender obstructed administrative proceedings or an investigation relating to the offense, add the offense value from §S215 (Obstructing an S.E.C. Proceeding or Investigation).

Commentary

This guideline applies to conduct that violates 17 C.F.R. § 240.10b-5 (as incorporated by 15 U.S.C. § 78j(b)) solely because it involves a misuse of "inside" information.

This offense is unique to the securities laws and is the subject of considerable controversy. Although the prevailing view is that insider trading should be prohibited, not everyone agrees, and other countries have not outlawed the practice. It is generally agreed, however, that insider trading is neither as harmful nor as reprehensible as outright deception.

With two exceptions, the Commission has nonetheless set the sanctions for insider trading at the same levels as securities fraud. This is because insider trading is more difficult to detect than deceit. The exceptions are for (1) offenses involving small profits and (2) offenses where the offender, because of his/her position, might not have appreciated the duty to refrain from trading on the basis of inside information. The changing state of the law interpreting the extent of the duty to refrain from trading on inside information justifies a lower penalty for those persons who are more likely to be unaware that such conduct is criminal. However, when the volume of trading becomes large, it is difficult to accept the argument that the behavior was innocent; accordingly, the discount for such offenders does not increase with the amount of profit.

In most of the cases that currently are prosecuted, this guideline will mandate a minimum term of imprisonment of two months or longer. Imprisonment is not required in every case because it may be possible to provide adequate deterrence and punishment without imprisonment in cases involving relatively small profits because the Insider Trading Sanctions Act provides for a civil penalty of treble the gain; in cases involving small profits, many offenders might be able to pay the penalty.

When multiple trades are involved, the gains should be added together. Losses as a result of insider trading should not be offset against gains.

§S213. Market Manipulation (Other than Insider Trading). The offense value is that for Securities Fraud specified in §S211.

Commentary

This guideline deals with certain forms of conduct that may violate 17 C.F.R. § 240.10b-5, as incorporated by 15 U.S.C. § 78j(b), but is not characterized as insider trading. It also applies to conduct proscribed by 15 U.S.C. §§ 78a(1)-(5) or 80b-6.

The offense is treated separately for clarity and completeness. It provides a cross-reference to the guideline for securities fraud, of which market manipulation is one form. The cross-reference in §S211 to the guidelines for Offenses Involving Fraud and Deception will apply in some cases.

§S214. Fraudulent or Deceptive Purchases and Tender Offers. The offense value is that for Securities Fraud specified in §S211.

a. Cross-References

1. If the offender did not intend to deliver the consideration promised or if he/she materially misrepresented the value of the consideration, the base offense value is that specified in Part F, Offenses Involving Fraud and Deception.

Commentary

This guideline applies to certain forms of conduct that may violate 15 U.S.C. §§ 78n(a), 78n(e) or 17 C.F.R. § 240.10b-5, as incorporated by 15 U.S.C. § 78j, as well as more general fraud statutes.

This conduct is another form of Securities Fraud and is broken out for clarity and completeness. The only difference between this section and §S211 is in the wording of the cross-reference to the guidelines for Offenses Involving Fraud and Deception.

§S215. Obstructing an S.E.C. Proceeding or Investigation. The base offense value is 12.

a. Specific Offense Characteristics

1. If the offender committed or suborned perjury, whether orally or in writing, the base offense value is 16.
2. If the offender provided false material written information (not under oath) or destroyed evidence, the base offense value is 14.
3. If the conduct of the offender violated an injunction or consent decree entered against the offender in an S.E.C. or state securities enforcement or administrative proceeding, add 4.
4. If an injunction or consent decree previously was entered against the offender in an S.E.C. or state securities enforcement proceeding relating to fraudulent or deceptive practices, add 2.

Commentary

This guideline applies to conduct that is frequently prosecuted under 18 U.S.C. § 1505. However, a separate guideline tentatively has been established because the context in which the obstruction occurred provides valuable information regarding the appropriate punishment. If a more serious obstruction of justice is involved, such as one involving the use or threatened use of violence, consult the appropriate guideline section.

This form of behavior is classified into three levels: perjury, submitting false written information, and other. Perjury is punished most severely because of the need to protect the integrity of the adjudicative process. Providing false written evidence is punished more severely than the remaining forms of conduct because of the greater risk for error when the information is not provided formally. Perjury and submitting false written statements have mandatory minimum terms of imprisonment of two or four months because of the need to ensure the effectiveness of the regulatory process in protecting investors and markets. Other forms of obstruction do not carry a mandatory minimum, but a sentence to some term of imprisonment usually would be appropriate.

§S216. Violating an Injunction or Consent Decree. The base offense value is 16, or the offense value for the underlying conduct (as aggravated for violating the injunction or decree), whichever is greater.

Commentary

As with §S215, a separate guideline tentatively has been established for violating an injunction or consent decree because the context of the violation provides useful information regarding the appropriate punishment.

A minimum term of imprisonment of four months is required because of the need to ensure that injunctions are obeyed and the administrative enforcement process, which is the backbone of securities regulation, is effective.

§S217. Regulatory Violations. The base offense value is 10.

a. Specific Offense Characteristics

1. If the conduct involved an intentional misrepresentation to the Securities and Exchange Commission, the base offense value is 14.
2. If an injunction or consent decree previously was entered against the offender in an S.E.C. or state securities enforcement proceeding relating to fraudulent or deceptive practices, add 4 to the base offense value.

Commentary

This guideline applies to registration and reporting violations of the securities laws that are not described in §§S211-S216. These include, for example, violations of 15 U.S.C. § 78dd (transactions on unregistered exchanges) and 15 U.S.C. § 78f (national securities exchanges); most violations prosecuted under 15 U.S.C. § 78ff (general penalties provision); and non-fraudulent violations prosecuted under 15 U.S.C. § 77e (unregistered securities) and 15 U.S.C. § 77x (general penalties and false statements in registration statements).

These violations may be highly technical and their criminal prosecution is infrequent except when actual fraud is involved. Short mandatory terms of imprisonment are provided for those violations that involve intentional misrepresentation. Such violations undermine the regulatory process and pose the greatest risk of harm to investors. Such offenses may be prosecuted under 15 U.S.C. § 78ff.

CHAPTER THREE - OFFENDER CHARACTERISTICS

OVERVIEW

Chapter Three identifies offender characteristics that aggravate or mitigate a sentence. These adjustments are applied to the total offense value determined by Chapter Two. If more than one adjustment is applicable in a given case, follow the procedures set forth in Chapter One, Part VI, Application Instructions.

Part A provides aggravating and mitigating adjustments based upon the offender's role, level of relative involvement, and, if applicable, the nature of the criminal group or enterprise involved.

Part B identifies several aspects of an offender's post-offense conduct that aggravate or mitigate a sentence. Sentencing enhancements are provided in Section 1 for an offender who engages in or suborns perjury or obstructs justice in connection with the investigation, prosecution, or sentencing for the underlying offense(s). An offender who accepts responsibility for his or her conduct and takes objective steps toward rehabilitation may be eligible for a sentencing reduction under the provisions of Section 2. An offender may also qualify for a sentencing reduction if he or she provides assistance to authorities in accordance with the provisions of Section 3.

Part C provides for an enhancement of sentence if an offender has a prior history of criminal involvement. The adjustment takes into consideration the extent, seriousness, and recentness of the offender's prior criminal conduct.

Part D is reserved for the subject of plea agreements. The public is invited to comment and submit proposals on the policy issues relating to plea agreements presented in Chapter Six, Part C.

Public comment is also requested in Chapter Six, Part F, on the treatment of serious aggravating and mitigating factors that occur infrequently, such as brutal behavior or serious mental disability not rising to the level of a defense.

PART A - ROLE IN THE OFFENSE

- §A311. If the offender was in a position of control over a criminal enterprise or organization, multiply the total offense value from Chapter Two by a number between 1.5 and 2, depending upon the size of the enterprise and the nature of its criminal activities. If the offender is convicted under 21 U.S.C. § 848, the total offense value from Chapter Two should be multiplied by 2.

The appropriate numerical multiplier shall be determined by the sentencing judge upon findings that may include, but are not limited to, the following considerations:

- a. derivation of all or most of the income or resources of either the offender or the organization from illegal activities;
- b. involvement by the offender or the organization in illegal activities on an ongoing basis;
- c. involvement by the offender or the organization in more than one type of illegal activity;
- d. size of the organization's illegal operation or scope of its illegal activities; and
- e. use of violence, threats of violence, coercion, or intimidation to recruit and control subordinates in the organization or to procure other persons to perform illegal acts.

§A312. If the offender directed or supervised another person or persons in the commission of the offense, or used a special skill, trade, training, education, or public position to facilitate the commission of an offense, multiply the total offense value from Chapter Two by 1.2.

§A313. If the offender was either the sole participant or shared comparable responsibility with another offender or offenders, no adjustment is made to the total offense value from Chapter Two.

§A314. If the offender was a minor participant in the offense, multiply the total offense value from Chapter Two by a number within a range of .5 to .7, depending upon the offender's relative culpability and the nature of the criminal conduct involved.

Commentary

Section A311 applies to offenders who are in positions of control over groups that engage in serious ongoing criminal activity. For purposes of this provision, control and the exercise of decision-making authority are significant considerations, rather than affixing a label such as "leader," "organizer," "financier," or "kingpin."

Engaging in a continuing criminal enterprise under 21 U.S.C. § 848 presents one of the most aggravated forms of leadership of a criminal group. Conviction under that statute automatically establishes the applicability of a multiplier of 2.

The nature and scope of the criminal organization must be evaluated by the sentencing judge to determine the appropriate multiplier in the 1.5 to 2 range for an offender who is in a position of leadership or control.

Section A311 applies only if the criminal organization and the offender's position are relevant to the offense of conviction. For example, a leader of a motorcycle gang that is involved in the trafficking of narcotics, firearms, and stolen property would not be subject to this sentencing adjustment by reason of a conviction for an offense unrelated to gang activity.

Section A312 applies to an offender who is the most or more culpable member of any group that commits a crime, without regard to the size or nature of the group. A manager or supervisor in an otherwise legitimate business, or one of several casual acquaintances who directs or supervises the commission of a crime, qualify for this sentencing enhancement. Titles are not controlling. It is the offender's role in the offense that is significant. Objective factors of leadership may include recruitment of other offenders, planning of the offense, exercise of decision-making authority, use of a particular expertise (criminal, professional, or occupational), or right to claim a larger share of the fruits of the crime than other participants.

Section A312 also enhances the sentence of an offender who uses a special skill, training, education, trade, or public position to facilitate the commission of a crime. Thus, a pilot who smuggles cocaine from Colombia in a private plane, a doctor who prepares phony medical reports in an automobile accident insurance fraud, or a deputy sheriff who conspires with private citizens to commit a civil rights violation would be subject to this provision. A sole participant in an offense who uses professional expertise for criminal purposes qualifies for this adjustment.

Section A313 applies to a sole participant in an offense and to offenders who have comparable roles in the offense.

Section A314 applies to an offender who has a limited role in an offense that is planned, directed, and controlled by another person or persons. A minor participant is one who is not in a position to make decisions affecting the offense or to benefit substantially from its commission. In determining the appropriate numerical multiplier, the sentencing judge shall evaluate and make findings regarding the nature of the offender's role and conduct in relation to other participants.

* * * * *

PART B - POST-OFFENSE CONDUCT

1. OBSTRUCTION OF JUSTICE AND PERJURY

§B311. If the offender obstructed or attempted to obstruct the administration of justice, multiply the total offense value from Chapter Two by a number between 1.1 and 1.4, to be determined by the nature of the conduct.

The appropriate numerical multiplier shall be determined by the sentencing judge upon findings that may include, but are not limited to, the following considerations:

- a. whether the offender knowingly and intentionally destroyed or concealed or attempted to destroy or conceal material evidence;
- b. if the offender directed or procured or attempted to direct or procure another person to destroy or conceal material evidence;
- c. if the offender knowingly and intentionally offered untruthful testimony concerning a material fact, or knowingly and intentionally produced or attempted to produce an altered, forged, or counterfeit document or record before a grand jury proceeding, during trial, or during a sentencing hearing;
- d. if the offender directed or procured or attempted to direct or procure another person to offer perjured testimony, or to produce an altered, forged, or counterfeit document before a grand jury proceeding, during trial, or during a sentencing hearing.

§B312. Section B311 shall not be applied to enhance a sentence if the United States Attorney states an intention to prosecute for the same conduct. An offender cannot later be sentenced in an independent prosecution for conduct previously used as a basis for application of this section.

Commentary

This section provides an aggravating adjustment for an offender who engages in conduct calculated to unlawfully mislead or deceive authorities and/or those involved in a judicial proceeding. Before a sentence may be aggravated under this section, the sentencing judge must find the specific conduct present by a preponderance of evidence and determine the appropriate multiplier according to the nature of the conduct and its impact on the administration of justice.

The aggravation of a sentence because of perjury or obstruction of justice is in recognition of a basic principle that no one has a right to lie or deceive or direct others to do so or to destroy evidence of a crime. While no offender is obligated to give a statement, testify, or produce evidence, an offender should not present a fabricated defense or suborn perjury. For example, this provision applies to an offender who alters records or other evidence or procures false alibi testimony. A defendant's denial of guilt is not a basis for application of this provision.

* * * * *

2. ACCEPTANCE OF RESPONSIBILITY

§B321. If the offender demonstrates by a preponderance of evidence that he or she recognizes and sincerely accepts responsibility for the offense(s), the sentencing judge may reduce the offender's sentence by an amount the

judge deems appropriate, provided the reduction does not exceed 20 percent of the total offense value from Chapter Two.

Acceptance of responsibility for the offense(s) may be established by conduct that includes, but is not limited to, the following:

1. voluntarily surrendering to authorities before charges are filed or an arrest warrant is issued;
2. voluntarily making restitution of a substantial nature before sentencing;
3. voluntarily admitting actual involvement in the offense(s);
4. voluntarily providing assistance to authorities in the recovery of fruits and/or instrumentalities of the offense(s); or
5. any other conduct that establishes by a preponderance of evidence that the offender sincerely accepts responsibility for the offense(s) and has undertaken objective steps toward rehabilitation.

§B322. An offender may qualify for a reduction under this section without regard to whether the offender's conviction is based upon a guilty plea or a finding of guilty by a court or jury. An offender who enters a guilty plea is not automatically entitled to a reduction under this section.

Commentary

The reduction of a sentence available under §B321 recognizes a number of societal interests. The offender who sincerely accepts responsibility for wrongdoing, who takes affirmative steps toward disassociation from past criminal conduct, and who attempts to rectify the harm done to others is entitled to receive recognition for these socially desirable actions. This conduct also is a sound indicator of rehabilitative potential.

The sentencing judge is in a unique position to evaluate whether the offender's post-offense conduct is sincere or merely self-serving. For this reason, the sentencing judge is not required to find that conduct such as that described actually justifies a sentencing adjustment. If the sentencing judge finds that the offender is entitled to a reduction, the amount of the reduction is totally within the discretion of the sentencing judge. However, in no event may the reduction exceed 20 percent of the adjusted offense value for an offense.

While a plea of guilty may be some evidence of the offender's acceptance of responsibility for the offense(s), a guilty plea does not automatically entitle an offender to an adjustment. The availability for the reduction under §B321 is not governed by the plea entered by the offender.

Offenders who plead guilty currently receive substantially lower sentences than those who are sentenced after a trial. The rationale for this disparity is that a

guilty plea "is the first step toward rehabilitation," that such pleas conserve the resources of the criminal justice system, and that witnesses (particularly victims) are spared the stress of a trial. The Commission requests comment whether this practice should be perpetuated by providing an automatic sentencing reduction for a guilty plea or whether the approach suggested by Part 2 should be followed.

* * * * *

3. COOPERATION

§B331. If the United States Attorney certifies that the offender provided truthful and significant information regarding the criminal activities of another person or persons, multiply the total offense value from Chapter Two by .8.

§B332. If the United States Attorney certifies that the offender actively assisted authorities in an ongoing investigation or provided truthful and significant testimony before a grand jury or in a court proceeding, multiply the total offense value by .7.

§B333. If the United States Attorney certifies that the offender provided exceptional assistance to law enforcement authorities, multiply the total offense value by .6.

Commentary

The Supreme Court has recognized that an offender's willingness to cooperate with authorities is a valid consideration at sentencing. Cooperation by knowledgeable offenders is particularly valuable in the investigation and prosecution of major narcotics offenses and other organized criminal activity.

Sections B331, B332, and B333 are mutually exclusive; the United States Attorney shall select the most appropriate category if an offender's cooperation overlaps several categories. The certification of the prosecuting United States Attorney is required before the offender is eligible for the adjustments set forth in §§B331, B332 or B333, either at sentencing or for a reduction of sentence under the new provisions of Rule 35, Federal Rules of Criminal Procedure that become effective simultaneously with the guidelines. These provisions apply whether the offender's cooperation is in the same case, a related case, or wholly unrelated to the offense committed by the offender.

Section B333 provides for a 40 percent sentencing reduction for exceptional cooperation, such as the offender who provides valuable information and assistance in the early stages of a major investigation or who performs undercover work or testimony under life-threatening or personally dangerous circumstances.

The certification may be made under seal if it contains information that endangers any person, including the offender, or jeopardizes an ongoing investigation. However, certifications of cooperation shall be subject to the rules of discovery otherwise applicable in criminal cases.

The sentencing judge shall apply the cooperation adjustment in accordance with the certification of the United States Attorney, unless a finding is made that the certification was made in bad faith or was made in an effort to circumvent the guidelines.

Cooperation by an offender is often a subject of plea agreements. The Commission recognizes, however, that occasional disputes may arise over the existence, level, or quality of an offender's cooperation. The Commission requests specific comment accompanied by suggestions for resolution of this issue.

* * * * *

PART C - CRIMINAL HISTORY

A sentence adjustment for an offender's criminal history can be justified on both just punishment and utilitarian grounds. From a just punishment perspective, repeat offenders who have already experienced intervention from the criminal justice system has ignored warnings. Therefore, they are deemed more blameworthy than offenders who have not been confronted previously. The amount of the sentence adjustment that is justified by a criminal history is a subject of debate, but many just punishment proponents accept some sentence modification for criminal record.

Crime control arguments provide a stronger justification for using criminal history to adjust a sentence. Criminal record is a strong predictor of recidivism. As a result, it is often used to increase the length of imprisonment and the level of supervision for offenders, thus addressing incapacitation and deterrence respectively.

The major components of the criminal history adjustment are the number and severity of sanctions imposed for prior convictions, and whether the offender was under criminal justice control during the commission of the current offense or had recently been released from custody. These components reflect the extent, seriousness, and recentness of criminal history. An additional item deals with the use of heroin, opiate derivatives, and other dangerous drugs. A decay factor is used to eliminate old offenses from the criminal history adjustment.

The resulting criminal history score does not include a specific item that gives weight to a pattern of violent criminal behavior. Neither does it include any measure of unadjudicated factors that might indicate ongoing criminal behavior, such as prior failures to comply with administrative orders in major economic crime offenses, and evidence of significant income for which there is no legitimate source. Because these factors are present in a relatively small number of cases and tend to be context-specific, they are addressed in policy statements.

1. CRIMINAL HISTORY SCORE

The sum of the criminal history points from items A through E below provides the criminal history score. The definitions and instructions in Subpart 3 apply to the determination of criminal history points.

- A. Score at least 3 points for each prior sentence of imprisonment for a maximum term of more than one year. For each such term:
 - 1. score 3 points if the offender served less than three years;
 - 2. score 4 points if the offender served three or more years but less than five years;
 - 3. score 5 points if the offender served five or more years.
- B. Score 2 points for each prior sentence of imprisonment for a maximum term of 60 days or more that is not counted above.
- C. Score 1 point for each prior sentence that is not counted above.
- D. Score 2 points if the offender committed the current offense:
 - 1. while under any form of criminal justice control, including probation, parole, or supervised release, custody or escape status, or any form of release pending trial, sentencing, or appeal; or
 - 2. within three years after any release from imprisonment on a sentence counted in (A) above; or within three years after the imposition or commencement of any sentence counted in (B) above.
- E. Score 3 points if the offender had a positive urine test for heroin or any other opiate, cocaine, or PCP either at the time of arrest, during the pretrial release period, or during the presentence release period; or score 3 points if the offender is determined to have been an abuser of heroin or any another opiate, cocaine, or PCP within ten years of the current conviction.

2. SPECIAL CONDITIONS: POLICY STATEMENTS

C321. If the offense of conviction is a violent offense or a controlled substance offense and the offender has at least two prior felony convictions, each of which is either a violent offense or a controlled substance offense, then the sentence shall equal the maximum term of imprisonment authorized for the offense. This policy statement implements 28 U.S.C. § 994(h). Violent offenses are the state and federal counterpart of offenses in Chapter Two, Part A, Offenses Involving the

Person, and any other offense that involves force or threat of force against a person, including burglary of a dwelling. Controlled substance offenses are described in Section 401 of the Controlled Substance Act (21 U.S.C. § 841); Sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 952(a), 955, and 959); and Section 1 of the Act of September 15, 1980 (21 U.S.C. § 955a).

C322. If it can be established by a prior failure to comply with an administrative order, a civil adjudication, or a preponderance of other evidence that the offender previously engaged in similar conduct (other than conduct that resulted in a previous criminal conviction), aggravation of the sentence beyond the guideline range shall be warranted.

C323. If it is determined by a preponderance of the evidence that the current offense was part of a pattern of criminal conduct from which the offender derived a substantial portion of his or her income, aggravation beyond the guideline range shall be warranted. This policy statement implements 28 U.S.C. § 944(i)(2).

C324. If the offender knowingly fails to appear before a court as required by the conditions of his release, aggravation of the sentence beyond the guideline range shall be warranted; or, if the offender knowingly fails to surrender for service of sentence pursuant to a court order, he shall be sentenced to a mandatory consecutive sentence which may exceed the guideline range. This policy statement is consistent with 18 U.S.C. § 3146.

3. DEFINITIONS AND INSTRUCTIONS FOR SCORING CRIMINAL HISTORY

The following definitions and instructions apply to the scoring of criminal history points.

Prior Sentences. A prior sentence refers to a sentence imposed prior to sentencing on the current offense for conduct that is not part of the conduct constituting the current offense. If two or more prior sentences are imposed concurrently, they are to be treated as one sentence for purposes of the criminal history score, using the longest sentence of imprisonment imposed. If two or more prior sentences are imposed consecutively, they are to be treated as separate sentences for purposes of calculating the criminal history score.

When determining time served, the probation officer shall assume that the offender served one-third of the maximum term imposed, or one-third of the statutory maximum term when the maximum term was not stipulated. The offender shall be allowed to rebut this assumption and establish the fact that less time was served. However, the offender may not rebut the assumption if less time was served

because the offender escaped or because the prison portion of a sentence has not yet been completed.

Sentences to Imprisonment. A sentence to imprisonment refers to an executed sentence of imprisonment, not one that has been suspended. If part of a sentence of imprisonment has been suspended, the term "sentence to imprisonment" refers to the part that has not been suspended.

Sentences for Non-Felony Offenses. Sentences based on convictions for certain non-felony offenses are to be counted only if the sentence was imprisonment for 30 days or more, or probation for at least one year. These are:

- Criminal contempt of court
- Disorderly conduct and similar offenses
- Driving without a license or with a revoked or suspended license
- False information to a police officer
- Fish and game violations
- Gambling
- Loitering
- Non-support
- Prostitution
- Resisting arrest
- Trespassing

Sentences based on convictions for certain other non-felony offenses are not to be counted. These are:

- Hitchhiking
- Local regulatory violations
- Public intoxication and similar offenses
- Minor traffic infractions
- Vagrancy

Juvenile Sentences. Juvenile sentences are counted for offenses against persons, including residential burglary and drug trafficking.

Decay Factor For Prior Sentences. If there exists a ten-year period during which the offender neither sustained a sentence of imprisonment including a maximum term of more than one year, nor is known to have served time in confinement on a sentence of imprisonment including a maximum term of more than one year, sentences imposed prior to the beginning of that ten-year period shall not be counted. Convictions for crimes of violence and convictions for crime involving the distribution of drugs are, however, always counted. Violent offenses are the state and federal counterpart of offenses in Chapter Two, Part A, Offenses Involving the Person, and any other offense that involves force or threat of force against a person, including burglary of a dwelling. Controlled substance offenses are described in Section 401 of the Controlled Substance Act (21 U.S.C. § 841); Sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 952(a), 955, and 959); and Section 1 of the Act of September 15, 1980 (21 U.S.C. § 955a).

Diversiory Dispositions. A judicial determination of guilt or an admission of guilt before a judicial body for an otherwise countable offense shall be counted as a sentence under 1.C above, even if a conviction or sentence is not formally entered. This provision includes diversionary dispositions where the offender's guilt has been established but the offender is diverted prior to entry of a record of conviction.

Sentences Resulting From Military Offenses. Sentences resulting from military offenses are counted if they result from general or special court-martial for conduct that is prohibited by civilian criminal law (e.g., theft, assault). Sentences resulting from summary court-martial or Article 15 proceedings are not counted. Sentences for conduct that has no counterpart in civilian criminal law (i.e., strictly military offenses) are not counted.

Sentences Resulting From Foreign Convictions. Sentences resulting from foreign convictions are counted if they are for conduct that would be criminal if committed in the United States.

Sentences Resulting from Tribal Court Convictions. Sentences resulting from tribal court convictions are counted under the same conditions as sentences from any other convictions.

4. EFFECT OF CRIMINAL HISTORY SCORE

The Commission faces a difficult problem: How should criminal history be used to promote efficiency and justice in sentencing? From a modified deserts standpoint, criminal record would play a role that is consistent with the increased blameworthiness of habitual offenders. However, no formula exists for determining how much a criminal record should matter when fixing blame. From a deterrence viewpoint, recidivists may be demonstrating their recalcitrance, and thus, may require more severe sentences. An alternative conclusion is that recidivists are not deterred by available sanctions, so from an efficiency perspective, enhanced sentences are wasteful of corrections resources. A third view is that criminal record should matter because offenders with serious criminal histories are likely to continue to victimize the public if given the opportunity, and thus, prison should be used to incarcerate offenders for periods of time during which they would otherwise be committing crimes. The quandary raised by this third view is how the Commission should determine which offenders are likely to recidivate and how to determine the appropriate term of incarceration.

The Commission invites public comment on the appropriate relationship between criminal record and sentence. To facilitate discussion, the Commission temporarily has adopted a criminal history score table that approximates the role that criminal history has played in past sentencing decisions. The Commission does not assume that replicating past practices is optimal. For example, from a pure incapacitation standpoint, an offender would be incarcerated for a long time only when the risk posed is sufficient to justify the prison costs. Otherwise, if the risk is not commensurate with the cost of incarceration, the offender would be freed. This suggests that past sentencing practices may be inconsistent with both the goals of pure incapacitation, and other pure sentencing objectives. Nevertheless, past practices provide a useful focal point for discussion.

A review of past practices indicates that the additional time attributable to criminal record is not a simple multiple of the base sentence. Rather, and perhaps surprisingly, the percentage increase attributable to criminal record is largest for offenders convicted of the least serious crimes and smallest for offenders convicted of the most serious crimes. The relationship between time served and criminal record is approximated in the criminal history score table.

The criminal history score table is somewhat complex. An alternative approach, which retains the differential proportionality across offense levels, is to provide step-by-step instructions for translating the criminal history score into a sentence enhancement. An example using this approach is shown below. In practice, other formulations are possible.

Both the criminal history score table and the step-by-step formulation have merit. The Commission seeks comment about which approach is more desirable, and seeks recommendations about the appropriate numbers to be used.

Criminal History Score Table

The criminal history score is the sum of the points from 1.A above. This table adjusts the offense value from Chapter Two by adding the appropriate number of points as set forth in the following table.

| <u>Criminal History Score</u> | <u>Base Offense Value</u> | | | | |
|-------------------------------|---------------------------|--------------|--------------|--------------|------------|
| | <u>1-17</u> | <u>18-23</u> | <u>24-31</u> | <u>32-59</u> | <u>60+</u> |
| 0 | 0 | 0 | 0 | 0 | 0 |
| 1 | 1 | 2 | 3 | 5 | 5 |
| 2 | 2 | 4 | 6 | 9 | 9 |
| 3 | 2 | 6 | 9 | 14 | 14 |
| 4 | 3 | 8 | 12 | 18 | 19 |
| 5 | 4 | 9 | 15 | 23 | 24 |
| 6 | 5 | 11 | 18 | 27 | 28 |
| 7 | 5 | 13 | 21 | 32 | 33 |
| 8 | 6 | 15 | 24 | 36 | 38 |
| 9 | 7 | 17 | 27 | 41 | 43 |
| 10 | 8 | 19 | 30 | 45 | 47 |
| 11 | 8 | 21 | 33 | 50 | 52 |
| 12 or more | 9 | 23 | 36 | 54 | 57 |

Alternative Approach

This formulation provides sentence enhancements that are similar to those that appear in the criminal history score table. The criminal history score is the sum of the points from 1.A above. To adjust the offense value from Chapter Two, complete the following three steps:

1. Step 1 -- Determine the multiplier from the following list. For example, if the base offense value is 20, the multiplier is 2.

| <u>Base Offense Value</u> | <u>Multiplier</u> |
|---------------------------|-------------------|
| 1-17 | 0.75 |
| 18-23 | 2.00 |
| 24-31 | 3.00 |
| 32-59 | 4.50 |
| 60 or more | 5.00 |

2. Step 2 -- Determine the appropriate adjustment as the product of the multiplier and the criminal history score. For example, if the multiplier is 3.00 and the criminal history score is 7, the adjustment is 21. Round the result down to the nearest whole number.
3. Step 3 -- Add the adjustment to the base offense value to obtain an adjusted base offense value. For example, if the adjustment is 21 and the base offense value is 30, the adjusted base offense value is 51.

Commentary

Approximately half of the offenders convicted in federal courts have been convicted previously of misdemeanor or felony offenses. Their prior convictions result from prosecutions in the federal system, from fifty state systems and the District of Columbia, from the military, from territories, and from foreign countries. There are variations across jurisdictions and over time in offense definitions, sentencing structures, and manners of sentence pronouncement.

To minimize problems associated with cross-jurisdictional differences, the Commission tentatively determined that the criminal history score should be based on previous sentences imposed and time served but rather than other measures, such as evaluation of the offender's actual conduct underlying the offense of conviction, the definition of the offense of conviction, or the statutory maximum sentence available for the offense. Several considerations informed this choice. Basing the criminal history score on the sentence imposed and time served can perpetuate past sentencing disparity. However, other measures also may perpetuate past disparities. For example, prior convictions perpetuate prosecutorial disparity with respect to numbers of charges or counts and reductions in charges. In addition, examining the underlying conduct of prior convictions raises practical and legal problems.

Although past disparity is a problem when using prior sentences and time served to modify the current sentence, past sentences are not random. Length of sentence imposed reflects a judicial assessment of the seriousness and scope of the underlying criminal conduct, particularly when judges consider total offense behavior. Similarly, time served results from a judicial assessment combined with assessments made by prison and parole officials.

The three sentence distinctions used in the guidelines are a custody sentence longer than one year, a custody sentence of sixty days or more but not greater than one year, and other sentences including custody sentences of less than sixty days, probation, fines, and residency in a halfway house. Criminal history points are based

on the sentence imposed. To consider a sentence to be a custody sentence, a portion of the custody sentence must have been executed; that is, time must have been served (or, if the offender escaped, would have been served). Time in custody that results from a split sentence (for example, two years suspended on the service of six months) is counted as if it were a custody sentence. If the offender was resentenced by the judge after the initial sentencing hearing, the later pronouncement is used in assigning criminal history points.

The three time-served distinctions used in the guidelines are terms of less than three years, terms of from three years to less than five years, and terms of five years or more. Because it is often difficult for probation officers to ascertain time served before the sentencing hearing, the probation officer is instructed to assume that time served equals one-third of the maximum sentence imposed. The Commission realizes that the percentage of the sentence served varies widely across the country, so to prevent injustice, the offender is allowed to rebut that assumption.

A time limit for considering prior sentences is included because recent offenses are more relevant to blameworthiness and are better predictors of recidivism than are older offenses. In addition, older records are difficult to access and are often less accurate than more recent records. Nevertheless, criminal conduct involving crimes of violence and drug transactions is counted in the criminal record score regardless of when it occurred.

Drug users commit crimes at a higher rate than non-users. In addition, drug users are more likely to recidivate than are non-users. Consequently, a drug abuse item is included in the guideline.

Specific Options For Consideration

1. Drug Abuse. Additional options would be to delete item E or to restrict it to abuse of heroin or other opiates. The argument against inclusion rests both on possible difficulty in scoring and because it would be the only item that does not involve past instances of adjudicated criminal conduct. It is also noted that the section by section analysis of the proposed 28 U.S.C. § 994 (d)(5) in S.1630, which deals with factors that should be considered by the Commission in formulating the guidelines, states "Drug dependency, in the Committee's view, generally should not play a role in the decision whether or not to incarcerate the offender."

On the other hand, the observations of criminal justice practitioners and the measurements of social science researchers agree that there is a strong association between substance abuse and criminal activity. A panel of the National Academy of Sciences (NAS) reached the following conclusions:

A. Drugs are more likely to be used by people who commit crimes than by people who do not commit crimes. According to the NAS, ". . . the available evidence on participation in serious criminal activity suggests that drug users, especially multiple drug users, are much more likely to be involved than non-users." Citing a national sample of youths studied by Elliott and Huizinga, the NAS concluded: "The self-reported participation rates for felony assault, felony theft, and robbery increase dramatically as drug use becomes more serious. . ."

(A. Blumstein, *et al.*, (eds.), Criminal Careers and "Career Criminals", National Academy of Sciences, Washington, D.C., 1986, p. 50).

B. Among active offenders, people who abuse drugs commit crimes at a greater rate than people who do not abuse drugs. According to the NAS: "Higher frequency rates are found both among active offenders currently using drugs and among those with histories of drug use, especially early drug use as juveniles, across a variety of offense types, and using both official-arrest and self-report data." For example, the NAS reports that ". . . active offenders among participants in drug treatment programs are estimated to commit an annual average of 3 assaults, 6 to 8 robberies, and more than 20 property offenses. These rates are twice those found for adult arrestees generally." And: "During these periods (of heavy drug use), crime spurts with frequencies as much as 6 times as high as those for nonusing offenders have been reported" (NAS pp. 74-75).

C. Past drug use predicts future criminal behavior. The National Academy of Sciences reviewed four empirically derived instruments that were developed to predict future criminal behavior. Past drug use was a factor in each scale. A scale developed by the Rand Corporation contained one item about drug use in the preceding two years and another item concerning drug use as a juvenile. A scale used by the U.S. Parole Commission contains an item concerning heroin or opiate dependence. The Iowa Risk Assessment scale coded substance abuse into specific categories: history of PCP use, non-opiate injections, sniffing volatile substances; history of opiate addiction; history of heavy hallucinogenic use; history of drug problems; history of opiate or hallucinogen use, or alcohol problem; and no history. A scale developed by the Institute for Law and Society uses an item concerning heroin use.

2. Non-Felony Offenses. The proposal enumerates various non-felony offenses and separates them into two categories: those that are more serious and more likely to be the result of a plea down from more serious behavior, which are to be counted if a significant sentence is imposed (i.e., incarceration of 60 days or more or one year or more of probation); and those that are less serious (not to be counted at all). There are two other options for addressing non-felony prior offenses. The first, similar to that presented, would retain the list of excluded offenses but count any of them as convictions if the sentence imposed was a sentence to imprisonment of 60 days or more. This option does not differentiate among the offenses on the basis of seriousness and considers only incarcerative sentences of 60 days or more as a significant sentence. The second option would exclude from the score all offenses that carried a maximum term of six months or less. The difficulty with the latter option is that statutory maximums differ from jurisdiction to jurisdiction, thereby both building in disparity and creating work for the probation officer to determine what the maximum sentence was in the jurisdiction in which the conviction was given.

3. Juvenile Sentences. Attempting to count every juvenile conviction may have the potential for creating large disparities due to differential availability of records. Another option would be to limit sentences for offenses committed prior to age 18 by use of the following wording:

Sentences for Offenses Committed Prior to Age 18. Sentences for offenses committed prior to age 18 are counted only if one or more of the following is applicable:

A. the offender was convicted as an adult and received a sentence of imprisonment with a maximum term of more than one year; or

B. the offender was age 21 or younger at the commencement of the current offense, and the sentence imposed for the offense committed prior to age 18 resulted in a commitment (adult or juvenile) of 60 days or more, and was imposed not earlier than four years before the commencement of the current offense. Note: the maximum number of points that may be scored for any sentence under this paragraph is 2.

This option attempts to capture important juvenile indicators of risk (most relevant when dealing with a young offender who has not yet had the opportunity to build an adult record) that are likely to be available across most jurisdictions. Another option would be to eliminate paragraph B, thereby excluding juvenile offenses that did not result in an adult conviction. Because of the problem of record availability and because of the added complexity, the first option may not be meaningful since only about five percent of federal offenders are under 21.

4. Decay Factor For Prior Sentences The option presented above excludes from the criminal history score criminal conduct that preceded a ten-year period within which the offender neither incurred nor served time on a sentence to incarceration for more than a year. If the offender had been convicted during this ten-year period, convictions prior to this ten-year period would be counted. Another option would be to limit consideration of prior sentences to those imposed within a certain interval before commencement of the current offense, regardless of what has occurred in the interim. Under this approach, any sentence to imprisonment for which the offender remained under criminal justice control or was within three years of release at the commencement of the current offense behavior would be counted. The wording of this option would be as follows:

A. Score 3 points for each prior sentence of imprisonment for a maximum term of more than one year that was imposed within fifteen years of the commencement of the current offense behavior.

B. Score 2 points for each prior sentence to imprisonment for a maximum term of 60 days or more that is not counted above and that was imposed within ten years of the commencement of the current offense behavior.

C. Score 1 point for each prior sentence that is not counted above that was imposed within ten years of the commencement of the current offense behavior.

D. Score 2 points if the offender committed the current offense:

1. while under any form of criminal justice control, probation, parole, or supervised release, custody or escape status, or any form of release pending trial, sentencing, or appeal; or

2. *within three years after any release from imprisonment on a sentence counted in A above; or within three years after the imposition or commencement of any sentence counted in B above.*

Note to Section D: Any sentence giving rise to the scoring of points under either of the subsections in section D should be counted in A or B above, notwithstanding the fifteen or ten year limitation otherwise applicable.

This option is easier to apply because the date of sentencing is more easily available than the date of release on a sentence to incarceration. Its adoption, however, could prevent the counting of the most serious prior criminal conduct.

PART D - PLEA AGREEMENTS

[Reserved]

See Chapter Six, Part C, for a discussion of policy issues presented for public comment.

PART E - OTHER OFFENDER CHARACTERISTICS

The Commission's authorizing legislation requires it to consider whether a number of offender characteristics have "any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined relevant. 28 U.S.C. § 994(d). The characteristics are:

1. *age;*
2. *education;*
3. *vocational skills;*
4. *mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;*
5. *physical condition, including drug dependence;*
6. *previous employment record;*
7. *family ties and responsibilities;*
8. *community ties;*
9. *role in the offense;*
10. *criminal history; and*
11. *degree of dependence upon criminal activity for a livelihood.*

Chapter Three of the preliminary guidelines addresses role in the offense and degree of dependence on criminal activity for a livelihood in Part A, and criminal history in Part C. The other factors have not, however, been thoroughly addressed in this preliminary draft.

One method of permitting courts to address these characteristics would be to allow the court the discretion to consider one or more them, as appropriate, in setting the sentence within the 25 percent range. 28 U.S.C. § 944(b). Another method would be to cite them as aggravating or mitigating factors where appropriate. A third method would be to treat them as multipliers in the same manner as Chapter Three adjustments.

In connection with its May 22, 1986 hearing on prior criminal history, the Commission asked over 200 persons and organizations to provide written comment on the extent to which these characteristics should be considered in sentencing. Public comment is now invited on which of these factors should be considered relevant to sentencing and in what circumstances.

CHAPTER FOUR - DETERMINING THE SENTENCE

OVERVIEW

Chapter Four describes the process by which sanction units are converted into actual sentences and explains the range of sentencing options available to the court. §A411 describes the conversion of sanction units into months of imprisonment. §A412-A420 describe, in turn, each of the sentencing options other than imprisonment: probation, supervised release, community confinement, home detention, restitution, fines, forfeiture, community service, and order of notice to victims. Section A421 addresses the relationship of statutory maximum and mandatory minimum sentences to the guidelines, and §A422 offers guidance on the use of consecutive and concurrent sentences.

The Commission has identified two issues in Chapter Four as particularly appropriate for public comment:

- (1) How should sanction units be converted into terms of imprisonment?
- (2) How should sanction units be converted into sentences other than imprisonment?

Two other Chapter Four-related issues are discussed in Chapter Six (Other Issues):

- (1) How should the appropriate amount of a fine to impose on an offender be determined? (Chapter Six, Part A)
- (2) What "eligibility criteria" or other restrictions should be established for offenders the court is considering for placement in community confinement or home detention? (Chapter Six, Part D)

§A411. Imprisonment

- a. The guideline table set forth in (e) below displays the guideline range of months of imprisonment applicable to the total sanction units. If the exact number of the total sanction units is not listed in the table, it is to be rounded down to the nearest listed number.
- b. Where the minimum number of months of imprisonment specified in the guideline range is greater than zero, that number must be satisfied by imprisonment or by custody for intervals of time as a condition of probation under 18 U.S.C. § 3563(b)(11). The imprisonment or custody sentence may not exceed the highest number in that range. For example, if the offender's total sanction units are 26, the court must impose a term of imprisonment of between 14 and 20 months.
- c. Where the minimum number of months of imprisonment specified in the guideline range is zero, no minimum term of imprisonment or

custody is required. However, a term of imprisonment up to six months may be imposed.

- d. A sentence is within the guidelines if it includes at least the minimum number, and not more than the maximum number of months of imprisonment specified in the guideline range.

e. Guideline Table

| <u>Total</u> <u>Sanction Units (in Months of Imprisonment)</u> | <u>Guideline Range</u> <u>(in Months of Imprisonment)</u> | <u>Total</u> <u>Sanction Units</u> | <u>Guideline Range</u> <u>(in Months of Imprisonment)</u> |
|---|--|---------------------------------------|--|
| Less than 14 | 0-6 | 174 | 162-202 |
| 14 | 2-8 | 180 | 168-210 |
| 16 | 4-10 | 186 | 174-216 |
| 18 | 6-12 | 192 | 180-224 |
| 20 | 8-14 | 198 | 186-232 |
| 22 | 10-16 | 204 | 192-240 |
| 24 | 12-18 | 210 | 198-246 |
| 26 | 14-20 | 216 | 204-254 |
| 28 | 16-22 | 222 | 210-262 |
| 30 | 18-24 | 228 | 216-270 |
| 32 | 20-26 | 234 | 222-276 |
| 34 | 22-28 | 240 | 228-284 |
| 36 | 24-30 | 246 | 234-292 |
| 38 | 26-32 | 252 | 240-300 |
| 40 | 28-34 | 258 | 246-306 |
| 42 | 30-36 | 264 | 252-314 |
| 44 | 32-40 | 270 | 258-322 |
| 48 | 36-44 | 276 | 264-330 |
| 52 | 40-50 | 282 | 270-336 |
| 56 | 44-54 | 288 | 276-344 |
| 60 | 48-60 | 294 | 282-352 |
| 66 | 54-66 | 300 | 288-360 |
| 72 | 60-74 | 306 | 294-366 |
| 78 | 66-82 | 312 | 300-374 |
| 84 | 72-90 | 318 | 306-382 |
| 90 | 78-96 | 324 | 312-390 |
| 96 | 84-104 | 330 | 318-396 |
| 102 | 90-112 | 336 | 324-404 |
| 108 | 96-120 | 342 | 330-412 |
| 114 | 102-126 | 348 | 336-420 |
| 120 | 108-134 | 354 | 342-426 |
| 126 | 114-142 | 360 | 348-434 |
| 132 | 120-150 | 366 | 354-442 |
| 138 | 126-156 | 372 or above | 360-Life |
| 144 | 132-164 | | |
| 150 | 138-172 | | |
| 156 | 144-180 | | |
| 162 | 150-186 | | |
| 168 | 156-194 | | |

Commentary

The guideline table presented above translates the offender's total sanction units into guideline ranges of months of imprisonment. Sanction units totalling less than 14 equate to an imprisonment range of zero to six months. The court may, therefore, impose a sentence other than imprisonment on offenders whose units total less than 14. Sanction unit totals of 14 or more will require the court to impose some term of imprisonment.

The selection of 14 sanction units as the level below which a court may sanction an offender without imprisonment was intended to establish a range of units (0-14) that was broad enough to permit the court to give minor offenders (including repeat violators of the most minor statutes) probation or other non-imprisonment sentences. Selection of a significantly lower number than 14 would have unnecessarily complicated the required mathematical calculations without any discernible benefit.

Because 14 sanction units correspond to a minimum of two months' imprisonment, the total of the offender's sanction units is always 12 more than the minimum months of imprisonment in the corresponding range. The maximum of the guideline range generally exceeds the minimum by the greater of 6 months or 25%, the limit allowed by 28 U.S.C. § 994(b) (as amended by Pub. L. No. 99-363). For simplicity, it was decided to use only even numbers in the guideline range.

The court is required to impose a sentence within the guideline range set forth below unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Commission in formulating the applicable guideline (18 U.S.C. § 3553(b)).

Subject to applicable policy statements, the determination of where to sentence within the guideline range is within the discretion of the court. For example, if the total sanction units are 56, the court, in order to sentence within the guidelines, must sentence the offender to a term of imprisonment of at least 44 months but not more than 54 months.

The court must explain its specific reasons for imposing a sentence at a particular point within the range, or outside the range, in open court at the time of sentencing. 18 U.S.C. § 3553(c).

The guideline table presents one approach for converting sanction units into a term of imprisonment. Another approach would be to make the conversion rate from sanction units to imprisonment depend on the nature of the offense committed. Offenses resulting in the most serious harms would result in the imposition of proportionately greater prison terms. For example, an offender who committed an offense involving the person could be required to discharge 90% of his sanction units by imprisonment, while an offender who committed an offense involving property would be required to discharge only 50% of his units by imprisonment. Comment is invited on the guideline table approach as well as any other method of converting sanction units to terms of imprisonment.

CONVERSION OF SANCTION UNITS INTO SENTENCES OTHER THAN IMPRISONMENT

The Commission has identified several ways to address this issue. One question is common to each approach, however: what types of sentences, other than imprisonment, should be measured by sanction units? The Commission could, for example, adopt a guideline that would require an offender to compensate a victim for his/her losses separate and apart from any punishment the offender might receive for his conduct. Accordingly, under such a guideline, restitution would be required whenever feasible without regard to the satisfaction of any sanction units; the offender would still be subject to other punishment(s) in satisfaction of all sanction units. A similar approach could be taken with respect to forfeiture and an order of notice to victims.

The same question occurs with respect to probation and supervised release: should those sentences or any conditions of those sentences be accorded sanction unit value? Because the underlying purpose of many probation sentences is fundamentally rehabilitative, some observers have noted that it is inappropriate to accord any sanction unit value to their imposition. Others have contended that it would be appropriate to accord sanction unit values to those conditions that are punitive or significantly deprive the offender of some liberty such as a condition that the offender observe a curfew or submit to urinalysis on a frequent basis. Comment is specifically invited on these issues as well as the alternative proposals outlined below.

OPTION 1: Mandatory Satisfaction of All Sanction Units

Under this approach, the court would be required to impose a sentence that satisfied all of the offender's sanction units. If, for example, an imprisonment range of 80-100 months applied, and the court selected the minimum of the range as the appropriate term of imprisonment, the remaining 20 months in the range would still have to be discharged by alternative sanctions of equivalent weight. Establishment of a system of this nature would require the Commission to set equivalency rates between imprisonment and all other types of sentences determined to have sanction unit value. The Commission could, for instance, develop a table that established certain terms of community confinement or home detention as the equivalent of one month's imprisonment. Other equivalencies would be established for non-confinement sentences, like fines and community service, as well. Comment is invited on both the approach in general and the equivalency rates that should be established between imprisonment and other sanctions.

OPTION 2: Permissive Satisfaction of All Sanction Units

There are several possible approaches to this option. The common thread among all of them is that the court would not be obligated to impose a sentence that satisfied all sanction units. One approach would be to establish equivalencies between imprisonment and other types of sentences, but permit the court to impose non-imprisonment units in any amount up to the maximum of the range. So, for example, where the court chose to impose the minimum term of imprisonment in an 80 to 100 month range, the judge could impose additional 0-20 units of non-imprisonment sanctions.

A second approach would be to separate the sanction units into imprisonment and non-imprisonment categories, and to calculate imprisonment and non-imprisonment sanctions independently. A judge's decision to impose the minimum term of imprisonment in a range would have no bearing on the amount of non-imprisonment punishment imposed. This method obviates the need to establish equivalencies between imprisonment and other types of sentences, but would still require equivalency rates among non-imprisonment sanctions.

A third approach would be to calculate a range of imprisonment and leave the imposition of other sanctions to the total discretion of the judge. A variation on this approach, as well as the two described above, would require the court to discharge a certain minimum number or percentage of sanction units by non-imprisonment sanctions.

§A-12. Probation

- a. Imposition of Term of Probation. An offender may be sentenced to a term of probation in addition to any other sanction imposed unless:
 1. the offense of conviction is a Class A or B felony (18 U.S.C. § 3561(a)(1));
 2. the offense of conviction is one which expressly precludes probation as a sentence (18 U.S.C. § 3561(a)(2)); or
 3. the offender is sentenced at the same time to a term of imprisonment for the same or a different offense (18 U.S.C. § 3561(a)(3)).
- b. Length of Term of Probation. When a term of probation is imposed, the length of such term shall be:
 1. for a felony, not less than one nor more than five years;
 2. for a misdemeanor, not more than five years;
 3. for an infraction, not more than one year.

Commentary

The preliminary guideline for length of probation is identical to the maximum terms of probation set forth at 18 U.S.C. § 3561(b). Comment is solicited as to whether more specific terms of probation should be provided.

- c. Conditions of Probation.
 1. When a term of probation is imposed, the court shall impose the following conditions of probation in each case:

- A. the offender shall not commit another federal, state, or local crime during the term of probation (18 U.S.C. § 3563(a)(1));
- B. the offender shall not leave the judicial district without obtaining permission from the probation officer;
- C. the offender shall report to the probation officer as directed by the court or the probation office and submit a truthful written monthly report within the first five days of each month;
- D. the offender shall permit a probation officer to visit his/her home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- E. the offender shall answer inquiries by a probation officer and follow the instructions of the probation officer;
- F. the offender shall notify the probation officer promptly of any changes in address or employment;
- G. the offender shall notify the probation officer promptly if arrested or questioned by a law enforcement officer;
- H. the offender shall maintain reasonable hours, shall associate only with law-abiding persons, and shall not associate with individuals with criminal felony records unless granted permission to do so by the probation officer;
- I. the offender shall not possess a firearm, dangerous weapon, or destructive device;
- J. the offender shall not purchase, possess, use, distribute, or administer any controlled substance, including narcotics, marijuana, depressants, or stimulants, or any paraphernalia related to the foregoing unless prescribed by a physician. The offender shall not frequent places where such drugs are illegally sold, dispensed, used or given away. Neither shall the offender drink alcoholic beverages to excess;
- K. the offender shall not enter into any agreement to act as an informer or special agent of any law enforcement agency;
- L. as directed by the probation officer, the offender shall provide notification to third parties as to risks that may be occasioned by the offender's criminal record or personal characteristics, and shall permit the probation officer to make such notifications and to confirm the offender's compliance; and

- M. the offender shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons. The offender shall notify the probation officer immediately of any change in employment status to include job changes or being out of work.
- 2. If a term of probation is imposed for a felony, the court must impose a fine, an order of restitution, or community service as a condition of probation. 18 U.S.C. § 3563(a)(2).
- 3. Custody for intervals of time may be ordered as a condition of probation during the first year of probation pursuant to 18 U.S.C. § 3563(a)(11).

Commentary

Pursuant to 18 U.S.C. § 3563(b), the court may impose any other conditions of probation that are reasonably related to the nature and circumstances of the offense, the history and characteristics of the offender, and the purposes of sentencing set forth at 18 U.S.C. § 3553(a)(2).

§A413. Supervised Release

a. Imposition of Term of Supervised Release

- 1. The court shall order a term of supervised release to follow imprisonment when:
 - A. a period of imprisonment of more than one year is imposed for an offense involving violence or the distribution or sale of drugs;
 - B. the court determines that such a term is necessary to enforce conditions of restitution, community service, or a fine; or
 - C. the court determines that the offender's readjustment to society will require supervision.
- 2. The court may impose a term of supervised release to follow imprisonment in any other case.

b. Length of Term of Supervised Release

- 1. When a term of supervised release is ordered, the length of such term shall be:
 - A. for a Class A or B felony, 3 years;

- B. for a Class C or D felony, 2 years;
- C. for a Class E felony or a misdemeanor, 1 year.

c. Conditions of Supervised Release

1. When a term of supervised release is imposed, the court shall impose the following conditions of supervised release in each case:
 - A. the offender shall not commit another federal, state, or local crime during the term of supervised release (18 U.S.C. § 3583(d));
 - B. the offender shall not leave the judicial district without obtaining permission from the probation officer;
 - C. the offender shall report to the probation officer as directed by the court or the probation office and submit a truthful written monthly report within the first five days of each month;
 - D. the offender shall permit a probation officer to visit him at his/her home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
 - E. the offender shall answer inquiries by a probation officer and follow the instructions of the probation officer;
 - F. the offender shall notify the probation officer promptly of any changes in address or employment;
 - G. the offender shall notify the probation officer promptly if arrested or questioned by a law enforcement officer;
 - H. the offender shall maintain reasonable hours, shall associate only with law-abiding persons, and shall not associate with individuals with criminal felony records unless granted permission to do so by the probation officer;
 - I. the offender shall not possess a firearm, dangerous weapon, or destructive device;
 - J. the offender shall not purchase, possess, use, distribute, or administer any controlled substance, to include narcotics, marijuana, depressants or stimulants, or any paraphernalia related to the foregoing unless prescribed by a physician. The offender shall not frequent places where such drugs are illegally sold, dispensed, used, or given away. Neither shall the offender drink alcoholic beverages to excess;

- K. the offender shall not enter into any agreement to act as an informer or special agent of any law enforcement agency;
- L. as directed by the probation officer, the offender shall provide notification to third parties as to risks that may be occasioned by the offender's criminal record or personal characteristics, and shall permit the probation officer to make such notifications and to confirm the offender's compliance; and
- M. the offender shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons. The offender shall notify the probation officer immediately of any change in employment status to include job changes or being out of work.

Commentary

Where supervised release is imposed, the terms of supervised release set forth in the guideline are the maximum terms authorized by law. 18 U.S.C. § 3583(b).

By statute, the court may impose any other condition of supervised release that is reasonably related to (A) the nature and circumstances of the offense; (B) the history and characteristics of the offender; (C) the need to deter further criminal conduct; and (D) the need to provide the offender with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. Such condition must involve no greater deprivation of liberty than is reasonably necessary to achieve the needs of deterrence and rehabilitation as set forth in (C) and (D) above. The court may impose any condition that could be imposed as a condition of probation except the condition that the offender be placed in custody for intervals of time. 18 U.S.C. § 3583(d).

§A414. Community Confinement

- a. Community confinement may be imposed as a condition of probation or supervised release.
- b. "Community confinement" means residence in a community treatment center, restitution center, or other community residential correctional facility, and community service, employment, and/or treatment during non-residential hours.
- c. Community confinement may not be imposed for a period greater than six months.

Commentary

Subject to the restrictions in §A413 and §A414, the court may impose such other discretionary conditions of probation or supervised release as it considers appropriate to effectuate community confinement.

§A415. Home Detention

- a. Home detention may be imposed as a condition of probation or supervised release.
- b. "Home detention" means a program of confinement and supervision by means of the following:
 1. restriction to the offender's home during specified hours, enforced by appropriate means of surveillance by the probation office;
 2. community service, employment, and/or treatment during non-detention hours; and
 3. a minimum of 8 probation officer contacts per month (including no less than 4 direct contacts per month).
- c. Home detention may not be imposed for a period greater than six months.

Commentary

Subject to the restrictions listed in §A413 and §A414, the court may impose such other conditions of probation or supervised release as it considers appropriate to effectuate home detention.

§A416. Restitution

- a. Restitution may be imposed as a condition of probation or supervised release or as an independent sentence.
- b. When an offender has been ordered to make restitution and to pay a fine, any money paid by that offender in satisfaction of sentence shall first be applied to satisfy the order of restitution.

Commentary

Where the record demonstrates sufficient evidence to justify an order of restitution and the imposition of such order will not unduly complicate or prolong the sentencing process (18 U.S.C. § 3663(d)), the court shall order restitution.

§A417. Fines

RESERVED. (See discussion at Chapter Six, Part A).

§A418. Forfeiture

RESERVED.

§A419. Community Service

RESERVED.

§A420. Order of Notice to Victims

The court may set off the cost of any notice ordered against any fine ordered.

Commentary

An order of notice to victims may only be imposed for an offense involving fraud or other intentionally deceptive practices. 18 U.S.C. § 3555. The court may not require an offender to pay more than \$20,000 to give notice to victims.

§A421. Statutory Maximum and Mandatory Minimum Sentences

- a. If the application of the guidelines would result in a greater sentence than the maximum sentence authorized by statute for the offense of conviction (or, in the case of more than one count of conviction, than the maximum sentence that might be imposed if consecutive sentences were ordered), then the maximum sentence authorized by statute shall apply.
- b. If the application of the guidelines would result in a sentence less than the minimum sentence required by statute, the mandatory minimum sentence shall apply.

§A422. Construction of the Sentence

- a. The court generally shall impose a sentence on each count of the indictment on which the offender is convicted.
- b. Where the court has discretion to impose concurrent or consecutive sentences, it shall exercise its discretion to produce the sentence most consistent with the applicable guideline range set forth in §A411(d).

- c. The court may not impose consecutive sentences for an offense of conspiring to commit an offense or soliciting commission of an offense and for the offense that was the sole object of the conspiracy or solicitation.

Commentary

28 U.S.C. § 994(1)(2) provides that the guidelines shall reflect the "general inappropriateness" of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for the offense that was the sole object of the conspiracy or solicitation.

18 U.S.C. § 3584 provides that (1) sentences of imprisonment may not be imposed consecutively for an attempt and for another offense that was the sole object of the attempt; (2) terms of imprisonment imposed at the same time must run concurrently unless the court order or governing statute requires the terms to run consecutively; and (3) terms of imprisonment imposed at different times must run consecutively unless the court orders the terms to run concurrently.

CHAPTER FIVE - VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

The Comprehensive Crime Control Act expressly directs the Commission to establish guidelines or policy statements regarding the appropriate use of probation revocation provisions (28 U.S.C. § 994(a)(3)). The act also grants the Commission the general authority to issue similar guidelines and policy statements regarding the revocation of supervised release.

The approach the Commission proposes to take to the handling of violations is to establish minimum standards of compliance for the conditions of supervision that might be imposed by the judge at sentencing. The standards would require that if the person under supervision does not adhere to at least a minimum level of compliance as directed by the guidelines, certain actions would be taken by the probation officer and, ultimately, by the sentencing judge. The violations would essentially be classified as serious, serious technical, and lesser technical. Upon revocation, certain sentences would be required depending on the classification of the violation.

1. Requirements of the Comprehensive Crime Control Act

Under the Comprehensive Crime Control Act, probation becomes a sentence in itself and constitutes a final judgment. As a sentence, it is to be imposed after consideration of the general sentencing factors described in 18 U.S.C. § 3553(a), and the special sentencing factors set forth in 18 U.S.C. § 3562(a). When a sentence of probation is imposed there is only one mandatory condition: that the offender not commit another crime (18 U.S.C. § 3563(a)(1)). If the conviction is for a felony, the statute requires the additional condition that the offender either pay a fine, pay restitution, or perform community service (18 U.S.C. § 3563(a)(2)).

Otherwise, the court may impose discretionary conditions to the extent they are related to the nature and circumstances of the offense and the history and characteristics of the offender; and are related to and involve only such deprivations of liberty or property as reasonably necessary for the purposes of reflecting the seriousness of the offense, promoting respect for the law, providing just punishment for the offense, affording adequate deterrence to criminal conduct, protecting the public from further crimes of the offender, and providing the offender with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3563(b)).

The Act provides that if the offender violates a condition of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors that are to be considered when a sentence is originally imposed (18 U.S.C. § 3553(a)), either: 1) continue the offender on probation, with or without extending the term or modifying or enlarging the conditions; or 2) revoke the sentence of probation and impose any other sentence that was available at the time of the initial sentencing (18 U.S.C. § 3565(a)).

Under the new law, a term of supervised release may be imposed as part of a sentence to imprisonment. With the elimination of parole, supervised release permits a period of supervision by a U.S. Probation Officer upon the offender's release from imprisonment. The authorized terms of supervised release are: 1) not more than three years for a class A or class B felony; 2) not more than two years for a class C or class D felony; and 3) not more than one year for a class E felony or a misdemeanor. The court is required to consider the following in including a term of supervised release, its length, and conditions: 1) the nature and circumstances of the offense and history and characteristics of the offender; 2) the need to afford adequate deterrence to criminal conduct; 3) the need to provide the offender with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; 4) the kind of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of the offender as set forth by the Commission guidelines; 5) any pertinent policy statement issued by the Commission; and 6) the need to avoid unwarranted sentence disparities among offenders with similar records who have been found guilty of similar conduct (18 U.S.C. § 3583(c)).

One mandatory condition applies whenever a term of supervised release is imposed: that the offender not commit another crime (18 U.S.C. § 3583(d)). The same discretionary conditions that may be imposed with a sentence of probation may also be imposed with supervised release, with the exception of the requirement of remaining in the custody of the Bureau of Prisons. Any condition of supervised release must be reasonably related to the nature of the offense and history of the offender, to affording adequate deterrence to criminal conduct, and to providing correctional treatment; must involve no greater deprivation of liberty than is reasonably necessary for the purposes of affording adequate deterrence to criminal conduct and providing correctional treatment; and must be consistent with any pertinent policy statements issued by the Commission (18 U.S.C. § 3583(d)).

Pursuant to 18 U.S.C. § 3583(e), upon consideration of the same factors that relate to imposing the term of supervised release, the court may: 1) terminate a term of supervised release; 2) after a hearing, extend a term to a maximum term or modify, reduce, or enlarge the conditions of supervised release; or 3) treat a violation of a condition of a term of supervised release as contempt of court under 18 U.S.C. § 401(3).

2. Current Probation Practices

Although presently there are no statutorily required conditions of probation, aside from the requirement that the offender not commit another crime, seven standard conditions of probation are generally imposed. These conditions are not specifically enumerated by the judge at sentencing, but are explained to the offender by the probation officer after sentencing. These conditions require the probationer to:

1. Refrain from violation of any law, and to inform the probation officer immediately if arrested or questioned by a law enforcement officer;
2. Associate only with law-abiding persons and maintain reasonable hours;

3. Work regularly at a lawful occupation and support legal dependents, if any, to the best of the offender's ability. Persons who become unemployed must notify their probation officer immediately;
4. Not leave the judicial district without permission of the probation officer;
5. Notify the probation officer immediately of any change in place of residence;
6. Follow the probation officer's instructions and report as directed; and
7. Report to the probation officer as directed.

The sentencing judge occasionally imposes additional special conditions related to the specific offense or offender.

3. Current Procedures Regarding Violations

Under the present system, a number of considerations by both the probation officer and the court may influence the response to violations of probation. These considerations may include the policies and procedures of the Probation Division or a respective district, an assessment of the offender's overall adjustment to supervision, a personal philosophy of corrections, etc. For example, the individual probation officer may determine whether to report a violation to the court and, if so, whether to request a warrant. Ultimately, the court decides whether to issue a violation warrant after weighing information provided from a variety of sources.

The Probation Division currently distributes a supervision monograph to U.S. Probation Officers that distinguishes between violations of law and technical violations and provides general policy for each. Regarding violations of law, the monograph states that the probation officer should report the violation to the court and in making a recommendation regarding revocation:

"The probation officer must weigh the risk posed by the new offense to the community at large. In most cases the commission of a criminal offense as serious or more serious as that for which the offender is currently on supervision represents an untenable risk to the well-being of the community. A series of arrests or convictions for minor offenses should be thoroughly investigated by the probation officer to determine the risk posed to the community" (*The Supervision Process, Publication 106, Page 18*).

The supervision monograph breaks technical violations into three types. The first, an unacceptable pattern of behavior, involves violations of conditions of supervision that have been associated with serious criminal activity in the offender's past (such as a drug addict not meeting the condition of drug treatment). These violations are to be reported to the court by the U.S. Probation Officer.

The second type of technical violation, flagrant disregard for conditions, involves a willful failure by the probationer to adhere to the conditions of

probation (such as refusal to pay a fine or restitution, or absconding supervision). According to the monograph, flagrant disregard also necessitates a report to the court.

The third type, incidental behavior, involves violations representing "neglect or oversight on the part of the defendant." Here the monograph states that the violations may be reported to the court, but that "the primary responsibility of the probation officer is to bring the person under supervision into compliance" (*id.*, pp. 18-19).

Because supervised release is a new form of supervision created by the Comprehensive Crime Control Act, there are no established policies or procedures for the U.S. Probation Officer regarding its revocation. The Act contains no provisions regarding the revocation of supervised release. Pending legislative proposals, however, seek to grant courts the authority to revoke supervised release. The proposal set forth below is predicated on enactment of such legislation.

4. Commission Proposals

The approach that the Commission outlines below for handling violations of conditions of probation and violations of conditions of supervised release is identical for each up to the point of the judicial determination that violations have been committed. The Commission's approach establishes minimum standards of compliance for the conditions imposed by the judge. The standards would require that, should the person under supervision not adhere to at least the minimum level of compliance established by the Commission, the probation officer, and in some cases the sentencing judge, take action. While a violator's warrant could be requested by the probation officer and issued by the sentencing judge at any time for any violation of any condition, no action would have to be taken by either the probation officer or the sentencing judge until the offender failed to meet minimum levels of compliance.

The action required of the probation officer and the judge for each condition of supervision would depend on whether the noncompliance represented lesser technical violations, serious technical violations, or new criminal behavior.

For lesser violations, including certain petty offenses, the probation officer would generally be allowed to continue casework efforts in dealing with the noncompliance. If violations continue, the court would have to be notified, at which point it would make a determination as to what action, including the issuance of a violator's warrant, should occur. At a specified point of continued violations, a warrant would have to be issued and a violation hearing held. Depending upon the specific condition violated, the court could modify or increase the conditions of supervision, or order revocation.

In the matter of more serious technical violations, the probation officer would have less discretion in providing casework efforts before notifying the court, and the court itself would be required to conduct a violation hearing at earlier stages of noncompliance.

For the most serious of violations, including conduct that constitutes new criminal behavior (except certain petty offenses), the probation officer would have no discretion in reporting the violation and the court would be required to issue a violator's warrant and conduct a violation hearing. Upon a finding that the violation occurred, revocation would be in order.

At a violation hearing where the court elects to increase the sanctions, the conditions imposed would make supervision more restrictive and afford greater control in monitoring the case than the current conditions of supervision provide. Increased sanctions could include conditions such as conditions of custody (for probation cases only), curfew, home detention, association restrictions, participation in a rehabilitation program, submission to urinalysis, and so forth.

Upon revocation of probation, the court would be required to impose a certain sentence. For lesser technical violations a custody sentence at least at the midpoint of the guideline range applicable to the offender at the time he was sentenced to probation would be imposed. For more serious technical violations, a custody sentence at the maximum of the originally applicable guideline range would be imposed. For violations that represent unlawful behavior (except for certain petty offenses), a custody sentence of 90 days beyond the maximum of the originally applicable guideline range would be imposed, provided that the sentence did not exceed the statutory maximum.

Regarding supervised release, upon judicial determination that violation of a condition had occurred, the court would also be required to impose certain sanctions. For lesser technical violations, a custody sentence of 1/6 the term of supervised release, not to exceed 1/6 of the initial term of imprisonment, would be imposed. For more serious technical violations, a sentence of 1/3 of the term of supervised release, not to exceed 1/3 of the initial term of imprisonment, would be imposed. For violations representing new criminal behavior, except for minor law violations, a sentence equal to the total term of the period of supervised release, not to exceed the initial term of imprisonment, would be given. Under this approach, the maximum sentences that could be imposed upon revocation for lesser technical violations, serious technical violations, and new criminal behavior, respectively, would be: for class A and B felonies, six months, one year, and three years; for class C and D felonies, four months, eight months, and two years; and for class E felonies and misdemeanors, two months, four months, and one year.

5. Issues for Comment

The Commission invites public comment on several issues related to violations of probation and supervised release. These include:

1. Which violations of conditions of supervision should be considered less serious and more serious? (See Chapter Four of the guidelines, Determining the Sentence, for a list of proposed mandatory conditions of probation and supervised release, and 18 U.S.C. § 3563(b) for examples of discretionary conditions available to the court.);

2. The extent to which the probation officer should have discretion in dealing with persons under supervision before formally reporting violations to the court;
3. The appropriateness of the sentences proposed above for application to revocation of supervision;
4. Upon revocation, the credit, if any, the offender should receive for time successfully spent on supervision or for compliance with other conditions of supervision such as payment of fine, community service, halfway house residency, or intervals of custody for probationers; and
5. The manner of handling probation violations for organizations.

CHAPTER SIX - OTHER ISSUES

PART A - FINES

The Commission specifically invites comment on the method a court should use to determine the amount of a fine to be imposed on an individual offender. The next part of this chapter invites comment on the method that should be used to determine the amount of a fine to impose on an organization. See Chapter Six, Part B (Organizational Sanctions).

In October 1984, Congress enacted federal statutes that significantly raise the maximum limits on fines that may be imposed on convicted offenders. The new federal sentencing statutes that will take effect with enactment of the guidelines continue those new maximums. Under the new statutes, an individual may be fined up to \$250,000 for a felony or a misdemeanor resulting in death. For any other misdemeanor, an individual may be fined up to \$25,000 and, for an infraction, up to \$1,000. An organization may be fined up to \$500,000 for a felony or a misdemeanor resulting in death, \$100,000 for any other misdemeanor, and \$10,000 for an infraction. 18 U.S.C. § 3571. Organizations convicted of antitrust offenses may be fined up to \$1 million. 15 U.S.C. § 1.

In establishing these new maximums, Congress clearly intended to make the fine a more effective sanction than it has been in the past. Previously, the low fine maximums often resulted in judges avoiding fines as a sentence because they could not be imposed in an amount sufficient to punish or deter. Congress has now granted the courts authority to impose meaningful fines and has charged the Commission with the responsibility to provide guidance in their use.

Under the new law, a sentencing judge contemplating whether to impose a fine must consider the general purposes of sentencing, including, among other things, the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, and afford adequate deterrence to criminal conduct. In addition, the court must specifically consider the following five factors in determining whether to impose a fine, and the amount of the fine, the time for payment, and the method of payment:

- (1) the ability of the offender to pay the fine in view of income, earning capacity, and financial resources (and, if the offender is an organization, the size of the organization);
- (2) the burden the fine will impose on the offender and dependents, relative to the burden imposed by other punishments;
- (3) any restitution made or obligated to be made by the offender;
- (4) any measure an organizational offender has taken to discipline those officials responsible for the offense or to insure against its recurrence; and
- (5) any other pertinent equitable consideration. 18 U.S.C. § 3572(a).

The Commission has identified two approaches for determining the appropriate amount of a fine to impose on an individual offender. Comment is specifically invited on these two approaches as well as on any other method of establishing an appropriate fine that meets Congressional intent. The first approach emphasizes the fine as punishment; the second emphasizes the deterrent effect of the fine.

1. The Proportionate ("Ability to Pay") Approach

The proportionate approach seeks to make the fine punitive in proportion to the offender's financial resources. While a punitive fine may have some deterrent effect, this approach does not purport to maximize deterrence. Under this approach, the sanction unit value of a fine would be expressed in terms of a percentage of the offender's income or assets determined to be "available" for fine payment.

"Available income" could be defined to mean either gross income less taxes paid, or gross income less taxes and that portion of income deemed necessary for housing, food, clothing, and other essential expenses. The first definition would render a greater amount of the offender's income available for fining; the second definition constricts the amount available by permitting the offender to protect a greater share of income from exposure to a fine. The choice of the appropriate technical definition requires resolution of a much more fundamental question about the use of the fine: how punitive is it intended to be?

Choosing the first definition would arguably permit a court to fine an offender to the extent of depriving him/her of all assets and income, including home and most basic possessions. This option affords the court the greatest opportunity to make the fine a truly punitive sanction. The more assets or income that an offender is permitted to shield from exposure to a fine, the more diluted the potential punitive impact of a fine becomes. The Commission invites public comment on whether an offender should be permitted to protect some portion of income or assets from a fine and, if so, which ones and to what extent.

Under either choice, the value of one sanction unit could be expressed, for example, as one percent of the offender's available annual income. Although the real dollar amount of the fine could differ between two offenders convicted of the same offense, the fine would have the same punitive "sting" on both of them in proportion to their respective financial resources. Any restitution obligation, on the other hand, would have to be paid in full regardless of the offender's income; if the court has to choose between imposing financial "suffering" on the offender or the victim, the guideline would direct it to impose the pain on the offender.

Proponents of basing a fine on the offender's resources argue that this approach would have two principal benefits: (1) the sentencing court will be able to impose a fine that actually punishes the offender to the desired degree; and (2) the offender will be able to pay the fine without imposing substantial, and often futile, fine collection burdens on the federal criminal justice system.

With respect to the first benefit, if a court imposes a fine without considering its actual impact on the offender, the fine is likely to be either excessively high or low. Excessively high fines may financially overwhelm the offender and punish unfairly in relation to both the offender's culpability and society's need to deter

others from committing similar crimes. If too low, the offender is not punished and other potential offenders may be encouraged rather than discouraged.

With respect to the second benefit, this approach may ensure that the fine will be an effective sanction. An offender is not punished by a large fine that he/she cannot pay. If, however, the fine is set at an amount that imposes some hardship on an offender in relation to particular financial resources, it can be both punitive and payable. Setting the fine at a punitive but payable level will also benefit the Department of Justice, the Probation Office, and other components of the criminal justice system by reducing the substantial administrative burdens of collecting delinquent fines. The Commission could assure that relatively trivial fines would not be imposed for offenses resulting in serious financial losses either by issuing a guideline directing courts to impose sanctions other than a fine when the offender is too poor or debt-laden to pay a meaningful fine or by establishing a minimum dollar amount per sanction unit.

Attempting to establish a fine that punishes an offender in relation to his or her particular financial status always presents the risk that if the amount is set too high, it may not be paid. The Commission is exploring a variety of approaches used in other contexts, *e.g.*, the consumer credit industry and child support enforcement, that can be adapted to set a fine at the appropriate level. The Commission is also considering other steps a court could take to minimize the risk of nonpayment. One step would be to impose a condition of probation prohibiting the offender from either opening new lines of credit or placing new charges on existing lines until the fine is paid. Another step would be to require that all or a substantial portion of the fine be paid at the time of sentencing, particularly in cases when the fine is imposed as a result of a negotiated plea.

The Commission could also promulgate guidelines or policy statements that would authorize a sentencing judge to impose a fine that exceeds the offender's calculated "ability to pay" level in certain circumstances. For example, the Commission could authorize the judge to impose a greater fine in cases where the court has reason to believe the offender has unreported assets or income, *e.g.*, a drug trafficker, or where the crime caused a large, but unquantifiable loss to unidentified victims, *e.g.*, environmental pollution.

2. The Harm-Based Deterrent and Compensation Approach

This approach is based on the premise that fines should compensate society for the wrong done and deter future criminal conduct. According to theory, the monetary penalty best suited to achieving these purposes is a multiple of the harm caused by the criminal act, plus an amount representing the cost of enforcement. (The size of the multiple depends upon how likely offenders are to be caught and what additional punishments, including restitution, are imposed.) The financial resources of the offender are a secondary consideration; the conduct and its consequences matter most.

This proposed approach starts with an estimate of the monetary value of the harm caused. Where this is difficult to assess, the gain to the offender might be used as a substitute. The guideline for each offense would specify a multiplier and a suggested method for estimating the harm, including a base value. For some crimes,

such as price fixing, the fine might be based upon a substitute indicator of the harm, such as the volume of commerce affected. For drug offenses, it might be based upon the value of the drugs sold or the offender's estimated income from the sale of drugs. For crimes primarily involving non-economic harms, the guidelines would specify a fine amount that would vary depending upon the extent of harm or risk created. Fines would be collected only after the offender made restitution to victims.

Once the fine had been calculated, the particular offender's present or prospective ability to pay the fine would be taken into account. Familial obligations, employment history, job skills, apparent standard of living, and probable assets (including those, such as fruits of the crime, that might be concealed) would be evaluated. This procedure could be bypassed for small fines or if the offender admitted an ability to pay the prescribed fine.

If the judge determined that there was a reasonable possibility that the offender would be able to pay the prescribed fine, the judge would impose that fine, establishing an appropriate payment schedule and making use of the civil enforcement provisions in 18 U.S.C. § 3613 to ensure payment. If the offender later failed to pay the fine, the judge would proceed in accordance with 18 U.S.C. § 3614. Offenders who refuse to pay the fine even though they have the ability to do so would be resentenced, probably to prison. If, on the other hand, the offender made a good-faith effort to pay the fine, the judge could (1) extend the payment terms; (2) sentence the offender to an alternative form of punishment, such as community service; (3) waive the unpaid portion of the fine if the total sanction has been sufficient; or (4) sentence the offender to prison, but only if no other alternative would adequately serve the purposes of just punishment and deterrence. If at the time of initial sentencing it was clear that the offender would be unable to pay the entire fine, the judge would impose a lesser fine and consider options (1) through (4) described above.

Proponents of this system argue that it has the advantages of:

- (1) to the extent possible, forcing the offender to compensate society for his/her wrongs;
- (2) ensuring that, for all offenders, the sanction imposed will be sufficient to provide just punishment and deterrence;
- (3) avoiding demeaning the seriousness of the offense by appearing to recommend trivial fines (e.g., the guideline punishment for stealing \$10,000 could never be a fine of \$1,000);
- (4) avoiding the injustice of imposing a huge fine on someone for a trivial offense merely because the offender may be wealthy;
- (5) minimizing discrimination on the basis of socioeconomic status;
- (6) avoiding incentives for offenders to dissipate their assets or lie about their financial resources;

- (7) making it possible to impose large fines on persons, such as major drug dealers, whose financial resources may be large but difficult to establish; and
- (8) it gives the sentencing judge greater flexibility than any approach that relies upon a formula.

3. Additional Issues

The Commission also invites comment on whether the cost of investigating and prosecuting the case should be taxed to the convicted offender as part of a fine, regardless of the approach taken to calculate the amount of the fine. If so, what standard of proof should the government be required to meet to establish the cost and what procedures, if any, should the court establish to determine the government's claim for reimbursement?

PART B - ORGANIZATIONAL SANCTIONS

The Commission specifically invites comment on the appropriate sentencing of organizational offenders. The oral testimony and written submissions presented to the Commission in connection with its June 10, 1986 hearing on organizational sanctions have been very helpful in framing the issues and proposing possible solutions. The Commission invites public comment on the key questions it has yet to resolve in this area.

The principal provision of the Comprehensive Crime Control Act affecting the sentencing of organizations is 18 U.S.C. § 3551(c). That section requires the sentencing court to impose a term of probation or a fine on a convicted organization. Section 3551(c) also authorizes a court to impose a fine as a condition of probation, and permits a court to order a forfeiture of property pursuant to 18 U.S.C. § 3554 (when an organization is convicted of racketeering or drug offenses), a notice to victims pursuant to 18 U.S.C. § 3555, or restitution pursuant to 18 U.S.C. § 3556.

The statutory provisions affecting the imposition of fines and probation on organizations are described below, followed by two alternative approaches to their implementation. The Commission invites comment on the approaches presented as well as on any other approach, and the appropriate use of forfeiture, notice to victims, and restitution.

1. Fines

Under 18 U.S.C. § 3571(b)(2), an organization convicted of a felony, or of a misdemeanor resulting in the loss of human life, may be fined up to \$500,000. An organization may be fined up to \$100,000 upon conviction of any other misdemeanor, and up to \$10,000 upon conviction of an infraction. Organizations convicted of antitrust offenses may be fined up to \$1 million. 15 U.S.C. § 1.

As noted previously in the discussion of fines in the previous Part, a court contemplating whether to impose a fine on an organization must consider the general purposes of sentencing, including the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and afford adequate deterrence. In determining whether to impose a fine, the amount of a fine, and the time and method of payment, the court must also consider the following five specific factors:

- (1) the ability of the organization to pay the fine in view of its income, earning capacity, financial resources, and size;
- (2) the nature of the burden the fine will impose on the organization relative to the burden imposed by other punishments;
- (3) any restitution made or obligated to be made by the organization;
- (4) any measure the organization has taken to discipline those officials responsible for the offense or to insure against its recurrence; and
- (5) any other pertinent equitable consideration. 18 U.S.C. § 3572(a).

Section 3572(b) of Title 18 limits the aggregate amount of a fine that may be imposed on a offender convicted of different offenses that "arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage" to twice the amount that may be imposed for the most serious offense. The greatest amount, therefore, that could be imposed on an organization convicted of multiple felonies arising from a common scheme that did not cause "separable or distinguishable kinds of harm or damage" is \$1 million. The statute does not discuss the maximum fine that could be imposed when separable or distinguishable kinds of harm or damage result.

The appropriate role of fines as organizational sanctions is a major consideration of the Commission. Fines may accomplish the purposes of just punishment and deterrence, but those two purposes have different implications for the structure of fines. Just punishment may compel judges to impose a fine in terms of a percentage of the organization's income or wealth. By this standard, large organizations would probably receive a higher fine than small organizations convicted of the same crime.

By contrast, when deterrence is the primary concern, the size of the fine would be determined by the injury resulting from the criminal act and the difficulty of discovering the crime. The fine would, at least in theory, be determined by multiplying the amount of damage (or harm) intended or done by a factor representing the likelihood of detection and conviction. Fines would always be a multiple of the harm intended. The lower the likelihood of detection, the higher the multiplier and hence the higher the fine. Those criminal acts most difficult to discover would be punished most severely. Given equal difficulties of discovery, those criminal acts likely to cause more harm will be punished more severely. The offender's ability to "harm and hide" determines the punishment. Ability to pay would not be a factor in setting the level of the fine, although it might be important in devising a payment schedule.

The Commission seeks comment on whether its approach to fines should emphasize the organization's culpability and ability to pay, or the harmfulness of its conduct and the likelihood of detection. In addition, the Commission solicits public comment on which aspects of the "size of the organization," as that term is used in 18 U.S.C. § 3572(a)(1), should be considered in sentencing.

2. Probation

An organization convicted of an offense may be sentenced to a term of probation unless the offense is a Class A or B felony (a crime punishable by a maximum term of imprisonment of 20 years or more) or is an offense for which probation has been expressly precluded. An organization convicted of a Class C, D, or E felony may be sentenced to probation for not less than one nor more than five years. An organization convicted of a misdemeanor may be sentenced to probation for up to five years, and one convicted of an infraction may be sentenced to probation for not more than one year. 18 U.S.C. § 3561.

Where sentencing an organization to probation for a felony, the court must impose the following conditions on the offender: (1) the organization must not commit another federal, state, or local crime while on probation; and (2) the organization must either pay a fine, make restitution, or perform community service. 18 U.S.C. § 3563(a). The only mandatory condition imposed upon probationers convicted of a misdemeanor or an infraction is the requirement that they commit no further crimes while on probation.

In addition to those mandatory conditions, organizations may receive any of the discretionary conditions of probation permitted for individual probationers. (See 18 U.S.C. § 3563(b)), with the exception of 18 U.S.C. § 3563(b)(6), which permits a court to disqualify only an individual offender from a specific occupation, business, or profession.)

The Commission seeks comment on the types of probation conditions that might be imposed and the circumstances that would justify their imposition, including but not limited to the use of internal audits and disciplinary actions; the appointment of outside directors or supervisors; recommendations for debarment or ineligibility for federal contracts, grants, or subsidies; charitable contributions; community service; and publicity about the organization's misdeeds and subsequent corrective action.

The Commission also seeks comment on when probation should be used rather than a fine and when the two should be used together. In addition, the Commission seeks comment on the appropriate term of probation to be imposed on an organization. Finally, the Commission requests public comment on when modification or revocation of an organization's probation might be appropriate.

3. Possible Approaches to Sanctioning the Organization

The alternative approaches to the use of organizational sanctions are based on just punishment and deterrence philosophies. These general approaches are presented for comment.

A. The Just Punishment Approach

The just punishment approach retains the guidelines concepts of the offense value for measuring the severity of the organization's offense and the sanction unit for establishing the appropriate quantity of punishment. The offense values for organizations would be the same as for individuals, but different adjustment multipliers would be used to measure the organization's culpability. Adjustments to offense values could be made, for example, on the basis of whether the crime resulted from a conscious plan of top management or by the independent actions of lower echelon employees, or whether the organization took steps to discipline responsible employees prior to indictment.

The guideline might then establish fines and conditions of probation to be imposed for various ranges of sanction units and, in some circumstances, permit the court to impose additional penalties. For instance, if the organization's sanction units totalled 50 or less, the guideline could mandate a fine within a range of relatively low percentages of the organization's income or assets and conditions of probation requiring the organization to correct the harm caused by its conduct.

Similarly, sanction units totalling 50-100 could result in a fine within a higher range and additional conditions of probation, such as the appointment of outside counsel to prepare a report for distribution to shareholders on how the offense actually occurred. An offense resulting in 100 sanction units or more could be punished by a fine within a range capped by the statutory maximum. The court could also be required to impose the previously noted probation conditions, and permitted to impose additional necessary conditions, such as a restructuring of management to avoid future criminal conduct, the discipline or removal of organizational officers, and a limitation on the organization's activities in certain markets or for certain periods of time.

Other types of sentences, such as restitution, forfeiture, community service, and notice to victims, and discretionary conditions of probation such as publicity concerning the organization's conviction, could also be imposed regardless of the number of sanction units.

B. The Harm-Based Deterrence and Compensation Approach

The philosophy underlying the deterrence and compensation approach is that fines should both deter organizations from engaging in criminal conduct and compensate society for the harm that the organization's acts cause. Because organizations are motivated almost entirely by economic self-interest, the obvious way to deter them from committing crimes is to make crime unprofitable.

In order to ensure that society is compensated for the harm caused by all criminals, this approach requires that the fine be set at a level equal to the harm caused by the crime divided by the probability of conviction. This same fine would also make crime unprofitable, so that deterrence should be achieved.

Implementation of this approach requires estimation of two elements of the fine computation: the value, converted into money, of all harm caused and the probability of conviction. For purely monetary crimes, estimating the harm is straightforward. For many cases involving non-economic injuries, the government

already calculates a suitable estimate of the harm -- for example, the cost of clean-up in a toxic waste dumping case. For other crimes, the guidelines could substitute the offender's economic gain or specify a rule assigning monetary to various types and levels of harm. Offense values or sanction unit scores would not be utilized as a guide to setting fines because those numbers are based primarily on judgments about how long individuals should be imprisoned, not how much harm they caused. For this reason, the proposed just punishment approach, which makes the fine directly proportional to the offense value and the wealth of the organization would actually place heavier emphasis on wealth than the harmfulness of the conduct.

The probability of conviction would be based upon estimates of the level of occurrence of each crime type compared to the level of detection and conviction. The probability would be adjusted based upon the organization's actions in the specific case. If, for example, the organization notified authorities immediately upon learning of the crime, the probability of conviction might be treated as near certainty, resulting in a multiplier of one. On the other hand, if the organization took elaborate measures to conceal the crime, the probability would be treated as small, resulting in a large multiplier. An amount representing the cost of detecting crimes and convicting offenders would be added to the fine.

At least three additional considerations would enter into setting the actual fine amount. First, to the extent that the responsible employees had been identified and punished, the fine for the organization would be lowered. This might result in somewhat larger fines on average for large organizations, where the responsible individuals tend to be more difficult to identify. Second, to the extent that the organization was subject to civil penalties, the fine also would be lower. This is particularly important for regulatory crimes, where the civil and criminal enforcement schemes often are interrelated. For example, an antitrust violator would be fined more when the government is the victim, because the government can only recover actual damages in a civil action, whereas private plaintiffs can recover treble damages. Third, the assets and projected earnings of the organization would be considered insofar as they affect its ability to pay the fine.

Consideration of ability to pay presents difficult problems. Imposing a fine so high that it might force a firm into bankruptcy seems undesirable because of the effects on relatively innocent parties, such as creditors and employees. However, if fines are lowered to prevent this from occurring, crime will be a good bet for the organization, and a good bet is sure to marginal firms will be encouraged to commit crimes. If firms cannot be profitable without engaging in criminal conduct, it might be better to force them out of business.

This is a prime area in which conditions of probation and other alternative sanctions designed to remove the actual wrongdoers from management and impose the cost of punishment on them might be desirable. We invite comment on what sanctions would achieve this objective. Although it seems undesirable at first glance, we suggest consideration of whether forcing an organization into Chapter 11 reorganization through imposition of a large fine might be consistent with these goals, since the bankruptcy court would be authorized to appoint new management which could continue the business and simultaneously pursue civil remedies against the offending management. Creditors might not be injured because of the lower priority that fines and penalties have relative to general unsecured claims in bankruptcy. Although shareholders would be likely to suffer, that happens whenever

a fine that exceeds the organization's gains is imposed. The organizations most likely to be driven into bankruptcy by the imposition of large fines might well be relatively small firms in which there is a substantial overlap between management and shareholders. If that is the case, the burden of the fine ultimately would fall on the responsible parties.

PART C - PLEA AGREEMENTS

The Commission specifically invites comment on issues relating to the role of plea agreements under the guidelines. Congress has directed the Commission to promulgate general policy statements for consideration by federal judges in deciding whether to accept or reject a plea agreement. 28 U.S.C. § 994(a)(2)(D). The legislative history of this provision reflects concern that plea agreements might be used to undermine guidelines. S. Rep. No. 225, 98th Cong., 1st Sess. 63 (1983). Policy statements are therefore needed to insure responsible plea negotiation practices that do not perpetuate unwarranted sentencing disparities.

Public comment is specifically requested on the following issues related to plea agreements.

- (1) What are the appropriate limits on judicial scrutiny of plea agreements?
- (2) What standards should a sentencing judge apply in evaluating whether a plea agreement is acceptable according to the letter and spirit of the sentencing guidelines?
- (3) What is the impact of the Sentencing Reform Act on "charge bargaining" under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure?
- (4) What is the impact of the Sentencing Reform Act on "sentence bargaining" under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure?
- (5) To what extent can prosecutors and defense attorneys stipulate to the underlying facts of an offense and the offender's characteristics when such factors determine the sentencing result?

PART D - COMMUNITY CONFINEMENT AND HOME DETENTION

The Commission is considering the use of community confinement and home detention as appropriate conditions of probation or supervised release for certain offenders. Community confinement would involve a condition of supervision requiring residency in a community treatment center, restitution center, or other community residential facility, along with additional conditions such as community service, employment, and treatment. Home detention would involve conditions of supervision including a curfew, community service, employment and/or treatment, and would require the probation officer to maintain a high degree of contact with the individual

on supervision. These sanctions are described further in Sections A414 and A415, respectively.

1. As a Condition of Probation

The Commission is attempting to determine the categories of probationers for whom community confinement and home detention would be suitable sanctions. Many serious offenders will automatically be excluded from placement in a community confinement or home detention program as a condition of probation because the guidelines will not permit them to be sentenced to probation. When the guidelines do permit probation, a sentencing court may decide that community confinement or home detention affords acceptable levels of punishment or control for an offender who the court believes requires supervision but not imprisonment.

The Commission specifically invites comments on the following questions:

What purposes of sentencing might best be fulfilled through such sanctions? Which category of offenders and offenses should be eligible for those programs? What offender characteristics, e.g., a history of violent or sexually assaultive conduct, should exclude an offender from consideration for these programs? Would community residential correctional facilities and probation resources be misspent if an individual with "low risk" for recidivism was placed in such a program for punitive purposes?

2. As a Condition of Supervised Release

In conjunction with supervised release (where the offender has completed a prison term and is under supervision) other questions as to which offenders should be placed into programs of community confinement and home detention are appropriate. Because Congress intended the purpose of punishment to be fulfilled by way of the individual having served a prison term, that purpose may not statutorily be considered in determining whether to place an offender on supervised release. Sec 18 U.S.C. § 3583(d).

For purposes of monitoring, control, or providing rehabilitative services, however, the Commission solicits public comment in determining which of these purposes might be most appropriately fulfilled through these programs. Which categories of offenders and offenses should be eligible for placement into these programs, and which should be excluded? For example, should violent criminals who might not be placed in community confinement on probation be placed in such confinement on supervised release as a means of control and assimilation back into the community?

PART E - DETERMINING OFFENSE VALUES FOR MULTIPLE CRIMES

Comment is solicited on how to calculate the offense value for multiple crimes. How should the guidelines treat a bank robber who pistol whips three (or ten) tellers, a conman who sends 10,000 letters defrauding each recipient of \$10, or a drug dealer who shoots a police officer, while endangering several others?

The Commission could resolve some fundamental issues in this area with the following basic rules:

1. Where one crime is charged (and conviction obtained), take into account only uncharged conduct that the guideline for the crime of conviction explicitly cross-references. (This rule flows from the proposed approach to modified offense sentencing in part VII of Chapter One).
2. Where the offender is convicted of several crimes that are not related, add the offense values (as determined by the guidelines) for each separate crime.
3. Where the offender is convicted of an inchoate crime and also the related completed crime, ignore the inchoate crime. (This is the traditional merger rule.)
4. If the offender, during a single course of conduct, has committed a financial crime or caused financial injury more than once, add the financial injuries (on the basis of the relevant guideline tables) to determine the total offense value for that series of crimes. Treat similarly other offenses, such as drug offenses, where guideline sentences rest upon quantities.
5. When an offender is convicted of two or more crimes arising out of the same course of criminal conduct, apply the appropriate guideline to each conviction; insofar as the conduct underlying the conviction overlaps, eliminate any overlapping offense value (using the higher offense value in case of conflict).

The rule presented below is particularly suitable for public comment:

6. If more than one offense is committed or injury results during the same course of conduct, add the offense values of the three most serious injuries or crimes (after calculating the offense values for each according to rules 1-5) and ignore the others.

If no rule is adopted limiting multiple injuries, the guidelines will produce seriously anomalous results where there are many injuries or threats of injury during the same course of conduct. A car driver, for example, who recklessly runs a busload of passengers off the road would receive 50 times the penalty imposed on a similar person who knocked a bus with only one passenger off the road; yet the underlying conduct is the same. An offender who threatened one hundred people with physical injury would receive one hundred times the punishment imposed on an offender who threatened one person. Of course, in each example the multiple injuries caused are considerably worse than the single injury and courts should increase the sentence to reflect that difference. The Commission does not believe that the sentence should rise directly in proportion to the number of victims involved. That is not because the injury to the fiftieth victim is any the less serious than the injury caused the first. Rather, viewed from a just punishment perspective, it is because one who hurts three people is already so highly culpable that injuring three more is not viewed as twice as bad. Viewed from a crime control perspective, the penalty for injuring three people is likely to be severe

enough to deter the conduct in question; a sentence twice as severe is not needed to deter injury to six.

The Commission has considered certain alternatives to Rule (6). For example, the injuries could be added up to a multiple other than three. Or, a multiplier could be used that diminishes according to a mathematical formula as the number of separate injuries increases (as with the approach taken with financial injuries and drugs).

The Commission requests comment on the proposed rules set forth above as well as suggestions regarding workable and just alternative approaches.

PART F - TREATMENT OF UNUSUAL AGGRAVATING OR MITIGATING FACTORS

The Commission requests comment on the treatment of aggravating or mitigating factors that occur only rarely but are serious concerns in the few cases where they do arise. Examples of such mitigating factors might be the presence of a serious mental disability that did not rise to the level of a successful defense, self-defense, coercion, necessity, provocation, or a criminal act done for merciful purposes, e.g., euthanasia. An example of a rare, but serious aggravating factor would be extremely barbaric behavior by the offender.

The Commission has identified several options for considering these factors. One would be to promulgate a guideline expressly permitting the court to go outside the guideline range where the factor was demonstrated to be present. The guideline could establish a general standard of proof, or specific standards for each circumstance. If the court determined the factor present, the guideline could establish a certain range or amount by which the sentence could be adjusted. Another approach would be to establish separate Chapter Three adjustment multipliers for each factor.

The Commission invites comment on (1) what specific unusual factors should be considered so compelling as to warrant special treatment; (2) the standards of proof that should govern the court's inclusion of any such factor in sentencing; and (3) the method by which the Commission should permit courts to take these factors into consideration.

CONCLUSION

As its work has progressed, the Commission has become increasingly aware of the difficulties of foreseeing and capturing in a single set of guidelines the vast range of human conduct likely to be relevant to a sentencing decision. For this reason, the Commission has concluded that the guideline writing process is a continuing one, to be carried on with progressive changes over a period of many years, as Congress contemplated in establishing a continuing Commission. Congress realized, and the Commission agrees, that greater knowledge and experience can only improve the guidelines over time.

The Commission will collect and carefully analyze public response to these guidelines. After the guidelines become effective, the Commission will carefully

consider the reasons articulated by sentencing judges for departure from the guidelines and the impact of the guidelines on all aspects of the federal criminal justice system. Guided by this analysis, the Commission will then refine future versions of the guidelines. Reason, analysis, actual practice, and public comment all will be used to produce, over the years, a progressively more informed, just, and workable set of guidelines.

UNITED STATES SENTENCING COMMISSION

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STATUTORY INDEX TO GUIDELINES

This Index lists only those provisions of the United States Code
for which preliminary sentencing guidelines have been drafted.

| <u>Title & Section</u> <u>Offense</u> | <u>Max. Penalty*</u> | <u>Guideline Section</u> |
|---|----------------------|------------------------------|
| TITLE 2 - CONGRESS | | |
| 2 U.S.C. §437g(d)(1)(A) Knowingly and willfully violating any provision of Federal Election Campaign Act of 1971 which involves the making, receiving, or reporting of any contribution or expenditure aggregating \$2,000 or more during a calendar year | 1 yr. | §H225 |
| (C) If fraudulent misrepresentation of campaign authority, above penalties apply without regard to whether amount involved is \$1,000 or more | 1 yr. | §F211 |
| TITLE 8 - ALIENS AND NATIONALITY | | |
| 8 U.S.C. §1252(e) Willful failure on part of alien against whom a final order of deportation is outstanding to depart or whoever hampers his departure | 10 yrs. | §L212, §L213 |
| 8 U.S.C. §1306 (a) Willful failure to register | 6 mos. | §F211 |
| (b) Failure to notify of change of address | 30 days | §F211 |
| (c) Fraudulent statements | 6 mos. | §F211 |
| (d) Counterfeiting certificates of alien registration | 5 yrs. | §B241 |
| 8 U.S.C. §1324(a) Knowingly bringing in and harboring certain aliens (including attempts) | 5 yrs. | §L211, §L213 |
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| 8 U.S.C. §1326 Reentry of deported alien | 2 yrs. | §L211, §L212 |
| 8 U.S.C. §1327 Aiding subversive alien to enter | 5 yrs. | §L211 |
| 8 U.S.C. §1328 Importation of alien for immoral purpose | 10 yrs. | §L211 |

TITLE 15 - COMMERCE AND TRADE

| | | | |
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| 15 U.S.C. §1 | Illegal trust in restraint of trade: if corporation; if other person | \$1,000,000 3 yrs. | §R211 |
| 15 U.S.C. §2 | Monopolizing trade: if corporation; if other person | \$1,000,000 3 yrs. | §R212 |
| 15 U.S.C. §3 | Illegal trust in restraint of trade: if corporation; if other person | \$1,000,000 3 yrs. | §R211 |
| 15 U.S.C. §8 | Illegal trust in restraint of import trade | ≥ 3 mos. ≤ 1 yr. | §R211 |
| 15 U.S.C. §13a | Discrimination in rebates, discounts or advertising service charges; underselling for purpose of destroying competition | 1 yr. | §R212 |

Domestic Securities

| | | | |
|----------------|---|--------|--------------|
| 15 U.S.C. §77e | (a) Sale or delivery after sale of unregistered securities through the mails | 5 yrs. | §S211, §S217 |
| | (b) Sending a prospectus not meeting the requirements of §78j through interstate commerce | 5 yrs. | |
| | (c) Use of the mails to sell or buy through the use of prospectus or otherwise any security unless a registration statement filed | 5 yrs. | |
| 15 U.S.C. §77f | All securities must be registered by filing a registration statement | 5 yrs. | §S217 |
| 15 U.S.C. §77g | Certain information must be contained in a registration statement | 5 yrs. | §S217 |
| 15 U.S.C. §77j | Certain information required in a prospectus | 5 yrs. | §S217 |
| 15 U.S.C. §77q | (a) Use of interstate commerce for purpose of fraud or deceit in the offer or sale of any security | 5 yrs. | §S217 |
| | (b) Use of the mails to publish, etc. any notice, etc. which, though not pur- porting to offer a security for sale, describes such security for consideration without fully disclosing the receipt of such consideration | 5 yrs. | §S217 |

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| 15 U.S.C. §77w_Misrepresentations | 5 yrs. | §S211, §S217 |
| 15 U.S.C. §77x_Penalties: A willful violation of any of the above provision or the willful making of any untrue statement of a material fact or omitting to state any material fact required or necessary to make statements not misleading in a registration statement | 5 yrs. | §S211, §S217 |

Trust Indentures

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| 15 U.S.C. §77eee_(a)Information required for a trust indenture to be registered | 5 yrs. | §S217 |
| (c)Information required in a prospectus | | §S217 |
| 15 U.S.C. §77fff_(a)Use of interstate commerce to sell an unregistered security not issued under indenture through the use of any prospectus or for the purpose of sale of for delivery after sale | 5 yrs. | §S211 or §S217 |
| (b)Unless accompanied by a written statement containing information specified in §77eee(c) | | |
| (c)Unlawful to use the mails to offer to sell through the use of any prospectus any security which is not registered under the Securities Act of 1933 and to which this subsection is applicable unless such security is issued under an indenture | | |
| 15 U.S.C. §77xxx___Misrepresentation | 5 yrs. | §S211 |
| 15 U.S.C. §77yyy___Penalties for violation of Trust Indenture Act | 5 yrs. | §S211, §S217 |

Securities Exchanges

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| 15 U.S.C. §78e_Provisions regarding exchanges, members, through and brokers | 5 yrs. | §S217 |
| 15 U.S.C. §78h | | |
| 15 U.S.C. §78i_Manipulation of security prices | 5 yrs. | §S213 |
| 15 U.S.C. §78j_Manipulative and deceptive devices | 5 yrs. | §§S211-S214 §S217 |
| 15 U.S.C. §78k_Trading by members of exchanges, brokers, and dealers | 5 yrs. | §S217 |

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| 15 U.S.C. §78k-1__Registration of securities information processors; reports of purchase or sale of qualified securities; limiting registered securities transactions to national securities exchanges | 5 yrs. | §S217 |
| 15 U.S.C. §78l__Registration requirements for securities | | §S217 |
| 15 U.S.C. §78m_Periodical or other reports | 5 yrs. | §S217 |
| 15 U.S.C. §78n_Proxies | 5 yrs. | §S211, §S214 §S217 |
| 15 U.S.C. §78o__Provisions relating to brokers and through dealers 15 U.S.C. §78o-4 | 5 yrs. | §S217 |
| 15 U.S.C. §78p_Directors, officers, and principal stockholders | 5 yrs. | §S217 |
| 15 U.S.C. §78q_Records and reports | 5 yrs. | §S217 |
| 15 U.S.C. §78q-1__Registration of leasing agencies | 5 yrs. | §S217 |
| 15 U.S.C. §78s_Registration, responsibilities, and oversight of self-regulatory organizations | 5 yrs. | §S217 |
| 15 U.S.C. §78t_Liability of controlling persons | 5 yrs. | §S217 |
| 15 U.S.C. §78u_Refusal to obey subpoena | 1 yr. | §S215 |
| 15 U.S.C. §78x_Unlawful disclosure of any information contained in statement, report, etc. by a member or employee of SEC | 5 yrs. | §S217 |
| 15 U.S.C. §78z_Unlawful representations | 5 yrs. | §S211, §S217 |
| 15 U.S.C. §78bb_Exchange, broker, dealer commissions | 5 yrs. | §S217 |
| 15 U.S.C. §78dd_Foreign securities exchanges | 5 yrs. | §S217 |
| 15 U.S.C. §78ff_Penalties: (a) Any person who willfully violates any above provision or any rule or regulation thereunder, or any person who willfully and knowingly makes any statement in any report, etc. which is false or misleading | 5 yrs. | §§S211-S214 §S217 |

Securities Investor Protection

15 U.S.C. §78jjj(c) SIPC members --Concealment of assets;
false statements or claims; fraudulent
conversion 5 yrs. §§S211, §F211

Public Utility Holding Companies

15 U.S.C. §79d Provisions affecting utility holding
through companies 5 yrs. §S217
15 U.S.C. §79q

15 U.S.C. §79r Refusal to obey subpoena 1 yr. §S215

15 U.S.C. §79v Public disclosure of information filed
with the SEC 5 yrs. §S217, §H235

15 U.S.C. §79z-1 Disability of controlling person;
preventing compliance with law 5 yrs. §S217

15 U.S.C. §79z-2 Representation of guaranty or recommend-
ation by U.S. 5 yrs. §S217

15 U.S.C. §79z-3 Penalties: 5 yrs. §S211, §S217
Any person who willfully violates any
above provision or any rule or regulation
thereunder, or any person who willfully makes
any statement or entry in any application,
etc. knowing such to be false or misleading,
or any person who willfully destroys, etc.
any account, etc. required to be kept

Investment Companies

15 U.S.C. §80a-7 Transactions by unregistered investment
companies 5 yrs. §S217

15 U.S.C. §80a-8 Registration of investment companies 5 yrs. §S217

15 U.S.C. §80a-9 Ineligibility of certain affiliated persons
and underwriters 5 yrs. §S217

15 U.S.C. §80a-10 Affiliations or interest of directors,
etc. 5 yrs. §S217

15 U.S.C. §80a-11 Offers to exchange securities 5 yrs. §S211, §S214
§S217

15 U.S.C. §80a-12 Regulatory provisions affecting investment
through companies 5 yrs. §S217
15 U.S.C. §80a-19

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| 15 U.S.C. §80a-20 | Proxies; voting trusts; circular ownership | 5 yrs. | §S214,§S217 |
| 15 U.S.C. §80a-21 | Regulatory provisions affecting investment through companies | 5 yrs. | §S217 |
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| 15 U.S.C. §80a-33 | Destruction and falsification of reports and records | 5 yrs. | §S211, §S217 |
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| 15 U.S.C. §80a-54 | Regulatory provisions affecting business through development companies | 5 yrs. | §S217 |
| 15 U.S.C. §80a-64 | | | |

Investment Advisors

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| 15 U.S.C. §80b-5 | Investment advisory contracts | 5 yrs. | §S217 |
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| 15 U.S.C. §80b-10 | Public disclosure of information by SEC, member, etc. | 5 yrs. | §S217 |
| 15 U.S.C. §80b-17 | Penalties: Any person who willfully violates any above provision | 5 yrs. | §S211-§S217 |

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| 15 U.S.C. §298 | Importing falsely stamped gold or silver; deviation from standard of fineness of gold or silver articles | 3 mos. | §B241 |
| 15 U.S.C. §645(a) | False statements in obtaining aid to small business | 2 yrs. | §F211 |
| 15 U.S.C. §645(b) | Embezzlement of aid to small business funds; | 5 yrs. | §B211 |
| | revealing insider information; | 5 yrs. | §H235 |
| | or making false entry | 5 yrs. | §F211 |
| 15 U.S.C. §645(c) | Concealment, etc. of property held, etc. by SBA > \$100; | 5 yrs. | §B211 |
| | value of property ≤ \$100 | 1 yr. | |
| 15 U.S.C. §714 | False statements to obtain money from Commodity Credit Corp; embezzlement; | 5 yrs. | §F211 |
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Chapt. 24 - Transportation of Gambling Device

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| 15 U.S.C. §1173 | Manufacturers and retailers failing to register or maintain records | 2 yrs. | §E231 |
| 15 U.S.C. §1174 | Mislabeling gambling devices for shipment | 2 yrs. | §E233, §E236 |
| 15 U.S.C. §1175 | Gambling devices in D.C., Indian country or specific jurisdiction | 2 yrs. | §E236 |
| 15 U.S.C. §1176 | Penalty for gambling device violations (above) | 2 yrs. | §E231, §E233 |

Chapt. 31 - Destruction of Property Moving in Commerce

| | | | |
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Chapt. 41 - Consumer Credit Protection

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| 16 U.S.C. §170 | Damaging property in Glacier National Park | 6 mos. | §B222 |
| 16 U.S.C. §198c | Damaging property in Rocky Mountain National Park | 6 mos. | §B222 |
| 16 U.S.C. §395c | Damaging property in Hawaii National Park | 6 mos. | §B222 |
| 16 U.S.C. §413 | Defacing, removing or destroying any structure in any national military park | ≥ 15 days-1 yr. | §B222 |
| 16 U.S.C. §433 | Destroying or appropriating historic monument or object owned by U.S. | 90 days | §B222 |
| 16 U.S.C. §470ee | (a) The knowing unauthorized excavation, removal, damage, alteration or defacement of archeological resources | 1 yr. | §B222 |
| | If value and cost of repair > \$5,000 | 2 yrs. | |
| | If 2nd or subsequent violation | 5 yrs. | |
| 16 U.S.C. §718e,g | (b) Altering or counterfeiting migratory bird hunting stamp | 16 U.S.C. §707 | 6 mos. §B241 |
| 16 U.S.C. §831t | (a) Larceny embezzlement and conversion of TVA property; | 5 yrs. | §B211 |
| | (b) False entry, report or statement; | 5 yrs. | §F211 |
| | (c) Conspiracy to defraud | 5 yrs. | §F211 |

TITLE 18 - CRIMES

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| 18 U.S.C. §35(b) Willfully and maliciously making false report concerning destruction or threatened destruction of aircraft or motor vehicles | 5 yrs. | §F211 |

Chapt. 5 - Arson

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| 18 U.S.C. §81 Arson on federal property; of dwelling or life threatening | 5 yrs. 20 yrs. | §B213 |
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Chapt. 7 - Assault

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| 18 U.S.C. §111 Assault on federal officers, with dangerous weapon | 3 yrs. 10 yrs. | §A221-§A225 |
| 18 U.S.C. §112(a) Assault on foreign official, with dangerous weapon | 3 yrs. 10 yrs. | §A221-§A225 |
| 18 U.S.C. §113(a) Assault with intent to murder or rape | 20 yrs. | §A221-§A225, §A234 |
| 18 U.S.C. §113(b) Assault with intent to commit any other felony | 10 yrs. | §A221-§A225 |
| 18 U.S.C. §113(c) Assault with a dangerous weapon | 5 yrs. | §A221-§A225 |
| 18 U.S.C. §113(d) Assault by striking | 6 mos. | §A221-§A225 |
| 18 U.S.C. §113(e) Simple assault | 3 mos. | §A221-§A225 |
| 18 U.S.C. §113(f) Assault causing serious bodily injury | 10 yrs. | §A222-§A224 |
| 18 U.S.C. §114 Maiming within maritime and territorial jurisdiction | 20 yrs. | §A222-§A223 |

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| 18 U.S.C. §115_(b)(1) Assault on member of Federal official's family with intent to interfere with Federal official | 18 U.S.C. §111 | §A221-§A225 |
| 18 U.S.C. §115_(b)(2) Kidnapping member of Federal official's family | 18 U.S.C. §1201 | §A242 |
| 18 U.S.C. §115_(b)(3) Murder or attempted murder of member of Federal official's family | 18 U.S.C. §1111, 1113 | §A211-§A216 |

Chapt. 9 - Bankruptcy

| | | |
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| 18 U.S.C. §152_Concealment, false claims | 5 yrs. | §F211 |
| 18 U.S.C. §153_Embezzlement by trustee | 5 yrs. | §B211 |

Chapt. 12 - Civil Disorders

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| 18 U.S.C. §231_(a)(1) Teaching use or making of firearm, explosive or incendiary device knowing same will be unlawfully used in a civil disorder | 5 yrs. | §K251 |
| 18 U.S.C. §231_(a)(2) Transporting or manufacturing for transport firearm or explosive knowing same will be used in civil disorder | 5 yrs. | §K232, §K251 |
| 18 U.S.C. §231_(a)(3) Obstructing law enforcement officer or fireman during civil disorder | 5 yrs. | §K251 |

Chapt. 13 - Civil Rights

| | | |
|---|--------------------------|--------------|
| 18 U.S.C. §241_Conspiracy against rights of citizens If death results | 10 yrs. Life | §H211, §H222 |
| 18 U.S.C. §242_Deprivation of rights under color of law If death results | 1 yr. Life | §H211 |
| 18 U.S.C. §243_Exclusion of jurors on account of race or color | \$5,000 | §H211 |
| 18 U.S.C. §244_Discrimination against person wearing uniform of armed forces | fine only | §H211 |
| 18 U.S.C. §245(b)_Interfering with federally protected activities; if bodily injury results; if death results | 1 yr. 10 yrs. life | §H211 |
| 18 U.S.C. §246_Deprivation of relief benefits on account of race, sex, etc. | 1 yr. | §H211 |

Chapt. 15 - Claims and Services

| | | |
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| 18 U.S.C. §285_Taking or using claims papers without authority | 5 yrs. | §B211 |
| 18 U.S.C. §286_Conspiracy to defraud government with respect to claims | 10 yrs. | §F211 |
| 18 U.S.C. §287_False claims | 5 yrs. | §F211 |
| 18 U.S.C. §288_False claims for postal losses > \$100; if ≤ \$100 | 1 yr. fine only | §F211 |
| 18 U.S.C. §289_False claims for pensions | 5 yrs. | §F211 |

Chapt. 17 - Coins and Currency

| | | |
|---|---------|--------------|
| 18 U.S.C. §331_Mutilation, diminution and falsification of coins | 5 yrs. | §B214 |
| 18 U.S.C. §332_Debasement of coins; alteration of official scales; embezzlement of metals | 10 yrs. | §B214, §B211 |
| 18 U.S.C. §333_Mutilation of national bank obligations | 6 mos. | §B214 |
| 18 U.S.C. §335_Circulation of obligations of expired corporations | 5 yrs. | §F211 |

Chapt. 18 - Congressional Assassination, Kidnapping and Assault

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| 18 U.S.C. §351_Assassination, kidnap or assault of Member of Congress, Cabinet or Supreme Court: | | |
| (a) Killing: see 18 U.S.C. §1111/1112 | | Part A |
| (b) Kidnapping, | life | §A242 |
| if death results | death/life | §A211 |
| (c) Attempt to kill | life | §A216 |
| (e) Assault without injury | 1 yr. | §A221 |
| Assault with personal injury | 10 yrs. | §A222-§A225 |

Chapt. 25 - Counterfeiting and Forgery

| | | |
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| 18 U.S.C. §471_Forging or counterfeiting any obligation or security of U.S. | 15 yrs. | §B241 |
| 18 U.S.C. §472_Uttering a forged or counterfeited obligation or security of U.S. | 15 yrs. | §B241 |
| 18 U.S.C. §473_Dealing in forged or counterfeited obligations | 10 yrs. | §B241 |

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| 18 U.S.C. §474_Offenses related to plates or stones for counterfeiting obligations | 15 yrs. | §B241 |
| 18 U.S.C. §475_Imitating obligations or securities | fine only | §B241 |
| 18 U.S.C. §476_Taking impressions of tools used for obligations or securities | 10 yrs. | §B241 |
| 18 U.S.C. §477_Possessing or selling impressions of tools used for obligations or securities | 10 yrs. | §B241 |
| 18 U.S.C. §478_Forging foreign obligations or securities | 5 yrs. | §B241 |
| 18 U.S.C. §479_Uttering counterfeit foreign obligations or securities | 3 yrs. | §B241 |
| 18 U.S.C. §480_Possessing counterfeit foreign obligations or securities | 1 yr. | §B241 |
| 18 U.S.C. §481_Possessing plates or stones for counter- feiting foreign obligations or securities | 5 yrs. | §B241 |
| 18 U.S.C. §482_Forging foreign bank notes | 2 yrs. | §B241 |
| 18 U.S.C. §483_Uttering counterfeit foreign bank notes | 1 yr. | §B241 |
| 18 U.S.C. §484_Connecting parts of different notes or bills | 5 yrs. | §B241 |
| 18 U.S.C. §485_Forging or uttering coins or bars | 15 yrs. | §B241 |
| 18 U.S.C. §486_Uttering coins of gold, silver or other metal | 5 yrs. | §B241 |
| 18 U.S.C. §487_Making or possessing counterfeit dies for coins | 15 yrs. | §B241 |
| 18 U.S.C. §488_Making or possessing counterfeit dies for foreign coins | 5 yrs. | §B241 |
| 18 U.S.C. §489_Making or possessing likeness of coins | fine only | §B241 |
| 18 U.S.C. §490_Forging or uttering 1 or 5 cent coins | 3 yrs. | §B241 |
| 18 U.S.C. §491_Using, possessing, or making tokens or paper money with intent to defraud | 1 yr. | §B241 |
| 18 U.S.C. §493_Forging or uttering bonds or obligations of certain lending agencies | 5 yrs. | §B241 |
| 18 U.S.C. §494_Forging or uttering contractors' bonds, bids or public records | 10 yrs. | §B241 |

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| 18 U.S.C. §495_Forging or uttering contracts, deeds or powers of attorney | 10 yrs. | §B241 |
| 18 U.S.C. §496_Forging of customs matters | 3 yrs. | §B241 |
| 18 U.S.C. §497_Forging or uttering letters patent | 10 yrs. | §B241 |
| 18 U.S.C. §498_Forging or uttering military discharge certificates | 1 yr. | §B241 |
| 18 U.S.C. §499_Forging or uttering military, naval or official passes | 5 yrs. | §B241 |
| 18 U.S.C. §500_Forging or uttering money orders or theft of forms or equipment | 5 yrs. | §B241 |
| 18 U.S.C. §501_Forging postage stamps or cards or fraudulent use of postage meter | 5 yrs. | §B241 |
| 18 U.S.C. §502_Forging or uttering postage or revenue stamps of foreign government | 5 yrs. | §B241 |
| 18 U.S.C. §503_Forging or uttering postmarking stamps | 5 yrs. | §B241 |
| 18 U.S.C. §505_Forging or uttering seals of courts or signatures of judges or court officers | 5 yrs. | §B241 |
| 18 U.S.C. §506_Forging, using or possessing forged seals of U.S. departments or agencies | 5 yrs. | §B241 |
| 18 U.S.C. §507_Forging or uttering ship's papers | 3 yrs. | §B241 |
| 18 U.S.C. §508_Forging or uttering government travel requests | 10 yrs. | §B241 |
| 18 U.S.C. §509_Unlawfully possessing or making plates or stones for government transportation requests | 10 yrs. | §B241 |
| 18 U.S.C. §510(a)_Forgery or uttering of Treasury checks or security of U.S. > \$500 (face value) | 10 yrs. | §B241 |
| 18 U.S.C. §510(b)_Receiving, retaining or concealing forged checks or securities > \$500 | 10 yrs. | §B241 |
| 18 U.S.C. §510(c)_Forgery or receiving checks or securities ≤ \$500 (face value) | 1 yr. | §B241 |
| 18 U.S.C. §511_Making, uttering or possessing counterfeit securities or implements for making counterfeit securities | 10 yrs. | §B241 |

Chapt. 27 - Customs

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|---|--------|--------------|
| 18 U.S.C. §541_Entry of goods falsely classified | 2 yrs. | §C231 |
| 18 U.S.C. §542_Entry of goods by means of false statements | 2 yrs. | §C231 |
| 18 U.S.C. §543_Entry of goods for less than legal duty | 2 yrs. | §C231 |
| 18 U.S.C. §544_Relanding of goods | 2 yrs. | §C231 |
| 18 U.S.C. §545_Smuggling into U.S. | 5 yrs. | §C231, §C232 |
| 18 U.S.C. §547_Unlawfully depositing goods in buildings on boundaries | 2 yrs. | §C231 |
| 18 U.S.C. §548_Removing or repacking goods in warehouses | 2 yrs. | §C231 |
| 18 U.S.C. §549_Removing goods from customs custody, breaking seals | 2 yrs. | §C231 |
| 18 U.S.C. §550_False claim for refund of duties | 2 yrs. | §C231 |
| 18 U.S.C. §551_Concealing or destroying invoices after demand or with intent to defraud | 2 yrs. | §C231 |

Chapt. 29 - Elections and Political Activities

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| 18 U.S.C. §592_Keeping military troops at polls | 5 yrs. | §H221 |
| 18 U.S.C. §593_Interference with election by armed forces | 5 yrs. | §H221 |
| 18 U.S.C. §594_Intimidation of voters | 1 yr. | §H222 |
| 18 U.S.C. §595_Interference with election by administrative employee of federal, state or territorial government | 1 yr. | §H222 |
| 18 U.S.C. §596_Polling any member of armed forces with reference to his vote | 1 yr. | §H226 |
| 18 U.S.C. §597_Offering, soliciting or receiving expenditures to influence voting; if willful | 1 yr. 2 yrs. | §H221 |
| 18 U.S.C. §598_Coercing any individual in exercise of his right to vote by means of relief appropriations | 1 yr. | §H211, §H222 |
| 18 U.S.C. §599_Promising appointment to procure support; if willful | 1 yr. 2 yrs. | §H227 |

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| 18 U.S.C. §600_Promising employment or other benefit for political activity | 1 yr. | §H227 |
| 18 U.S.C. §601_Threatening deprivation of employment or other benefit for political contribution | 1 yr. | §H228 |
| 18 U.S.C. §602_Unlawfully soliciting political contribution from government employee | 3 yrs. | §H223 |
| 18 U.S.C. §603_Making political contribution to U.S. employer | 3 yrs. | §H224 |
| 18 U.S.C. §604_Soliciting political contribution from persons on relief | 1 yr. | §H229 |
| 18 U.S.C. §605_Disclosing of names of persons on relief for political purposes | 1 yr. | §H229 |
| 18 U.S.C. §606_Intimidation to secure political contributions | 3 yrs. | §H223 |
| 18 U.S.C. §607_Soliciting or receiving political contributions in place where prohibited | 3 yrs. | §H224 |

Chapt. 31 - Embezzlement and Theft

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| 18 U.S.C. §641_Theft or embezzlement of government money or property; receiving, con- cealing or retaining stolen property > \$100; if ≤ \$100 | 10 yrs. 1 yr. | §B211, §B212 |
| 18 U.S.C. §642_Theft or embezzlement of tools and materials for counterfeiting purposes | 10 yrs. | §B211, §B241 |
| 18 U.S.C. §643_Failure to account for public money > \$100; Failure to account for public money ≤ \$100 | value/10 yrs. 1 yr. | §B211 |
| 18 U.S.C. §644_Banker receiving unauthorized deposit of public money > \$100; if ≤ \$100 | value/10 yrs. 1 yr. | §B211 |
| 18 U.S.C. §645_Embezzlement by court officers > \$100; Embezzlement by court officers ≤ \$100 | 2 x value/10 yrs. 1 yr. | §B211 |
| 18 U.S.C. §646_Failure of court officer to deposit promptly money belonging to court > \$100; if ≤ \$100 | value/10 yrs. 1 yr. | §B211 |
| 18 U.S.C. §647_Receiving embezzled court funds > \$100; Receiving embezzled court funds ≤ \$100 | value/10 yrs. 1 yr. | §B211 |

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| 18 U.S.C. §648_Custodian misusing public funds > \$100; value/10 yrs. Custodian misusing public funds ≤ \$1,000 yr. | | §B211 |
| 18 U.S.C. §649_Custodian failing to deposit federal money as required > \$100; if ≤ \$100 | value/10 yrs. 1 yr. | §B211 |
| 18 U.S.C. §650_Depository failing to safeguard deposits > \$100; Depository failing to safeguard deposits ≤ \$100 | value/10 yrs. 1 yr. | §B211 |
| 18 U.S.C. §651_Disbursing officer falsely certifying full payment > \$100; if ≤ \$100 | 2 x value/ 2 yrs. 1 yr. | §F211 |
| 18 U.S.C. §652_Disbursing officer paying lesser in lieu of lawful amount, if amount withheld > \$100; if amount withheld ≤ \$100 | x value/2 yrs. 1 yr. | §F211 |
| 18 U.S.C. §653_Disbursing officer misusing public funds > \$100; Disbursing officer misusing public funds ≤ \$100 | value/10 yrs. 1 yr. | §B211 |
| 18 U.S.C. §654_Employee of U.S. embezzling or converting property of another > \$100; if ≤ \$100 | value/10 yrs. 1 yr. | §B211 |
| 18 U.S.C. §655_Theft by bank examiner > \$100 Theft by bank examiner ≤ \$100 | 5 yrs. 1 yr. | §B211 |
| 18 U.S.C. §656_Theft or misapplication by bank employee; > \$100 if ≤ \$100 | 5 yrs. 1 yr. | §B211 |
| 18 U.S.C. §657_Embezzlement by employee of lending, credit or insurance institution > \$100; if ≤ \$100 | 5 yrs. 1 yr. | §B211 |
| 18 U.S.C. §658_Theft of property mortgaged or pledged to farm credit agencies > \$100; if ≤ \$100 | 5 yrs. 1 yr. | §B211 |
| 18 U.S.C. §659_Theft from or receipt of property stolen from interstate commerce > \$100; if ≤ \$100 | 10 yrs. 1 yr. | §B211, §B212 |
| 18 U.S.C. §660_Embezzlement of carrier's funds derived from interstate commerce | 10 yrs. | §B211 |

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| 18 U.S.C. §661_Theft or embezzlement > \$100; if ≤ \$100 | 5 yrs. 1 yr. | §B211 |
| 18 U.S.C. §662_Receiving stolen property > \$100; if ≤ \$100; | 3 yrs. 1 yr. | §B212 |
| 18 U.S.C. §663_Fraudulent solicitation of gifts for U.S. or embezzlement of gifts to U.S. | 5 yrs. | §B211 |
| 18 U.S.C. §664_Theft or embezzlement from employee benefit plan | 5 yrs. | §B211 |
| 18 U.S.C. §665(a)_Theft or embezzlement from employment and training funds > \$100; if ≤ \$100 | 2 yrs. 1 yr. | §B211 |
| 18 U.S.C. §665(b)_Improper inducement under CETA or JTPA | | 1 yr. §F211 |
| 18 U.S.C. §666(a)_Theft or embezzlement in federal program §B211 receiving > \$10,000 a year in fed. funds | | 2 x value/10 yrs. |
| 18 U.S.C. §667_Theft of > \$10,000 of livestock or related property | 5 yrs. | §B211 |

Chapt. 33 - Emblems, Insignia and Names

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| 18 U.S.C. §701_Fraudulent use of various emblems, through insignia, and names 18 U.S.C. §708 | 6 mos. | §F211 |
| 18 U.S.C. §709_False advertising or misuse of names to indicate federal agency by a business | 1 yr. | §F211 |
| 18 U.S.C. §710_Fraudulent use of various emblems, through insignia, and names 18 U.S.C. §711a | 6 mos. | §F211 |
| 18 U.S.C. §712_Fraudulent use of names, words, emblems, or insignia of U.S. by debts collectors or private police | 1 yr. | §F211 |
| 18 U.S.C. §713_Fraudulent use of great seal of U.S. or seals of President or Vice President | 6 mos. | §F211 |
| 18 U.S.C. §715_Fraudulent use of insignia of the Department of Interior | 6 mos. | §F211 |

Chapt. 40 - Importation, Manufacture, Distribution and Storage of Explosive Materials

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| 18 U.S.C. §842(a)_Dealing in explosives without a valid license; making false statement to obtain explosives or license | 10 yrs. 10 yrs. | §K213 §F211 |
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| 18 U.S.C. §842(b)-(e) Unlawful distribution of explosives by licensee | 10 yrs. | §K213 |
| 18 U.S.C. §842(f) Failure of licensee to keep required records | 10 yrs. | §F211 |
| 18 U.S.C. §842(g) Making false entries in required records | | 10 yrs. §F211 |
| 18 U.S.C. §842(h) Receiving stolen explosives | 10 yrs. | §B212 |
| 18 U.S.C. §842(i) Shipment or receipt of explosives by felon, fugitive, drug user or mental patient | 10 yrs. | §K225 |
| 18 U.S.C. §842(j) Unsafe storage of explosives | 1 yr. | §K212 |
| 18 U.S.C. §842(k) Failure to report theft or loss of explosive materials | 1 yr. | §K211 |
| 18 U.S.C. §844_(a),(b) Penalties for Section 842 violations as above | | |
| 18 U.S.C. §844_(d) Transporting or receiving explosives with knowledge or intent to injure person or property (attempts included); if injury to person results; if death results | 10 yrs. 20 yrs. death/life | §K217 §A221-§A225 §A211-214 |
| 18 U.S.C. §844(e) Bomb threat or false report | 5 yrs. | §K214 |
| 18 U.S.C. §844(f) Maliciously damaging or attempting to damage federal property by fire or explosives; arson; if injury to person results; if death results | 10 yrs. 20 yrs. death/life | §B213 §A211 |
| 18 U.S.C. §844(g) Unauthorized possession of explosive in building of U.S. | 1 yr. | §K215 |
| 18 U.S.C. §844(h) Using fire or carrying or using explosives during commission of a felony, 1st conviction if subsequent conviction | ≥ 1 yr. ≤ 10 yrs. ≥ 5 yrs. ≤ 25 yrs. | §K218 or see felony |
| 18 U.S.C. §844(i) Maliciously damaging or attempting to damage property in or affecting commerce; if injury to person results; if death results | 10 yrs. 20 yrs. death/life | §B213 §A221-§A225 §A211-§A214 |

Chapt. 42 - Extortionate Credit Transactions

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| 18 U.S.C. §892 Making extortionate extensions of credit | 20 yrs. | §E221 |
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18 U.S.C. §893_Financing extortionate extensions of credit 2 x advanced/
20 yrs. §E221

18 U.S.C. §894_Collection of extensions of credit by extortionate means 20 yrs. §E221

Chapt. 43 - False Personation

18 U.S.C. §911_False personation of citizen 3 yrs. §F211

18 U.S.C. §912_False personation of U.S. employee 3 yrs. §F211

18 U.S.C. §913_Impersonator making arrest or search 3 yrs. §F211

18 U.S.C. §914_False personation of creditor of U.S. 5 yrs. §F211

18 U.S.C. §915_False personation of foreign diplomat 10 yrs. §F211

Chapt. 44 - Firearms

18 U.S.C. §922_Firearm violations (amended 1986)
Knowing or willful violations 5 yrs. §K221

18 U.S.C. §922(c)_Making false records 1 yr. §K211, §F211

18 U.S.C. §922(g)_Transportation of firearm by felon,
fugitive, drug user or mental patient; 5 yrs. §K221
If felon has 3 previous convictions
for robbery or burglary ≥ 15 yrs.

18 U.S.C. §923_Licensing requirements

18 U.S.C. §924(a)_Penalties for §§ 922, 923, and 926

18 U.S.C. §924(b)_Transporting or receiving firearm with
intent to commit a felony with the firearm 10 yrs. §K222

18 U.S.C. §924(c)_Use of firearm during drug trafficking + 5 yrs. or crime of
violence, 1st conviction; mandatory §K223
subsequent convictions; + 10 yrs.
if firearm is a machine gun or + 20 yrs. §K223
equipped with a silencer mandatory

18 U.S.C. §929_Use of restricted ammunition (armor-
piercing) during crime of violence ≥ 5 yrs. ≤ 10 yrs. §K223

Chapt. 47 - Fraud and False Statements

18 U.S.C. §1001_False statements in any matter within
jurisdiction of U.S. Department/Agency 5 yrs. §F211

18 U.S.C. §1002_Possession of false papers to defraud
U.S. 5 yrs. §B241, §F211

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| 18 U.S.C. §1003 | Fraudulent demand against the U.S. by virtue of forged or counterfeit instrument > \$100; if ≤ \$100 | 5 yrs. 1 yr. | §B241 |
| 18 U.S.C. §1004 | False certification of checks by banker | 5 yrs. | §F211 |
| 18 U.S.C. §1005 | Unauthorized activities and making false bank entries, reports or transactions by banker | 5 yrs. | §F211 |
| 18 U.S.C. §1006 | Fraudulent federal credit institution entries, reports and transactions | 5 yrs. | §F211 |
| 18 U.S.C. §1007 | False statements to FDIC | 2 yrs. | §F211 |
| 18 U.S.C. §1008 | False statements to FSLIC | 2 yrs. | §F211 |
| 18 U.S.C. §1009 | Making untrue rumor which is derogatory to the financial condition of FSLIC | 1 yr. | §F211 |
| 18 U.S.C. §1010 | False statements to HUD or FHA to obtain loan | 2 yrs. | §F211 |
| 18 U.S.C. §1011 | False statement to federal land bank | 1 yr. | §F211 |
| 18 U.S.C. §1012 | False statements to HUD | 1 yr. | §F211 |
| 18 U.S.C. §1013 | False representation of farm loan bond or credit bank debentures | 1 yr. | §F211 |
| 18 U.S.C. §1014 | False statement on loan and credit applications or crop insurance | 2 yrs. | §F211 |
| 18 U.S.C. §1015 | False statement regarding naturalization, citizenship or alien registry | 5 yrs. | §F211 |
| 18 U.S.C. §1016 | False acknowledgment of appearance or oath by an official oath administrator | 2 yrs. | §F211 |
| 18 U.S.C. §1017 | Government seals wrongfully used and instruments wrongfully sealed | 5 yrs. | §F211 |
| 18 U.S.C. §1018 | False official certificates by public officer | 1 yr. | §F211 |
| 18 U.S.C. §1019 | False official certificates by consular officer | 3 yrs. | §F211 |
| 18 U.S.C. §1020 | False statement, representation, etc. regarding highway projects | 5 yrs. | §F211 |

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| 18 U.S.C. §1021 | False certification of title records by a public officer | 5 yrs. | §F211 |
| 18 U.S.C. §1022 | Fraud in connection with delivery of certificate, voucher, or receipt for military or naval property | 10 yrs. | §F211 |
| 18 U.S.C. §1023 | Insufficient delivery of money or property for military or naval service | 10 yrs. | §F211 |
| 18 U.S.C. §1024 | Purchase or receipt of military, naval or veteran's facilities property taken from the U.S. | 2 yrs. | §B212 |
| 18 U.S.C. §1025 | False pretenses on high seas and other waters: > \$100; ≤ \$100 | 5 yrs. 1 yr. | §F211 |
| 18 U.S.C. §1026 | False statement in regard to compromise adjustment, or cancellation of farm indebtedness | 1 yr. | §F211 |
| 18 U.S.C. §1027 | False statements and concealment of facts in relation to documents required by ERISA | 5 yrs. | §F211 |
| 18 U.S.C. §1028 | Credit card fraud and related activities in connection with identification documents: | | |
| | Production or transfer of any official identification documents or more than five other identification documents or possession of document making implements | 5 yrs. | §F211, §B241 |
| | Production or transfer of identification document or possession of five or more identification documents | 3 yrs. | §F211 |
| | Possessing false identification and other offenses | 1 yr. | §B241, §F211 |
| 18 U.S.C. §1029 | Credit card fraud and related activities in connection with access devices: | | |
| | (a) Producing, using or trafficking in counterfeit access devices or possessing device-making equipment (attempts included), 1st conviction | 2 x value/15 yrs. | §B241 |

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| Using unauthorized access devices and obtaining \$1,000 or more during one-year period or possessing 15 or more counterfeit or unauthorized devices (attempts included), 1st conviction; subsequent convictions | 2 x value/10 yrs. 2 x value/20 yrs. | §B241 |
| Conspiracy to commit above offenses | 1/2 max. yrs. above | §F211 |
| 18 U.S.C. §1030 Fraud and related activity in connection with computers: | | §F211 |
| (a)(1) Unauthorized access to computer information concerning national defense or atomic energy (attempts included), 1st conviction; 2nd conviction | 2 x value/10 yrs. 2 x value/20 yrs. | §F211 |
| (a)(2) Unauthorized access to financial records; or | | §F211 |
| (a)(3) Unauthorized use affecting operation of government computer (attempts included), 1st conviction; 2nd conviction | 2 x value/1 yr. 2 x value/10 yrs. | §F211 |
| <u>Chapt. 50 - Gambling</u> | | |
| 18 U.S.C. §1082 Setting up, operating, etc. a gambling ship | 2 yrs. | §E234 |
| 18 U.S.C. §1084 Transmission of wagering information | 2 yrs. | §E232 |
| <u>Chapt. 51 - Homicide</u> | | |
| 18 U.S.C. §1111 First degree murder | death/ life (mand.) | §A211 |
| Second degree murder (on federal jurisdiction or of U.S. official) | life | §A212 |
| 18 U.S.C. §1112 Manslaughter - voluntary | 10 yrs. | §A213 |
| Involuntary (on federal jurisdiction or U.S. official) | 3 yrs. | §A214 |
| 18 U.S.C. §1113 Attempted murder or manslaughter | 3 yrs. | §A216 |
| 18 U.S.C. §1114 Killing or attempting to kill officers and employees of U.S. | 20 yrs. | §A211-§A216 |
| 18 U.S.C. §1116 Murder or manslaughter of foreign officials, guests, or internationally protected persons: | | §A211-§A216 |
| 1st degree murder | life (mand.) | §A211 |

| | | |
|--------------------------|---------|-------|
| 2nd degree murder | life | §A212 |
| voluntary manslaughter | 10 yrs. | §A213 |
| involuntary manslaughter | 3 yrs. | §A215 |
| attempted murder | 20 yrs. | §A216 |

Chapt. 53 - Indians

| | | | |
|-----------------|--|-----------------|-------|
| 18 U.S.C. §1153 | Offenses (listed) committed by an Indian against the person or property of another within Indian country punished as if on U.S. jurisdiction | | |
| 18 U.S.C. §1158 | Counterfeiting Indian Arts and Crafts Board trademark | 6 mos. | §B241 |
| 18 U.S.C. §1159 | Misrepresentation in sale of Indian products | 6 mos. | §F211 |
| 18 U.S.C. §1163 | Embezzlement and theft from Indian tribal organization > \$100; if ≤ \$100 | 5 yrs. 1 yr. | §B211 |
| 18 U.S.C. §1164 | Destroying boundary and warning signs | 6 mos. | §B213 |

Chapt. 55 - Kidnapping

| | | | |
|-----------------|------------------------------------|---------|-------|
| 18 U.S.C. §1201 | Kidnapping (including conspiracy) | life | §A242 |
| 18 U.S.C. §1202 | Receiving, possessing ransom money | 10 yrs. | §A243 |
| 18 U.S.C. §1203 | Hostage taking | life | §A242 |

Chapt. 57 - Labor

| | | | |
|-----------------|----------------------------------|--------|-------|
| 18 U.S.C. §1231 | Transportation of strikebreakers | 2 yrs. | §H212 |
|-----------------|----------------------------------|--------|-------|

Chapt. 61 - Lotteries

| | | | |
|-----------------|---|------------------|-------|
| 18 U.S.C. §1301 | Importing or transporting lottery tickets | 2 yrs. | §E235 |
| 18 U.S.C. §1302 | Mailing lottery tickets or related matters, 1st offense; subsequent offenses | 2 yrs. 5 yrs. | §E235 |
| 18 U.S.C. §1303 | Postmaster or employee of Postal Service acting as lottery agent | 1 yr. | §E235 |
| 18 U.S.C. §1304 | Broadcasting lottery information | 1 yr. | §E235 |
| 18 U.S.C. §1306 | Participation by financial institutions | 1 yr. | §E231 |

Chapt. 63 - Mail Fraud

| | | | |
|-----------------|--|--------|-------|
| 18 U.S.C. §1341 | Frauds and swindles by mail | 5 yrs. | §F211 |
| 18 U.S.C. §1342 | Fraudulent use of fictitious name or address | 5 yrs. | §F211 |
| 18 U.S.C. §1343 | Fraud by wire, radio or television | 5 yrs. | §F211 |
| 18 U.S.C. §1344 | Bank fraud | 5 yrs. | §F211 |

Chapt. 65 - Malicious Mischief

| | | | |
|--------------------|---|-------------------|---------------|
| 18 U.S.C. §1361 | Willful injury to government property or contracts > \$100; if ≤ \$100 | 10 yrs. 1 yr. | §B213 |
| 18 U.S.C. §1362 | Willful or malicious injury to communication lines, stations or systems | 10 yrs. | §B213 |
| 18 U.S.C. §1363 | Malicious injury to buildings or property in federal jurisdiction; if a dwelling or life endangered | 5 yrs. 20 yrs. | §B213 |
| 18 U.S.C. §1364 | Interference with foreign commerce by violence | 20 yrs. | Part A, §B213 |
| 18 U.S.C. §1365(a) | Damaging an energy facility, causing more than \$100,000 in damages or causing a significant interruption | 10 yrs. | §B213 |
| 18 U.S.C. §1365(b) | Causing damages to an energy facility in excess of \$5,000 | 5 yrs. | §B213 |

Chapt. 69 - Nationality and Citizenship

| | | | |
|-----------------|--|--------|--------------|
| 18 U.S.C. §1423 | Misuse of evidence of citizenship or naturalization | 5 yrs. | §L222 |
| 18 U.S.C. §1424 | Personation or misuse of papers in naturalization proceedings | 5 yrs. | §L222 |
| 18 U.S.C. §1425 | Procurement of citizenship or naturalization unlawfully | 5 yrs. | §L221, §L222 |
| 18 U.S.C. §1426 | Unlawful reproduction or use of naturalization or citizenship papers | 5 yrs. | §L221 |
| 18 U.S.C. §1427 | Sale of naturalization or citizenship papers | 5 yrs. | §L221 |
| 18 U.S.C. §1428 | Failure to surrender a canceled naturalization certificate | 5 yrs. | §L225 |

18 U.S.C. §1429 Neglect or refusal to answer subpoena 5 yrs. §L226

Chapt. 71 - Obscenity

18 U.S.C. §1461 Mailing obscene or crime-inciting
matter, 1st offense; 5 yrs. §E241
subsequent offenses 10 yrs.

18 U.S.C. §1462 Importation or transportation of
obscene matters, 1st offense; 5 yrs. §E241
subsequent offenses 10 yrs.

18 U.S.C. §1463 Mailing indecent matter on wrappers or
envelopes 5 yrs. §E241

18 U.S.C. §1464 Broadcasting obscene language 2 yrs. §E243

18 U.S.C. §1465 Transportation of obscene matters
for sale or distribution 5 yrs. §E241

Chapt. 75 - Passports and Visas

18 U.S.C. §1541 Unauthorized issuance of passports
and visas 1 yr. §L221

18 U.S.C. §1542 False statement in application and
use of passport 5 yrs. §L223

18 U.S.C. §1543 Forgery or false use of passport 5 yrs. §L223, 224

18 U.S.C. §1544 Misuse of passport 5 yrs. §L223, §L224

18 U.S.C. §1546 Fraud and misuse of visas, permits
and other entry documents 5 yrs. §L221, §L222

Chapt. 83 - Postal Service

18 U.S.C. §1702 Obstruction of correspondence 5 yrs. §H234

18 U.S.C. §1703(a) Destruction of mail or
newspapers by postal employee 5 yrs. §B213

18 U.S.C. §1703(b) Destruction of mail
or newspapers by postal employee 1 yr. §B213

18 U.S.C. §1704 Stealing or reproducing post office keys 10 yrs. §B211, §B241

18 U.S.C. §1705 Destruction of letter boxes or mail 3 yrs. §B213

18 U.S.C. §1706 Injury to mail bags 3 yrs. §B213

18 U.S.C. §1707 Theft of property used by postal
service > \$100; 3 yrs. §B211
if ≤ \$100 1 yr.

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|-----------------|--|------------------------|--------------|
| 18 U.S.C. §1708 | Theft or receipt of stolen mail | 5 yrs. | §B211, §B212 |
| 18 U.S.C. §1709 | Theft of mail by postal employee | 5 yrs. | §B211 |
| 18 U.S.C. §1710 | Theft of newspaper by postal employee | 1 yr. | §B211 |
| 18 U.S.C. §1711 | Misappropriation or embezzlement of postal funds > \$100; if ≤ \$100 | value/10 yrs. 1 yr. | §B211 |
| 18 U.S.C. §1712 | Falsification of postal returns to increase compensation | 2 yrs. | §B241 |
| 18 U.S.C. §1713 | Issuance of money orders without paymefine only | | §F211 |
| 18 U.S.C. §1715 | Unlawful mailing of firearms | 2 yrs. | §K221 |
| 18 U.S.C. §1716 | Unlawful mailing of dangerous materials if with intent to kill or injure | 1 yr. 20 yrs. | §K217 |
| 18 U.S.C. §1735 | Using mails for sending sexually oriented advertisements, 1st offense; subsequent offense | 5 yrs. 10 yrs. | §E241 |
| 18 U.S.C. §1737 | Manufacturer of sexually related mail matter, 1st offense; subsequent offense | 5 yrs. 10 yrs. | §E241 |

Chapt. 84 - Presidential and Presidential Staff Assassination, Kidnapping and Assault

| | | | |
|-----------------|---|---|--|
| 18 U.S.C. §1751 | Killing - see 18 U.S.C. §1111, 1112: Kidnapping President or President staff if death results Attempts to kill Assault on President Assault on staff; if injury | life death/life life 10 yrs. 1 yr. 10 yrs. | §A241 §A211 §A216 §A221-§A225 §A221 §A221-§A225 |
| 18 U.S.C. §1752 | Unlawfully entering temporary residences and offices of the President and others | 6 mos. | §B222 |

Chapt. 87 - Prisons

| | | | |
|-----------------|--|----------------------------|------------------|
| 18 U.S.C. §1791 | Providing or possessing contraband in prison: firearm or destructive device other weapon or narcotics non-narcotic controlled substance | 10 yrs. 5 yrs. 1 yr. | Part K Part D |
| 18 U.S.C. §1792 | Mutiny or riot in prison | 10 yrs. | §K242 |

Chapt. 91 - Public Lands

| | | | |
|-----------------|--|--------|-------|
| 18 U.S.C. §1851 | Wrongfully appropriating coal reserved to the U.S. | 1 yr. | §B211 |
| 18 U.S.C. §1852 | Removing or transporting timber from public land | 1 yr. | §B211 |
| 18 U.S.C. §1853 | Cutting or injuring trees on public land | 1 yr. | §B213 |
| 18 U.S.C. §1854 | Cutting trees on public land for purpose of obtaining pitch or turpentine | 1 yrs. | §B213 |
| 18 U.S.C. §1855 | Setting fire to timber on public or Indian land | 5 yrs. | §B213 |
| 18 U.S.C. §1856 | Leaving fire unextinguished or unattended | 6 mos. | §B213 |
| 18 U.S.C. §1857 | Destroying fences or permitting livestock to enter through enclosures on public land | 1 yr. | §B213 |
| 18 U.S.C. §1858 | Survey marks destroyed or removed | 6 mos. | §B213 |
| 18 U.S.C. §1863 | Trespass on national forest lands | 6 mos. | §B222 |

Chapt. 93 - Public Officers and Employees

| | | | |
|-----------------|--|---------|-------|
| 18 U.S.C. §1902 | Unlawful disclosure of crop information and speculation thereon | 10 yrs. | §H235 |
| 18 U.S.C. §1904 | Unlawful disclosure of information or speculation in securities affecting Reconstruction Finance Corp. | 5 yrs. | §H235 |
| 18 U.S.C. §1905 | Disclosure of confidential information | 1 yr. | §H235 |
| 18 U.S.C. §1906 | Unlawful disclosure of information from a bank examination report | 1 yr. | §H235 |
| 18 U.S.C. §1907 | Unlawful disclosure of information by farm credit examiner | 1 yr. | §H235 |
| 18 U.S.C. §1908 | Unlawful disclosure of information by National Agricultural Credit Corp. examiner | 1 yr. | §H235 |
| 18 U.S.C. §1919 | False statement to obtain unemployment compensation for federal service | 1 yr. | §F211 |
| 18 U.S.C. §1920 | False statement to obtain federal employees compensation | 1 yr. | §F211 |

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|---------------------------------|---|---------------------------|-------------------------------|
| 18 U.S.C. §1921 | Unlawfully receiving federal employees' compensation after marriage | 1 yr. | §F211 |
| 18 U.S.C. §1922 | False or withheld report concerning federal employees' compensation | 1 yr. | §F211 |
| 18 U.S.C. §1923 | Fraudulent receipt of payments of missing persons | 1 yr. | §F211 |
| <u>Chapt. 95 - Racketeering</u> | | | |
| 18 U.S.C. §1951 | Interference with commerce by threat or violence (Hobbs Act) | 20 yrs. | §E213 |
| 18 U.S.C. §1952 | Interstate or foreign travel or transportation in aid of racketeering enterprises | 5 yrs. | §E212 |
| 18 U.S.C. §1952A | Use of interstate commerce facilities in commission of murder-for-hire; if personal injury; if death results | 5 yrs. 20 yrs. life | §E213 §A221-§A225 §A211 |
| 18 U.S.C. §1952B | Violent crimes in aid of racketeering: | | §E213 |
| | (a)(1) murder or kidnapping | life | §A211-§A242 |
| | (a)(2) maiming | 30 yrs. | §A221-§A223 |
| | (a)(3) assault with dangerous weapon or causing serious bodily injury | 20 yrs. | §A221-§A224 |
| 18 U.S.C. §1953 | Interstate transportation of wagering paraphernalia | 5 yrs. | §E233 |
| 18 U.S.C. §1954 | Offer, acceptance or solicitation to influence operations of employee benefit plan | 3 yrs. | §E281 |
| 18 U.S.C. §1955 | Conducting, etc., illegal gambling businesses | 5 yrs. | §E231 |
| 18 U.S.C. §1962 | Unlawful commercial activities by persons associated with or receiving income from a pattern of racketeering activity or collection of unlawful debt (including conspiracies) | 20 yrs. | §E213 |
| 18 U.S.C. §1963 | Penalty for 18 U.S.C. §1962 | 20 yrs. | §E213 |
| <u>Chapt. 97 - Railroads</u> | | | |
| 18 U.S.C. §1991 | Entering train to commit murder or robbery other crime | 20 yrs. 1 yr. | §B222 |

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|--|--|--------------------|------------------------|
| 18 U.S.C. §1992 | Derailing, disabling or wrecking a train; or setting fire to or placing explosives on or near any property used in operating a train with intent to derail, disable or wreck | 20 yrs. | §B241 |
| <u>Chapt. 99 - Rape</u> | | | |
| 18 U.S.C. §2031 | Rape on special maritime or territorial jurisdiction | death/life | §A231, §A232 |
| 18 U.S.C. §2032 | Carnal knowledge of female under 16, 1st offense; subsequent offenses | 15 yrs. 30 yrs. | §A231, §A233 |
| <u>Chapt. 101 - Records and Reports</u> | | | |
| 18 U.S.C. §2071 | Concealment, mutilation or removal of records in a public office | 3 yrs. | §F211, §B213 |
| 18 U.S.C. §2072 | False crop reports | 5 yrs. | §F211 |
| 18 U.S.C. §2073 | False entries and reports of monies or securities by U.S. employee | 10 yrs. | §F211 |
| 18 U.S.C. §2074 | False weather reports | 90 days | §F211 |
| <u>Chapt. 1102 - Riots</u> | | | |
| 18 U.S.C. §2101 | Traveling in or using any facility of interstate or foreign commerce to incite a riot | 5 yrs. | §K241 |
| <u>Chapt. 103 - Robbery and Burglary</u> | | | |
| 18 U.S.C. §2111 | Robbery within special maritime and territorial jurisdiction | 15 yrs. | §B231 |
| 18 U.S.C. §2112 | Robbery of property of U.S. | 15 yrs. | §B231 |
| 18 U.S.C. §2113(a) | Bank robbery | 20 yrs. | §B231 |
| | Bank burglary with intent to steal or commit felony | 20 yrs. | §B221 |
| 18 U.S.C. §2113(b) | Bank larceny > \$100; if ≤ \$100 | 10 yrs. 1 yr. | §B211 |
| 18 U.S.C. §2113(c) | Receipt of stolen bank property > \$100; if ≤ \$100 | | 10 yrs. §B212 |
| 18 U.S.C. §2113(d) | Bank robbery, burglary or theft with a dangerous weapon | 25 yrs. | §B231, §B221, §B211 |

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| 18 U.S.C. §2113(e) Killing or kidnapping person in com- mitting bank robbery or burglary | ≥ 10 yrs. | §A211 §B231, §B221 |
| 18 U.S.C. §2114 Robbery (mail, money or property of U.S.), 1st offense; | 10 yrs. | §B231 |
| if by wounding or with dangerous weapon, subsequent offense | 25 yrs. | §B231 |
| 18 U.S.C. §2115 Breaking into post office with intent to commit larceny | 5 yrs. | §B221 |
| 18 U.S.C. §2116 Breaking into postal car, steamboat or vessel; assaulting postal clerk | 3 yrs. | §B221, §A221-§A225 |
| 18 U.S.C. §2117 Breaking or entering carrier facility with intent to commit larceny | 10 yrs. | §B221 |
| 18 U.S.C. §2118(a) Robbery of pharmacy | 20 yrs. | §B231 |
| (b) Burglary of pharmacy | 20 yrs. | §B221 |
| (c)(1) If by assault or with weapon | 25 yrs. | §A221-§A225 |
| (c)(2) If with killing | life | §A211 |

Chapt. 105 - Sabotage

| | | |
|---|---------|--------------|
| 18 U.S.C. §2152 Trespass on or sabotage of fortifica- tions, harbor defense or defensive sea areas | 5 yrs. | §B222, §B213 |
| 18 U.S.C. §2155 Destruction of national defense materials, premises, or utilities and conspiracy to do so | 10 yrs. | §B213 |
| 18 U.S.C. §2156 Production of defective national- defense material, national-defense premises or national-defense utilities; and conspiracy to do so | 10 yrs. | §F211 |

Chapt. 107 - Seamen and Stowaways

| | | |
|--|--------|--------------|
| 18 U.S.C. §2191 Unjustified imprisonment, beating, or cruelty to seamen by officer | 5 yrs. | Part A |
| 18 U.S.C. §2196 Destruction of vessel | 1 yr. | §B213 |
| 18 U.S.C. §2197 Misuse of federal certificate, license or document; alteration, forgery, theft of such | 5 yrs. | §B241, §B211 |
| 18 U.S.C. §2198 Seduction of female passenger | 1 yr. | §A232-§A235 |

Chapt. 110 - Sexual Exploitation of Children

| | | | |
|-----------------|--|-----------------------------|----------------|
| 18 U.S.C. §2251 | Sexual exploitation of children, 1st offense; subsequent offense | 10 yrs. ≥ 2 yrs.-15 yrs. | §E261 §A235 |
| 18 U.S.C. §2252 | Knowingly transporting, receiving, or distributing material involving sexual exploitation of children, 1st offense; subsequent offense; | 10 yrs. ≥ 2 yrs.-15 yrs. | §E242 |

Chapt. 111 - Shipping

| | | | |
|-----------------|---|---------|--------------|
| 18 U.S.C. §2271 | Conspiracy to destroy vessels | 10 yrs. | |
| 18 U.S.C. §2272 | Destruction of vessel by owner with intent to injure insurance under- writer, merchant or other owner | life | §B213 |
| 18 U.S.C. §2273 | Destruction of U.S. vessel by non-owner | 10 yrs. | §B213 |
| 18 U.S.C. §2274 | Destruction or misuse of vessel by person in charge | 10 yrs. | §B213 |
| 18 U.S.C. §2275 | Setting fire to or tampering with vessel on high seas with intent to injure | 20 yrs. | §B213 |
| 18 U.S.C. §2276 | Breaking and entering vessel with intent to commit a felony or destroy any cable, etc. | 5 yrs. | §B221, §B213 |
| 18 U.S.C. §2277 | Bringing explosives or dangerous weapons aboard vessels without permission | 1 yr. | §K213 |
| 18 U.S.C. §2278 | Explosives on vessels carrying steerage passengers | 1 yr. | §K213 |

Chapt. 113 - Stolen Property

| | | | |
|-----------------|--|--|----------------------------------|
| 18 U.S.C. §2312 | Transportation of stolen vehicles | 5 yrs. | §B212 |
| 18 U.S.C. §2313 | Sale or receipt of stolen vehicles | 5 yrs. | §B212 |
| 18 U.S.C. §2314 | Transportation of goods, securities, or money of value of \$5,000 or more: if stolen; if fraudulently obtained; if forged or counterfeited Transportation of tool or thing used in counterfeiting or forging | 10 yrs. 10 yrs. 10 yrs. 10 yrs. | §B212 §F211 §B241 §B241 |

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| 18 U.S.C. §2315 | Sale or receipt of goods, securities, money: if stolen; | 10 yrs. | §B212 |
| | if forged or counterfeited | 10 yrs. | §B241 |
| | Sale or receipt of tool or thing used in counterfeiting or forging | 10 yrs. | §B241 |
| 18 U.S.C. §2316 | Transportation of stolen livestock | 5 yrs. | §B212 |
| 18 U.S.C. §2317 | Sale or receipt of stolen livestock | 5 yrs. | §B212 |
| 18 U.S.C. §2318 | Trafficking in counterfeit labels for phonorecords and copies of audiovisual works | 5 yrs. | §B241 |
| 18 U.S.C. §2320 | Trafficking in counterfeit goods or services individual, company; subsequent convictions (individual), (company) | 5 yrs. \$1,000,000 15 yrs. \$5,000,000 | §B241 |

Chapt. 114 - Trafficking in Contraband Cigarettes

| | | | |
|--------------------|---|--------|-------|
| 18 U.S.C. §2342(a) | Transport, sell, possess, distribute or receive contraband cigarettes | 5 yrs. | §E271 |
| 18 U.S.C. §2342(b) | Knowingly making a false statement in records required of persons shipping, selling or distributing over 60,000 cigarettes/per transaction | 3 yrs. | §E271 |

Chapt. 117 - White Slave Traffic

| | | | |
|-----------------|--|---------|--------------|
| 18 U.S.C. §2421 | Transportation of women or girls for prostitution | 5 yrs. | §E252 |
| 18 U.S.C. §2422 | Coercion or enticement of female to travel for prostitution | 5 yrs. | §E252 |
| 18 U.S.C. §2423 | Transportation of minors for prostitution or prohibited sexual conduct which is commercially exploited | 10 yrs. | §E252 |
| 18 U.S.C. §2424 | Failing to file factual statement about alien female being harbored for prostitution | 2 yrs. | §F211; §L213 |

Chapt. 119 - Wire Interception and Interception of Oral Communications

| | | | |
|-----------------|---|--------|-------|
| 18 U.S.C. §2511 | Prohibited interception of wire or disclosure of intercepted or oral communications | 5 yrs. | §H231 |
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| 18 U.S.C. §2512 | Prohibited manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices | 5 yrs. | §H232, §H233 |
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TITLE 19 - CUSTOMS DUTIES

| | | | |
|----------------|--------------------------------------|-------------------|-------|
| 19 U.S.C. §283 | Failure to pay duty on saloon stores | ≥ 3 mos. ≤ 2 yrs. | §C231 |
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| 19 U.S.C. §1304 | Unlawful marking of imported articles containers | 1 yr. | §F211 |
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|-----------------|---|-----------------|----------------|
| 19 U.S.C. §1436 | Failure to make report of cargo; if such vessel also carries nonimportable goods; | fine only | §C231 |
| | presenting a forged document on making entry of a vessel | 1 yr. 2 yrs. | §C231 §B241 |

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|-----------------|--|--------|-------|
| 19 U.S.C. §1464 | Failure of sealed vessel or vehicle to proceed to port of destination | 5 yrs. | §C231 |
|-----------------|--|--------|-------|

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|-----------------|--|--------|-------|
| 19 U.S.C. §1465 | Failure to report a list of supplies purchased in a foreign country | 2 yrs. | §C231 |
|-----------------|--|--------|-------|

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|-----------------|---|-----------|-------|
| 19 U.S.C. §1586 | (a) Unlading prior to grant of permission by master of vessel | fine only | |
| | (b) Transshipment to any vessel for purpose of unlawful entry by master of vessel | fine only | |
| | (c) Unlawful transshipment to any vessel of U.S. by master of vessel | fine only | |
| | (d) Master of receiving vessel in unlawful transshipment | fine only | |
| | (e) Person aiding in unlawful unlading or transshipment | 2 yrs. | §C231 |

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|-----------------|---|--------|-------|
| 19 U.S.C. §1708 | (b) Procuring lading with intent to defraud revenue laws | 2 yrs. | §C231 |
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| 19 U.S.C. §1919 | Making a false statement or over-valuing a security for purpose of obtaining money or property | 2 yrs. | §F211 |
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|-----------------|---|-------|-------|
| 19 U.S.C. §2316 | Making a false statement for purpose of obtaining payment for relief from injury | 1 yr. | §F211 |
|-----------------|---|-------|-------|

TITLE 20 - EDUCATION

Chapt. 28 - Higher Education Resources and Student Assistance

| | | | |
|--------------------|---|-----------------|-------|
| 20 U.S.C. §1097(a) | Embezzling, stealing or obtaining by fraud student financial aid > \$200; if ≤ \$200 | 5 yrs. 1 yr. | §B211 |
| (b) | False statement or concealment in loan application | 1 yr. | §F211 |
| (d) | Destruction or concealment of records | 5 yrs. | §B213 |

TITLE 21 - FOOD AND DRUGS

Chapt. 13 - Drug Abuse Prevention and Control
Subchapter I - Control and Enforcement

| | | | |
|----------------|---|--------------------|-------|
| 21 U.S.C. §841 | Prohibited acts | | |
| (a)(1) | manufacturing, distributing or dispensing or possessing with intent to manufacture, dispense or distribute: | | §D211 |
| (a)(2) | creating, distributing, or dispensing, or possessing with intent to distribute or dispense a counterfeit substance | | §D211 |
| (b)(1)(A) | 100 grams contain sch. I or II opiate (i.e., heroin), a kilogram of other sch. I or II narcotic drug (i.e., cocaine), 500 grams of FCP or 5 grams of LSD, 1st offense; if after felony drug conviction | 20 yrs. 40 yrs. | §D211 |
| (B) | Sch. I or II controlled substances other than A or C described, 1st offense; if after felony drug conviction | 15 yrs. 30 yrs. | §D211 |
| (C) | ≤ 50 kilograms of marihuana, ≤ 10 kilograms of hashish, or ≤ 1 kilogram of hashish oil or any sch. III drug (i.e., barbiturate), 1st offense; if after felony drug conviction | 5 yrs. 10 yrs. | §D211 |
| (b)(2) | Sch. IV drugs, 1st offense; if after felony drug conviction | 3 yrs. 6 yrs. | §D211 |
| (b)(3) | Sch. V drugs, 1st offense; if after drug conviction | 1 yr. 2 yrs. | §D211 |

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| 21 U.S.C. §841_(b)(4) | Distribution marijuana for no remuneration, 1st offense; if after drug conviction | 1 yr. 2 yrs. | §D211 |
| (b)(5) | Cultivating a controlled substance on federal property, individual; if not an individual | \$500,000 \$1,000,000 | §D211 |
| (d)(1) | Possession of piperidine with intent to manufacture PCP | 5 yrs. | §D211 |
| (2) | Possession of piperidine knowing or having cause to believe that it will be used to manufacture PCP | | |
| 21 U.S.C. §842_(a)(1) | Knowingly violation of distributing or dispensing a controlled substance by prescription in sch. II, III, IV, and V | 1 yr. 2 yrs. | §D232 |
| (2) | for registrant knowingly to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration; | 1 yr. 2 yrs. | §D232 |
| (3) | for registrant knowingly to distribute a controlled substance in a commercial container unless such container bears a label containing an identifying symbol for such substance. Label of a sch. II, III or IV drug must contain warning that it is a crime to transfer the drug to any person other than the patient; sch. I, II, III and IV drugs must be distributed in container which is securely sealed; | 1 yr. 2 yrs. | §D232 |
| | if after drug conviction | | |
| (4) | knowingly to remove, alter or obliterate a symbol or label required by section 825 of this title; | 1 yr. 2 yrs. | §D232 |
| | if after drug conviction | | |
| 21 U.S.C. §842_(a)(5) | knowingly to refuse to make, keep or furnish any record, report, notification, order, order form, declaration, statement, invoice or information required to be kept (except relating to piperidine); | 1 yr. 2 yrs. | §F211 |
| | if after drug conviction | | |

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| (6) knowingly to refuse any entry into any premises or inspection authorized by this subchapter or subchapter II | same as above | §D232 | |
| (7) knowingly to remove, break, injure or deface a seal placed upon controlled substances pursuant to section 824(F) or 881 of this title or to remove or dispose of such substances | same as above | §D232 | |
| (8) knowingly to use, to his own advantage, or to reveal, other than to duly authorized persons or courts any information acquired in the course of an authorized inspection concerning any method or process which as a trade secret is entitled to protection | same as above | §H235 | |
| (9) knowingly to distribute or sell piperidine unless the recipient or purchaser presents identification to the distributor or seller | same as above | §D232 | |
| 21 U.S.C. §842_(b) for registrant to manufacture a controlled substance in sch. I or II which is knowingly (1) not authorized by his registration and assigned quota; | (2) in excess of assigned quota; | 1 yr. | §D232 |
| | if after drug conviction | 2 yrs. | |
| 21 U.S.C. §843_(a) For registrant | | | |
| (1) to distribute sch. I or II substance without order, | | | §D231 |
| (2) use false registration number, | | | §D231 |
| (3) acquire drugs by fraud or | | | §D222 |
| (4) to present false identification when purchasing piperidine, or | | | §D231 |
| (5) to possess materials to label counterfeit substances; or | | | §D231 |
| (b) For anyone to use communication facilities in committing drug felony; | | | |
| 1st offense; | 4 yrs. | | §D213 |
| if after prior felony drug conviction | 8 yrs. | | |
| 21 U.S.C. §844_Simple possession of controlled substance, 1st offense; | 1 yr. | | §D221 |
| subsequent convictions, this section | 2 yrs. | | |
| 21 U.S.C. §845_Distribution to persons under 21 (by person \geq 18), 1st offense; | 2 x penalty of 21 U.S.C. §841(b) | | §D211 |
| subsequent convictions, this section | 3 x penalty of 21 U.S.C. §841(b) | | §D211 |

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| 21 U.S.C. §845a | Distribution in or near schools, 1st offense; subsequent conviction, this section | 2 x penalty of 21 U.S.C. §841(b) 3 yrs. to life | §D211 |
| 21 U.S.C. §846 | Attempt or conspiracy to commit drug offense | same as offense | §D213 |
| 21 U.S.C. §848 | Continuing criminal enterprise; subsequent convictions | ≥ 10 yrs. to life ≥ 20 yrs. to life | §D212 §D212 |
| 21 U.S.C. §854 | Investing illicit drug profits in any "enterprise" involved in interstate commerce | 10 yrs. | §D212, §F211 |

Subchapter II - Import and Export

| | | | |
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| 21 U.S.C. §952 | Importation of controlled substances in sch. I-IV: | | |
| | if ≥ 100 grams of mixture containing certain narcotic in sch. I or II opiates (i.e., heroin); | | §D211 |
| | ≥ a kilogram of other narcotic in sch. I or II (i.e., cocaine); | | §D211 |
| | ≥ 500 grams of PCP; or ≥ 5 grams of LSD | 20 yrs. | §D211 |
| | All other controlled substances in sch. I or II except as provided below; | 15 yrs. | §D211 |
| 21 U.S.C. §953 | Exportation of controlled substances; exportation of any narcotic drug in sch. I-V: | 5 yrs. | §D211 |
| | if ≥ 100 grams of mixture containing certain narcotic in sch. I or II opiates (i.e., heroin); | | §D211 |
| | ≥ a kilogram of other narcotic in sch. I or II (i.e., cocaine); | | §D211 |
| | ≥ 500 grams of PCP; or ≥ 5 grams of LSD | 20 yrs. | §D211 |
| | Other controlled substances in Sch. I or II except as provided below; | 15 yrs. | §D211 |
| | any amt. of sch. III, IV or V drugs | 5 yrs. | §D211 |

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| 21 U.S.C. §954_Knowingly or intentionally importing into U.S. for transshipment to another country sch. I controlled substance without prior written approval of Attorney General; knowingly or intentionally importing, transferring, or transshipping controlled substance in sch. II, III or IV without advance notice to Attorney General | 1 yr. | §D233 |
| 21 U.S.C. §955_Possession on board vessels of a controlled substance in sch. I or II or a narcotic drug in sch. III or IV | same as §§ 952-953 | §D211 |
| 21 U.S.C. §955a(a) & (b) Manufacture, distribution or possession with intent to manufacture or distribute controlled substances on board vessels | same as §§ 952-953 | §D211 |
| (c) Attempt or conspiracy to possess, manufacture, distribute or possess with intent to distribute controlled substances on board vessels | same as §§ 952-953 | §D213 |
| (d) With intent to import; if 2nd or subsequent offense | 2 x above penalty | §D213 |
| 21 U.S.C. §957_Knowingly importing into U.S. or exporting from U.S. any controlled substance in Sch. I-V without a registration issued by the Attorney General | same as §§ 952-953 | §D211 |
| 21 U.S.C. §959_To manufacture or distribute for purposes of unlawful importation of sch. I or II controlled substance | same as §§ 952-953 | §D211 |
| 21 U.S.C. §960_Penalty provisions as above | | |
| 21 U.S.C. §962_Second or subsequent offenses after felony drug conviction | 2 x above penalties | §D211 |
| 21 U.S.C. §963_Attempts or conspiracies to violate any offenses in this subchapter | same as offense | §D213 |

TITLE 26 - INTERNAL REVENUE CODE

| | | |
|--|--------|-------|
| 26 U.S.C. §5148(1) Willful nonpayment of special tax | 2 yrs. | §C221 |
| 26 U.S.C. §5601 Prohibited acts involving stills | 5 yrs. | §C221 |
| 26 U.S.C. §5602 Tax fraud by distiller | 5 yrs. | §C221 |

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| 26 U.S.C. §5603 | Failing to make or falsifying required records with intent to defraud; if without intent to defraud | 5 yrs. 1 yr. | §C221 §C222 |
| 26 U.S.C. §5604(a) | Misuse of stamps, marks, brands, or containers | 5 yrs. | §C221 |
| 26 U.S.C. §5605 | Willful noncompliance with regulations set forth by the IRS for the disposition of distilled spirits or items used in its manufacture | 2 yrs. | §C222 |
| 26 U.S.C. §5608(a) | Fraudulent claims for export drawback; every owner or agent of any vessel, or other aider and abetter | 3 x amt./5 yrs. 3 yrs. | §C221 |
| | (b) Unlawful relanding or aiding and abetting unlawful relanding | 3 yrs. | §C221 |
| 26 U.S.C. §5661(a) | Evading taxes or intentionally failing to comply with regulations regarding wine with intent to defraud | 5 yrs. | §C221 |
| | (b) Failure to comply with regulations regarding wine without intent to defraud | 1 yr. | §C222 |
| 26 U.S.C. §5662 | Alteration of wine labels | 1 yr. | §C222 |
| 26 U.S.C. §5671 | Evasion of beer tax and intentional noncompliance with requirements | 5 yrs. | §C221 |
| 26 U.S.C. §5682 | Breaking locks or gaining access to a distilled spirits plant | 3 yrs. | §B213 |
| 26 U.S.C. §5683 | Transporting alcoholic beverages under improper designation | 1 yr. | §C222 |
| 26 U.S.C. §5685(a) | Unlawful possession of devices for emitting gas, smoke, or explosives and firearms when violating liquor laws | 10 yrs. | §K218 |
| | (b) Unlawful possession of machine gun or shotgun when violating liquor laws | 20 yrs. | §K218 |
| 26 U.S.C. §5691(a) | Failure of wholesalers/retailers to pay special tax on liquor | 2 yrs. | §C221 |
| 26 U.S.C. §5762(a) | Fraudulent acts regarding tobacco, including: manufacturing, filing forms, complying with regulations, evading taxes, destroying marks, removing tobacco products or papers or tubes | 5 yrs. | §C221 |

(b) Commission of above-mentioned acts
without intent to defraud 1 yr. §C222

Chapt. 53 - Machine Guns, Destructive Devices, and Certain Other Firearms

26 U.S.C. §5861 Prohibited acts involving firearms,
including receiving or possessing
firearms that are illegally made,
transferred or imported, that are
unregistered or that have oblit-
erated or altered serial numbers;
engaging in any firearm business
without paying tax and registering;
or making false entries or records 10 yrs.
26 U.S.C. §5871 §K221

Chapt. 75 - Crimes, Other Offenses and Forfeitures

26 U.S.C. §7201 Attempts to evade or defeat tax 5 yrs. §C211

26 U.S.C. §7202 Willful failure to collect or pay
over any tax 5 yrs. §C216

26 U.S.C. §7203 Willful failure to pay any estimated tax,
keep records, or supply information; 1 yr. §C212

26 U.S.C. §7204 Fraudulent statement or failure to make
statement to employees 1 yr. §C218

26 U.S.C. §7205 Fraudulent withholding exemption
certificate or failure to supply
information 1 yr. §C219

26 U.S.C. §7206 Fraud and false statements; aiding and
abetting tax fraud 3 yrs. §C213, §C214

26 U.S.C. §7207 Fraudulent returns, statements, or other
documents 3 yrs. §C215

26 U.S.C. §7211 False statements to purchasers or lessees
relating to tax 1 yr. §F211

26 U.S.C. §7213 (a)1 Willful disclosure of tax information
by federal employees 5 yrs. §H235

26 U.S.C. §§7215,
7512(b) Failure to comply with regulations dealing
with collection, recording, and paying
taxes 1 yr. §C217

26 U.S.C. §7232 Failure to register or false statement by
manufacturers or producer of gasoline or
lubricating oil 5 yrs. §F211

TITLE 29 - LABOR

| | | | |
|------------------------|--|-----------------|-------|
| 29 U.S.C. §501(c) | Embezzlement of assets of labor organizations | 5 yrs. | §B211 |
| 29 U.S.C. §§1816, 1851 | Unlawfully employing alien as farm worker; if without certificate of registration | 1 yr. 3 yrs. | §L214 |

TITLE 31 - MONEY AND FINANCE

| | | | |
|-----------------|---|--------|-------|
| 31 U.S.C. §5322 | Violating reporting requirements for certain financial transactions | 5 yrs. | §F211 |
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TITLE 42 - THE PUBLIC HEALTH AND WELFARE

Chapt. 6A - Public Health Service

| | | | |
|--------------------|--|---------|-------|
| 42 U.S.C. §261(a) | Introducing contraband into hospitals in which drug abusers are treated | 10 yrs. | §D211 |
| 42 U.S.C. §300e-17 | Knowingly making false statement in financial statement of health maintenance organization | 5 yrs. | §F211 |

Chapt. 7 - Social Security

| | | | |
|---|---|--------|--------------|
| 42 U.S.C. §408 | Penalties for violations concerning old age benefits and insurance; | 5 yrs. | §F211 |
| | if violator is a certified payee under section 405(j), upon second or subsequent conviction | 5 yrs. | |
| 42 U.S.C. §1383(d)(2) | Defrauding claimant or charging excessive fee (SSI) | 1 yr. | §F211 |
| 42 U.S.C. §1383a(b) | Fraud concerning supp. security income by one in role as payee under section 1383(a)(2) | | |
| | -first conviction; | 1 yr. | |
| | -second or subsequent conviction | 5 yrs. | |
| 42 U.S.C. §1395nn(a) | Fraud concerning health insurance; if by another | 1 yr. | 5 yrs. §F211 |
| 42 U.S.C. §1395nn(b) | Illegal remunerations | 5 yrs. | |
| 42 U.S.C. §1395nn(c) | Fraud with respect to certification of institution | 5 yrs. | §F211 |
| <u>Chapt. 12 - Compensation for Injury Outside U.S.</u> | | | |
| 42 U.S.C. §1713 | Fraud | 1 yr. | §F211 |

Chapt. 20 - Elective Franchise

| | | |
|--|--------|-------|
| 42 U.S.C. §1973i(c) False information in registering or voting | 5 yrs. | §H221 |
| 42 U.S.C. §1973i(d) Falsification or concealment of material facts in matters within jurisdiction of examiners or hearing officers | 5 yrs. | §H221 |
| 42 U.S.C. §1973i(e) Voting more than once | 5 yrs. | §H221 |
| 42 U.S.C. §1973j (a) depriving or attempting to deprive any person of any right secured by section 1973 | 5 yrs. | §H221 |
| (b) destroying, defacing, mutilating, or altering ballots or official voting records | | |
| (c) conspiring to violate or interfere with rights secured by section 1973 | 5 yrs. | §H221 |
| 42 U.S.C. §1974a Theft or destruction of records | 1 yr. | §H221 |

Chapt. 21 - Civil Rights

| | | |
|--|----------------|-------------|
| 42 U.S.C. §2000e13 Killing agent or employee of the EEOC engaged in performance of official function under Act | life | §A211-§A213 |
| Assaulting agent or employee of EEOC | 18 U.S.C. §111 | §A221-§A225 |
| 42 U.S.C. §2000g-2 Officer or employee of Community Relations Service revealing private information | 1 yr. | §H235 |

Chapt. 35 - Public Works and Economic Development

| | | |
|---|--------|--------------|
| 42 U.S.C. §3220 Economic development fraud | 5 yrs. | §F211 |
| 42 U.S.C. §3220(b) Embezzlement; false entries; fraud schemes | 5 yrs. | §B211, §F211 |

Chapt. 42 - Narcotic Addict Rehabilitation

| | | |
|----------------------------------|---------------------------|-------|
| 42 U.S.C. §3426 False statements | 5 yrs. 18 U.S.C. §1001 | §F211 |
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Chapt. 45 - Fair Housing

| | | |
|---|------------------|----------------------|
| 42 U.S.C. §3631 Intimidation in violation of fair housing regulations; if bodily injury | 1 yr. 10 yrs. | §H211 §A221-§A225 |
|---|------------------|----------------------|

Chapt. 46 - Justice System Improvement

42 U.S.C. §3795 Embezzlement, theft or fraud in connection
with federal assistance 5 yrs. §B211, §F211

Chapt. 68 - Disaster Relief

42 U.S.C. §5157 Fraudulent request for disaster relief 1 yr. §F211

TITLE 49 - TRANSPORTATION

49 U.S.C. §121 Offenses involving bills of lading 5 yrs. §F211

49 U.S.C. §1472 Federal Aviation Program:

(b)(1) Forgery of certificates and
false marking of aircraft 3 yrs. §F211

(b)(2)(A) Violation of paragraph 1
(above) with intent to commit
crime punishable by death or
imprisonment for term exceeding
1 year under state or federal
law relating to controlled sub-
stance (not simple possession) 5 yrs. §F211

(b)(2)(B) Violation of paragraph 1
(above) by selling fraudulent
certificate with knowledge that
buyer intends to commit crime
(as in (2)(A)) 5 yrs. §F211

(e) Failure to file reports;
falsification of records fine only §F211

(f) Unauthorized divulging of
Information 2 yrs. §H235

(h)(2) Willful delivery, reckless
cause of transportation, any
baggage, etc., which contains
hazardous material 5 yrs. §K231

(i)(1) Aircraft piracy;
if death results \geq 20 yrs.
death/life §A211

(j) Interference with flight crew
members or flight attendants
if with deadly/dangerous weapon \geq 20 yrs.
life Part A
§K216

| | | |
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| (l) Carrying weapons, loaded firearms, and explosives or incendiary devices aboard aircraft; if willful disregard for safety of human life | 1 yr. 5 yrs. | §K216 |
| (n) Aircraft piracy outside special aircraft jurisdiction of U.S.; if death results | \geq 20 yrs. death/life | §A211 |
| (p) Interference with aircraft accident investigation - withholding any part of aircraft involved in acci- dent, property aboard aircraft | 1 yr. | §F211 |
| (q) Transporting controlled substances without airman certificate | 5 yrs. | §D211, §D221 |
| 49 U.S.C. §1809 Unlawful transportation of hazardous materials | 5 yrs. | §K231 |

*With a few exceptions, the maximum fines established in specific statutes have not been listed because they have been superseded by the maximum fines established in 18 U.S.C. § 3571.