White Collar Working Group Report

Susan M. Kuzma - Chair

David Rauma
Nolan Clark
John Scalia
Chuck McDanal
Jeanneine Gabriel
Rusty Burress
Cameron Counters
Mary McDowell
Andy Purdy
Lori Fee
Win Swenson

Final Edition
April 1993

TABLE OF CONTENTS

TABLE OF CONTENTS i

I. INTRODUCTION 1

II. THEFT AND FRAUD OFFENSES (CHAPTER TWO, PARTS B AND F) 2
- A. Loss Issues 2
  - 1. Reliance on Loss 2
    - Introduction 2
    - The Role of "Loss" Under Part 2B and Part 2F 2
    - Research Data Relating to Loss 3
    - Benefits and Problems of Loss-Driven Guidelines 6
    - Possible Changes 9
    - Limitations of Research 10
  - 2. Definition of "Loss" under the Theft and Fraud Guidelines ... 10
    - Introduction 10
    - Definition of "Loss" Under §2B1.1 (Theft) and §2F1.1 (Fraud) 11
    - Issues Relating to the Current Definition of "Loss" 13
    - Analysis of Case Law 15
    - Analysis of Hotline Calls 19
    - Case-Coding Information 20
    - Conclusions 21
- B. More than Minimal Planning 22
  - 1. Introduction 22
  - 2. Current Sentencing Provisions Regarding More Than Minimal Planning 23
  - 3. Monitoring and Case-Coding Data 26
    - Monitoring Data 26
    - Case-Coding Information 26
    - Sanctions Imposed 28
  - 4. Case Law 29
  - 5. Issues Relating to "More Than Minimal Planning" 33
  - 6. Proposals for Change 34
- C. Incremental Punishment 36
  - 1. Introduction 36
  - 2. The Current Loss Tables in §2B1.1 and §2F1.1 36
    - Development of the Current Loss Tables 36
    - Issues Under the Current Loss Tables 40
  - 3. Examples of Revised Loss Tables to Address the Expressed Concerns 41

4. Severity of Punishment 53
D. Application in Embezzlement Cases of Abuse of Trust Adjustment .. 53
1. Introduction 53
2. Background of §3B1.3 (Abuse of Position of Trust) 54
3. Monitoring Data 55
4. Problems with §3B1.3 (Abuse of Position of Trust) 56
Issues Raised by the Courts 56
Issues Raised in Hotline Calls 58
5. Discussion 60
Exceptional Abuse of Trust Required 60
Position of Trust Makes the Offense Easier to Commit 62
6. Conclusion 63
7. Options 64
E. Consolidation of §2B1.1 and §2F1.1 65
1. Benefits of Consolidation 65
2. Detriments of Consolidation 66
3. Possible Approaches 67
F. Miscellaneous Issues 67
1. Summary of Departure Case Law: §2B1.1; §2F1.1 67
2. Recent Developments Concerning Fraud 69
Financial Institution Fraud 69
Computer Fraud and Abuse 69
3. Comparisons to Past Practice 70

III. TAX OFFENSES -- Chapter Two, Part T 71
A. Tax Offenders and the Commission's Expansion of Non-Prison Alternatives 71
1. Overview of the 1992 Alternatives Amendments 71
2. Department of Justice and Internal Revenue Service Perspectives 72
3. Historical Sentencing Patterns for Tax Offenders 74
Pre-guidelines Tax Sentences 74
Guidelines Tax Sentences 75
4. Tax Offenders and the 1992 Alternatives Amendments 76
5. Options for Increasing Tax Offense Levels 77
B. Simplification of Tax Guidelines 78
1. Introduction 78
2. Current Sentencing Provisions Under Tax Guidelines 79
3. Problems of Practice and Application 81
TAS Hotline Calls 82
Hypothetical Examples 82
Case Law 85
4. Proposals for Simplifying Guidelines 88

C. Tax Offenses Involving Illegally Derived Income 90
1. Introduction 90
2. Monitoring Data 91
3. Case Law 92
4. Discussion 92

IV. AREAS OF PRELIMINARY STUDY 94
A. Offenses Involving Counterfeit Currency 94
1. Introduction 94
2. Current Sentencing; Problems Disclosed by Available Data ... 94
3. Conclusion 97
B. Monitoring of Sentencing Data for Antitrust Offenses Committed by Organizations 97

V. APPENDICES 98

I. INTRODUCTION

The White Collar Working Group was formed to consider issues relating to the guidelines for various economic offenses. Generally, the guidelines for property (Part 2B), fraud (Part 2F), antitrust (Part 2R), and tax (Part 2T) offenses were included in the Group's consideration, although some guidelines within the category of property offenses were omitted because they deal with crimes of violence. Several specific issues relating to the theft, fraud, and tax guidelines, raised and deferred during the 1992 amendment cycle, were considered by the Group, as well as a number of new issues.

The Group's research included: obtaining and evaluating the monitoring data regarding economic offenses; analyzing case law relating to the issues under consideration; collecting and analyzing information relating to those issues from its coding of a sample of 191 fraud and theft cases; collecting and analyzing TAS and Attorney Hotline calls about the theft, fraud, and tax guidelines; and soliciting and considering comment or information provided by outside groups, such as the Probation Officers Advisory Group.

Set forth below is a report describing the Group's research and analysis. It contains a substantive consideration of various issues studied in depth by the Group, a brief description of issues about which preliminary research was conducted, and a compilation of tables and supporting materials, including a profile of economic offenders drawn from monitoring information available to the Commission.

II. THEFT AND FRAUD OFFENSES (CHAPTER TWO, PARTS B AND F)

A. Loss Issues

1. Reliance on Loss

a. Introduction

The Working Group was asked to examine questions raised about the definition of "loss"[1] under the fraud and theft guidelines, a matter that has been the subject of a number of amendments to the commentary, a substantial number of Hotline calls, and a fair amount of litigation. The Group also considered the general notion of reliance on loss as the primary indicator of offense severity.

In order to study the issues, the Group collected data in four ways. First, it obtained and evaluated monitoring data regarding "loss." Second, it analyzed case law relating to "loss." Third, it collected and analyzed information relating to "loss" from its coding of 191 fraud and theft cases. Fourth, it obtained and analyzed the TAS and Attorney Hotline calls about "loss."

The results of the Group's research are set forth below, along with a description of the benefits and problems raised by loss-driven guidelines, and a list of possible ways to address some of the issues that have arisen because of the reliance on "loss" to determine the severity of the offense.

b. The Role of "Loss" Under Part 2B and Part 2F

The commentary to the theft and embezzlement guideline, §2B1.1, explains the role of "loss" in determining the sentence for those offenses as follows: "The value of the property taken plays an important role in determining sentences for theft offenses, because it is an indicator of both the harm to the victim and the gain to the defendant." The fraud guideline also relies heavily on "loss" to determine the sentence, and, as the commentary to §2F1.1 acknowledges, "[f]requently, loss in a fraud case will be the same as in a theft case." The commentary further explains the reason for reliance on "loss": "Empirical analyses of pre-guidelines practice showed that the most important factors that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated."

Both guidelines acknowledge that there are cases in which "loss," at least as defined under the guidelines, does not accurately measure the severity of an offense. See U.S.S.G.

---

[1]Because the word "loss" has both a technical and a colloquial meaning, it is used in quotes to signify the technical meaning under the guidelines.

§2B1.1, comment. (n.2); §2F1.1, comment. (n.10). This result may stem from several sources: the wide range of conduct covered by the theft and fraud guidelines, the possibility that "loss" may be difficult to measure or prove, or the possibility that the guidelines' definition of "loss" may not measure all the factors that reflect the seriousness of the offense. For example, "additional factors" relating to "loss" that should be taken into account may be involved in cases sentenced under the fraud guideline, such as false statement offenses committed for nonpecuniary reasons and having no monetary impact, or fraud offenses involving misrepresentation of ability that create a risk of loss and diminution of opportunity for others.

The guidelines currently operate on the premise that reliance on "loss" will result in appropriate sentences in the great majority of cases, and that atypical cases can be dealt with either by special rules pertaining to the situations they present or by departure. As is set forth below, the Group's case coding data generally accords with this premise: The majority of theft and fraud cases involve crimes committed for monetary gain, as to which the "loss" amount seems fairly readily determinable and seems generally reflective of the seriousness of the offense.[2]

c. Research Data Relating to Loss

1. Case-Coding Information

The Group's coding of a sample of 191 fraud and theft cases yielded information about the theories used to determine "loss," the role of stipulations regarding "loss," the frequency of challenges to probation officers' determinations of "loss," and the outcome of such challenges.[3] In several respects, cases sentenced under §2B1.1 differed from cases sentenced under §2F1.1.

The theory used to calculate "loss" varied significantly between §2B1.1 and §2F1.1 cases. See Table G-1 in Appendix G. In §2B1.1 cases, the actual loss was used in 73.5 percent (N_w = 1,754)[4] of the cases and intended loss was used in 3.0 percent (N_w = 71) of

---

[2]This conclusion sets aside for present purposes the question whether too many offense level increases occur at the low end of the loss spectrum, particularly as compared to the high end of the spectrum.

[3]The selection of the sample is explained in detail in Appendix E of this Report.

[4]N_w = weighted N. The data are weighted because a stratified random sample was drawn from the population of eligible cases in the 1991 monitoring data file. In a simple random sample of the whole population, each sample member represents a fixed proportion of the population. In a stratified sample, a sampled case represents a fixed proportion of one stratum only; if the strata differ in size, the proportion of one case within one stratum will differ from the proportion of another case within another stratum. "Weighting" the data equalizes these proportions across strata so that each case in the weighted sample represents an equal proportion of the population. See Appendix E for more details.

the cases. Intended loss was more important in calculating loss in §2F1.1 cases. In §2F1.1 cases, actual loss was used in 51.7 percent (N_w = 1,539) of the cases and intended loss was used in 12.9 percent (N_w = 383) of the cases. In addition, "no-loss" cases played a role under §2F1.1 but were not found under §2B1.1. No monetary loss was involved in 9.8 percent (N_w = 291) of the §2F1.1 cases. The incidence of no-loss cases appears to be due primarily to false statement cases sentenced under §2F1.1.

"Loss" amounts were stipulated in plea agreements in 22.5 percent (N_w = 536) of the §2B1.1 cases and 24.1 percent (N_w = 719) of the §2F1.1 cases.[5] Under both §2F1.1 and §2B1.1, the probation officer's "loss" calculations generally were not challenged. No challenge was made in 88.8 percent (N_w = 2,120) of the §2B1.1 cases and in 76.9 percent (N_w = 2,289) of the §2F1.1 cases. When the "loss" calculation was challenged, the probation officer's determination was upheld by the court in 82.8 percent (N_w = 117) of the §2B1.1 cases and in about 56.5 percent (N_w = 348) of the §2F1.1 cases.

2. Hotline Calls

A significant number of TAS Hotline calls related to "loss" calculations under §2B1.1 and §2F1.1. From September 1990 to August 1991, 61 calls were received regarding the definition of "loss" under §2B1.1. In the same period, 57 calls were received regarding "loss" under §2F1.1.[6] Certain types of cases seemed to cause added difficulty in making "loss" determinations. Fifteen callers asked how the existence of collateral or the recovery or repayment of property or funds prior to sentencing related to the determination of "loss" under §2F1.1. Four §2F1.1 and five §2B1.1 calls related to stolen credit or ATM cards. Three §2F1.1 calls involved food stamps. Three §2B1.1 cases involved theft of archeological relics or damage to archeological sites.

3. Case Law Analysis

The case law indicates factors other than "loss" that courts have considered to be relevant in sentencing. For example, two reported cases involve defendants who refused to return money they stole. United States v. Bryser, 954 F.2d 79 (2d Cir. 1992); United States v. Valle, 929 F.2d 629 (11th Cir.), cert. denied, 112 S. Ct 401 (1991). In both cases, the courts departed upward to account for this circumstance, since under the guidelines, each defendant's offense level increase based on "loss" was equal to that of a person who took the same amount but immediately returned it. The Bryser court expressed the view that it

---

[5]The Group counted as a stipulation of the "loss" amount either a specific statement in a plea agreement that "loss" was a particular amount, or a statement that a certain amount was taken or obtained by the defendant.

[6]In addition, eight of the 11 calls to the Attorney Hotline concerned the determination of "loss." The TAS Hotline calls are described in more detail in Part II.A.2.e (Definition of "Loss") of this Report and in Appendix D-1 through D-4; Attorney Hotline calls are described in Appendix D-5.

saw "little incentive in the Guidelines for defendants to return" the money they stole, since it resulted in no reduction of the offense level. 954 F.2d at 89.

In a number of cases, an upward departure was given because "loss" did not reflect the seriousness of the offense, due to: (1) the psychological impact of the crime on the victims;[7] (2) the duration or sophistication of the crime;[8] (3) the motivation for committing the crime;[9] (4) the incalculability of "loss";[10] (5) the unusual degree of disruption caused by the crime;[11] or (6) the sensitive position of the defendant.[12] Some other nonmonetary factors considered as a basis for upward departure were rather unusual, such as the occurrence of a high-speed chase during the crime,[13] and the abuse of a corpse during the crime.[14]

A downward departure was granted because the "loss" was partially caused by the victim or a third party.[15] Two cases recognized the ability of a court to depart downward based on a finding that the defendant's crime was a single, "aberrant act."[16] Also noteworthy was the denial of a downward departure based on the disparity between actual loss and intended loss.[17]

The case law reflects a number of areas in which valuation has proved to be an issue; however, these cases appear to be relatively unusual. Such areas include valuation of unique property, such as antiques or goods manufactured under contract, or of property sold

---

[7]United States v. Perkins, 929 F.2d 436 (8th Cir. 1991); United States v. Benskin, 926 F.2d 562 (6th Cir. 1991); United States v. Astorri, 923 F.2d 1052 (3d Cir.), cert. denied, 112 S. Ct. 444 (1991).

[8]United States v. Palinkas, 938 F.2d 456 (4th Cir. 1991); United States v. Benskin, 926 F.2d 562 (6th Cir. 1991); United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990), rev'd on other grounds, 111 S. Ct. 2182 (1991).

[9]United States v. Scott, 915 F.2d 774 (1st Cir. 1990) (to escape arrest on state charge).

[10]United States v. Garcia, 900 F.2d 45 (5th Cir. 1990) (stolen mail).

[11]United States v. Garcia, 900 F.2d 45 (5th Cir. 1990); United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990), rev'd on other grounds, 111 S. Ct. 2182 (1991).

[12]United States v. Fousek, 912 F.2d 979 (8th Cir. 1990).

[13]United States v. Chiarelli, 898 F.2d 373 (3d Cir. 1990).

[14]United States v. Roberson, 872 F.2d 597 (5th Cir.). cert. denied, 493 U.S. 861 (1989).

[15]United States v. Phillips, 962 F.2d 739 (7th Cir. 1992).

[16]United States v. Carey, 895 F.2d 318 (7th Cir. 1990); United States v. Russell, 870 F.2d 18 (1st Cir. 1989).

[17]United States v. Koenig, 952 F.2d 267 (9th Cir. 1991).

only on the black market.[18] In such cases, some courts have looked to replacement value, but that amount may be difficult to ascertain. For example, in United States v. Wilson,[19] the defendant was convicted of stealing his employer's research and development information, which he tried to sell to a competitor of his employer. To determine "loss," the court started with a "ball park estimate" of the cost of developing the information ($8 million), reduced it by 50 percent because half the information was protected by patent, and reduced the remaining $4 million by 75 percent to give the defendant the benefit of the doubt.

Another problem with proving "loss" arises with respect to intended loss. Proof of the amount of "loss" that was intended may consist of the speculation or "puffing" of a defendant (or criminal cohorts) as to the expected "haul" from a crime, which may have been impossible to achieve, or may have been stated in response to the prompting of an undercover agent or informant. See, e.g., United States v. Koenig, 952 F.2d 267 (9th Cir. 1991).

d. Benefits and Problems of Loss-Driven Guidelines

1. Benefits

The initial benefit of relying upon "loss" to determine the severity of an offense is that it reflects conventional wisdom, as embodied in past practice, that crimes involving more money deserve greater punishment, because the harm, actual or potential, to the victim or to society is likely to be greater, and because the defendant's gain, actual or potential, and thus his or her incentive to commit the crime, is likely to be greater. Thus, considerations of retribution and of general and specific deterrence support this method of determining the severity of the offense.[20] The Group's case-coding information reflected that monetary loss usually measures both the harm to society and the gain to the criminal.

A second benefit is that in many cases monetary loss provides a fairly objective standard for measuring the seriousness of an offense, a method that can be used across a broad spectrum of offenses and offenders, thereby reducing the probability of sentencing disparity.

---

[18]See, e.g., United States v. Berkowitz, 927 F.2d 1376 (7th Cir.), cert. denied, 112 S. Ct. 141 (1991) (evidence); United States v. Cherif, 943 F.2d 692 (7th Cir. 1991) (stock-related information); United States v. Rivers, 917 F.2d 369 (8th Cir. 1990) (household items given as gifts or having sentimental value); United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990) (research and development information); United States v. Pemberton, 904 F.2d 515 (9th Cir. 1990) (technical drawings).

[19]900 F.2d 1350 (9th Cir. 1990).

[20]An analogous reliance on quantity to determine offense seriousness is found in the drug guidelines.

Another benefit is that monetary loss is generally a good proxy for other potential ways of measuring the seriousness of property offenses. For example, the number of victims, the number of criminal acts, and the degree of planning or sophistication of the offense may be generally correlated with loss.[21]

Finally, it appears that in most cases loss-driven guidelines are relatively simple to apply. In the Group's coding sample, the loss calculation was generally based on actual loss, and was challenged relatively infrequently.

2. Problems

Loss-driven guidelines do not measure all elements of offense seriousness or offender culpability. The theft and the fraud guidelines embrace a wide variety of conduct, the economic severity of which might be measured differently.[22] Offense seriousness may not be fully measured by monetary loss in cases that involve nonmonetary harm (such as physical injury, psychological injury, and impairment of government operations), or cases that involve risks of harm that may not have occurred (such as risk of nonpayment of loans fraudulently obtained, risk of bodily injury, and malfunction risks caused by a contractor's failure to test products). An offender's culpability may not be fully measured by monetary loss, for example in cases that involve abuse of position, selection of widows or widowers as victims, or misrepresentation of identity.

The benefits of a loss-driven guideline in part depend upon the precision and clarity of the definition of "loss."[23] Inevitably, there is a limit to which language can be sufficiently specific to ensure uniform application yet sufficiently all-inclusive to embrace the myriad

---

[21]Research by Weisburd, Wheeler, Waring, and Bode found that loss was positively and highly correlated with the number of victims and the geographic scope of the offense. D. Weisbard, et al., Crimes of the Middle Class: White Collar Offenders in the Federal Courts 75 (1991).

[22]Indeed, two courts, in evaluating "loss," have pointed out that theft and fraud cases are different, and therefore "decline to impose an identical analysis of ["loss"] for theft and fraud crimes in all cases." United States v. Kopp, 951 F.2d 521, 529 (3d Cir. 1991). Accord, United States v. Badaracco, 954 F.2d 928 (3d Cir. 1992); United States v. Schneider, 930 F.2d 555 (7th Cir. 1991).

[23]Although the Commission conceived of "loss" as a measure of the perceived economic severity of the offense, the use of the word "loss" may have focused attention on the economic impact of the crime upon the victim. Such a singular focus is not only contrary to the Commission's stated desire to reflect both harm and gain, actual or intended, but also might foster the view that "loss" and "restitution" are synonymous, which in turn might suggest analogies to "damages" in the civil context. Indeed, concepts imported from the law of torts or contracts, such as consequential damages, have arisen in various opinions relating to "loss." Several of the amendments to the commentary at §2F1.1 have addressed the question of incidental or consequential damages. Inasmuch as the Commission itself desires "loss" to embody more and less than "damages" for the purposes of civil law or restitution, renaming this portion of the guidelines might prove helpful. A phrase such as "economic severity" or "financial magnitude" may make it easier to focus attention on both harm and gain, and away from the notion of out-of-pocket loss.

factual permutations found in actual cases. The amendment history of both the fraud and theft guidelines and their commentary reflects that establishing a satisfactory definition of "loss" has been challenging. Although there are benefits to clarifications, the piecemeal fashion in which clarifications have been made may generate difficulties as well. See, e.g., United States v. Kopp, 951 F.2d 521, 530 n.14 (3d Cir. 1991) (amendment to Application Note 7 to §2F1.1 was "equally ambiguous" as the language it replaced, and "only succeeded in confusing courts further").

Another problem arises from the tension relating to drawing the line between losses that count under the guidelines and losses that do not count. Counting all types of loss that causally result from an offense, such as consequential and incidental damages, complicates the loss-determination process. Excluding certain types of losses may increase the potential that "loss" will not reflect the seriousness of the offense. Drawing the line between types of losses counted and types not counted creates definitional problems.

Furthermore, there are cases in which the "loss" amounts, as computed under the guidelines, are the same but the cases may not be perceived as reflecting the same degree of moral blameworthiness or the same degree of either harm or gain. For example, a bank employee randomly secretes a deposit pouch, which happens to contain $80,000. After a few days the employee returns the money. The "loss" amount under the guidelines is the same as for a bank employee who knew which pouch would contain a large amount, kept the money, and then spent it. Comparing the two cases, the bank in the second case has suffered more real harm than the bank in the first, and the benefit to the defendant in the second case is far greater than the benefit to the first. Likewise, the amount of the gain is fortuitous in the first case, but not in the second. The methods currently found in the guidelines to accommodate differences among cases involving the same "loss" amounts are departure or selection of a sentence within the applicable range,[24] but even treatment of defendants by either of these means may be problematic.[25]

Another problem with loss-driven guidelines is that in some cases involving monetary loss it is difficult either to prove or to measure the magnitude of the loss. The guidelines currently provide that "loss need not be determined with precision," and may be proved under a preponderance standard by "any reasonably reliable information available." The

---

[24]In addition, it is possible to conclude that another guideline is more appropriate than §2F1.1 or §2B1.1. For example, a false statement to a government agency might be considered more analogous to obstruction if its impact is not financial but rather interference with a governmental function.

[25]Furthermore, since the guidelines cannot control the charging decision, a defendant may be charged with a misdemeanor rather than a felony, even if the loss exceeds the felony level, and therefore be subject to a lower maximum penalty. In the Group's case-coding project, 33.4 percent (N_w = 797) of §2B1.1 cases and 9.7 percent (N_w = 287) of §2F1.1 cases were handled as misdemeanors. The highest amount of "loss" in a misdemeanor case was $229,300, and the lowest amount in a felony case was $100.

more flexibility built into the determination of "loss" to take into account proof problems, however, the less certain it may be that "loss" amounts are truly comparable.[26]

e. Possible Changes

As noted, the guidelines operate on the theory that using "loss" as the chief determinant of the sentence will result in an appropriate level of punishment in the typical case and that unusual cases can be dealt with through departure. It is possible to conclude that the data presented confirm what the Commission originally contemplated; namely, that there will be unusual cases that cannot be anticipated or dealt within the framework of the theft and fraud guidelines, but rather may form the basis for a departure. It also is possible to conclude that, to the extent problems have arisen in determining "loss," they can be dealt with by redefining "loss" or clarifying the commentary.

If the Commission desired to change the focus on "loss" in the theft and fraud guidelines, any one of the following methods could be employed:

- Add More Specific Offense Characteristics: This approach would seek to identify nonmonetary factors that aggravate or mitigate a theft or fraud case, and accord those factors weight under either or both guidelines by making them specific offense characteristics.

- Add Cross-References to Other Guidelines: This approach would seek to identify areas in which a loss-driven guideline does not appear to fit well and to determine whether some other guideline would yield a more appropriate sentence. For example, a false statement case that involved no monetary loss might be conceptualized as an obstruction of a government agency proceeding and treated under the obstruction guideline. This approach would necessitate careful scrutiny to determine whether such nonmonetary offenses are punished appropriately if treated under other guidelines, and may involve adding mitigating factors.

- Add Language Regarding Departures: This approach would expand Application Note 10 to §2F1.1 (Fraud) and add a similar application note to §2B1.1 setting forth examples of instances in which "loss" does not "fully capture the harmfulness or seriousness of the conduct," thus warranting an upward departure, or in which "loss" overstates the seriousness of the offense, thus warranting a downward departure.

- Add Alternative Method for Determining Offense Level: This approach would result in two prongs for determining the offense level for fraud or theft, one prong relevant to

[26]The use of differing standards of appellate review for determining "loss" (e.g., "clearly erroneous," deference, or "de novo") may enhance this prospect.

offenses involving monetary loss or gain, and the other relevant to nonmonetary offenses.[27] Because this approach is a more pronounced change from the current regimen, careful scrutiny of the overall levels of severity of punishment would have to be given, as well as close consideration of the "roll-over" effect on other guidelines that rely upon §2F1.1 or §2B1.1 or their loss tables to determine the offense level.

- Compress the Loss Table to De-Emphasize "Loss": This approach would retain the basic structure of the fraud and theft guidelines, but would decrease the number of offense level increases based on "loss," to de-emphasize the role of "loss" in the overall offense level. To implement this approach, it would be necessary either to increase the base offense level for each offense and provide for mitigating (and aggravating) factors, or to maintain the current base offense level and provide for specific offense characteristics to enhance punishment in particular cases.

f. Limitations of Research

Relatively little detailed research into the reliance on "loss" in determining the severity of the offense has been done since the guidelines went into effect. In the time this Working Group has had to consider the issues, several methods of looking at the loss-reliance issue have been undertaken, but the sample of cases examined by the Group may not provide complete assurance either that problems do not exist or that problems exist in sufficient number to warrant change. Moreover, input from various groups, such as the Probation Officers Advisory Group, may shed more light on this subject. In addition to conducting further research, it would be necessary, at a minimum, to run a large number of cases through any proposed system of change to ensure that appropriate sentences are consistently obtained.

2. Definition of "Loss" under the Theft and Fraud Guidelines

a. Introduction

The Working Group was asked to examine whether there were problems with the definition of "loss" under §2B1.1 and §2F1.1. In order to study this issue, the Group examined relevant case law, TAS and Attorney Hotline calls, monitoring data, and a sample of 191 theft and fraud cases. Information obtained from these sources indicates that the definition of "loss" remains a problem in some cases, such as unusual fraud cases.

---

[27]The January 1987 revised draft of the guidelines, for example, contained such alternative methods for fraud, §F211(3)(a).

b. Definition of "Loss" Under §2B1.1 (Theft) and §2F1.1 (Fraud)

1. §2B1.1 (Theft)

The 1987 version of the guidelines defined "loss" as the "replacement cost to the victim or the market value of the property, whichever is greater." U.S.S.G. §2B1.1, comment. (n.2), October 1987. Amendments effective June 15, 1988, changed the definition to "the value of the property taken, damaged or destroyed." The commentary states that ordinarily loss will be the fair market value of the property at issue. U.S.S.G. §2B1.1, comment. (n.2), June 15, 1988. In October 1988, Application Note 2 of the commentary was amended to include an instruction that in cases in which there is partially completed conduct, the offense level is to be determined in accordance with the provisions of §2X1.1 (attempt, solicitation, or conspiracy). Under §2X1.1, the attempted loss, or the loss that would have occurred had the offense been completed, may be used to determine the offense level. For instance, if a defendant is apprehended while trying to steal a car, the "loss" would be the value of the car, even though the crime was not completed.

Since the October 1988 amendment, the definition of "loss" for the purposes of §2B1.1 has remained virtually unchanged.[28] In simple theft cases, "loss" can usually be determined easily. For example, when a defendant steals a $10,000 car, the "loss" is $10,000, regardless of whether the car is recovered. Similarly, a bank teller who takes $10,000 from the teller drawer is accountable for the $10,000, regardless of any amount the defendant returned.

2. §2F1.1 (Fraud)

Unlike the theft guideline, the original version of §2F1.1 published in October 1987 did not contain a definition of "loss." Although the loss table in the guideline itself required consideration of the "estimated, probable or intended loss," "loss" was not otherwise defined in the guideline or the application notes. Specific commentary to §2F1.1, however, gave guidance in determining "loss." For instance, Application Note 8 permitted a court to estimate "loss" when "loss" could not be determined with precision. In making the estimate, the court could rely upon one or more factors set forth in the Note, such as the "approximate number of victims and the average loss to each victim, or more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations." The offender's gross gain from the fraud was listed as an "alternative estimate that ordinarily will understate the loss." Consistent with §2B1.1, Application Note 7 to §2F1.1 stated that "if a probable or intended loss the defendant was attempting to inflict can be determined," that figure would be used if it was larger than the actual loss.

---

[28] In November 1991, commentary was added that gives instruction about how to calculate "loss" in cases that involve partially completed conduct.

Application Note 9 gave some examples of instances in which dollar loss does not adequately reflect the "harmfulness and seriousness of the conduct," and indicated that an upward departure may be warranted in these instances. Application Note 11 gave several examples of instances in which dollar loss may overrepresent the seriousness of the offense, such as when a defendant misrepresented his debts in order to obtain a loan he genuinely expected to repay.

Effective June 15, 1988, the phrase "estimated, probable or intended loss" was amended to read simply "loss." Also effective that date, Application Note 7 to §2F1.1 was amended to add a reference in §2F1.1 to the definition of "loss" in §2B1.1.

From June 15, 1988, to November 1, 1990, the meaning of "loss" in §2F1.1 remained the same. Although the application notes at §2F1.1 gave additional guidance in determining "loss" in fraud cases, the value of the property taken, damaged, or destroyed was still the starting point, due to the reference to the discussion of "loss" in §2B1.1.

In November 1991, the Commission added commentary at §2F1.1. Application Note 7 now gives additional guidance in determining "loss" in the following specific types of cases: fraud involving the misrepresentation of the value of an item or product substitution; fraudulent loan application and contract procurement cases; diversion of government program benefits; and Davis-Bacon Act cases. The Commission found that in certain of these cases a net loss figure more accurately measured the harmfulness and seriousness of the offense. For example, prior to the amendment, when a defendant fraudulently represented that stock valued at only $10,000 was worth $40,000, a number of courts interpreted the "value of the property taken, damaged or destroyed" to mean that the "loss" in such a case was $40,000. The amendment to Application Note 7 makes clear that the "loss" in this case is the amount by which the stock was overvalued, i.e., $30,000.

Similarly, in a fraudulent loan application case in which the defendant misrepresented his capabilities, the "loss" is the actual loss to the victim (or, if loss has not yet occurred, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, "loss" is the amount of the loan not repaid at the time the offense is discovered, less the amount the bank has recovered, or can expect to recover, from any assets pledged to secure the loan. Previously a number of courts concluded that the "loss" was the total amount of the fraudulently obtained loan, regardless of whether the bank suffered an actual loss.[29]

[29] See note 36, infra.

c. Issues Relating to the Current Definition of "Loss"

The 1991 amendment to the commentary to §2F1.1 changed the definition of "loss," in some specific cases, from the value of the property taken to an actual or net loss figure, unless the intended loss is greater. Although the amendment addressed several problems with the definition of "loss" that existed prior to this change, the amendment gave rise to some additional concerns. Two frequently occurring problems (apparent through Hotline calls and training response) are described below.

1. Application in Embezzlement Cases

Embezzlement cases may involve obtaining money through fraudulent loans. The "loss" can vary substantially depending on whether §2F1.1 or §2B1.1 is applied. Take as an example a defendant who, through his position with a bank, obtained three fraudulent loans totalling $30,000, and who paid a total of $15,000 on the loans prior to the discovery of the offense. He is charged under 18 U.S.C. § 656 (embezzlement by a bank officer or employee). Although §1B1.2 provides that the applicable guideline is to be selected based on the offense conduct, the Statutory Index for the guidelines is frequently relied upon exclusively in selecting the applicable guideline. Prior to November 1, 1992, the guideline listed in the Statutory Index for 18 U.S.C. §656 was §2B1.1, under which "loss" would be based on the value of the property taken, $30,000. The commentary at §2B1.1 specifically prohibits reducing the loss by the amount of money the defendant returned.

If the same defendant were prosecuted under 18 U.S.C. § 1005 (fraudulent bank entries), however, the guideline listed in the Statutory Index prior to November 1, 1992, was §2F1.1, under which the "loss" would be $15,000 because the new commentary at Application Note 7(b) permits reduction of the loss by the amount the defendant repaid prior to the discovery of the offense. In this example, the difference in definition results in a two-level difference in the defendant's offense level.

In an effort to correct this problem, the Commission, effective November 1, 1992, changed the statutory reference at Appendix A by adding §2F1.1 to the list of applicable guidelines for 18 U.S.C. § 656, thus permitting the user to apply either §2B1.1 or §2F1.1. It is still possible, however, to manipulate the outcome of a case by choosing the guideline that achieves the desired result.

In addition, the interaction between the use of net loss for fraudulent loan application cases and the specific offense characteristic under the fraud guideline for an offense that "affected a financial institution" may raise questions. Under §2F1.1(6)(B), a four-level increase, with a floor of Offense Level 24, is required if an offense "affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense." If "gross receipts" is interpreted to include the face value of a loan, a bank officer who fraudulently obtained a loan of $1,000,001 would have an offense level of 24, even if he paid back the loan before the offense was discovered. But if the same officer obtained

a fraudulent loan of $1,000,000 and repaid it prior to the discovery of the offense, he would have a base offense level of 6 with no increase for "loss."

2. Examples in Application Note 7(b) to §2F1.1

The commentary to §2F1.1 raises another issue in interpreting the definition of "loss" that is best illustrated by a hypothetical case. An individual fraudulently obtained credit cards by using the names and social security numbers of deceased people, charged $20,000, and paid $14,000 on the account prior to the discovery of the offense. He is convicted of violating 18 U.S.C. § 1029 (fraudulent use of credit card), for which §2F1.1 is listed as the applicable guideline in the Statutory Index. Under the definition of "loss" at Application Note 7, "loss" is the value of the property taken, unless the intended loss the defendant was attempting to inflict can be determined and is greater. Under this formulation, the "loss" would be $20,000, the total amount of property illegally obtained through the use of the credit cards.

As stated in Application Note 7, "there are, however, instances where additional factors are to be considered in determining the loss or attempted loss." The Note sets forth three examples of instances in which these other factors apply. In particular, 7(b) applies to fraudulent loan application cases, and permits reduction of the "loss" by the amount the defendant repaid prior to the discovery of the offense.

The training staff reports that there is some confusion among probation officers about whether the instruction at Application Note 7(b) would apply to the hypothetical case described above. The confusion appears to center on whether the examples of loss involving additional factors apply only to the specific circumstances described in the examples, or to any case having similar characteristics. The hypothetical case, for example, might be seen as akin to a bank loan fraud in which the defendant has misrepresented his assets. If the example in Application Note 7(b) applies to the hypothetical, the amount of "loss" is $6,000, the balance due on the account. If the court interprets the guideline to limit application of the examples to the exact scenarios they encompass and relies solely on the "value of the property taken," the "loss" is $20,000. In this hypothetical, the offense level is one higher or lower depending on the interpretation of Application Note 7.

3. Changes to the Definition of "Loss" Effective November 1, 1992

Effective November 1, 1992, a sentence was added to the commentary to Application Note 7 to §2F1.1 to make clear that interest is not included in the determination of "loss." This sentence was not added to the commentary at §2B1.1, although the question is frequently asked, particularly with respect to embezzlement cases. Commentary was also added to Application Note 7(b) to §2F1.1 to make clear that in fraudulent loan application and contract procurement cases if the intended loss is greater than the actual loss, intended loss should be used.

Despite these changes there remain several other areas of confusion, evidenced through Hotline calls and training response, concerning the definition of "loss." For instance, is there any difference among the terms intended, expected, and attempted loss? Can consequential damages be included in the determination of "loss"? What is the intended loss in fraudulent loan application cases? Although it seems apparent that there are instances in which making payments on a fraudulent loan or pledging collateral may be indicative of the defendant's intent, defendants may be apprehended before their actions truly reflect their intent, thus making it difficult to determine intended loss.

d. Analysis of Case Law

An examination of the case law dealing with the determination of "loss" and the application of the definitions found in §2B1.1, §2B1.2, and §2F1.1 discloses several issues and noteworthy aspects.[30] When considering the issues raised in these cases, it should be noted that appellate cases often involve atypical situations and therefore may not reflect the frequency with which particular problems have arisen. In addition, some of the issues raised in the cases may have been resolved by subsequent amendment.

A number of cases dealt with the meaning of "loss" and questioned whether it includes: (1) incidental or consequential damages, such as interest,[31] tax and shipping charges,[32] secondary losses,[33] or other expenses;[34] (2) the value of property physically

---

[30]A noteworthy aspect of the case law dealing with the "loss" is the variation among the appellate courts as to the appropriate standard of review. Some courts treat the determination of "loss" as a question of fact, subject to review under the "clearly erroneous" standard, e.g., United States v. West, 942 F.2d 528 (8th Cir. 1991); others treat it as a question of application of law (the guideline) to fact, subject to the standard of deference in 18 U.S.C. § 3742(e), see United States v. Cea, 925 F.2d 56 (2d Cir. 1991); and others treat the definition of "loss" (and thus the inclusion or exclusion of certain items) as a question of law subject to de novo review. E.g., United States v. Lara, 956 F.2d 994 (10th Cir. 1992); United States v. Davis, 922 F.2d 1385 (9th Cir. 1991).

[31]See United States v. Curran, 967 F.2d 5 (1st Cir. 1992) ("loss" includes interest that would have accrued to bankrupt estate's account but for bankruptcy trustee's embezzlement of the principal); United States v. Jones, 933 F.2d 353 (6th Cir. 1991) ("loss" includes interest on charges to credit card account when cards obtained through false representations).

[32]See United States v. Burns, 894 F.2d 334 (9th Cir. 1990) ("loss" includes tax and shipping charges on items obtained through mail by fraud).

[33]See United States v. Pavao, 948 F.2d 74 (1st Cir. 1991) (victim's services as employee fraudulently obtained by defendant who failed to pay promised salary; "loss" includes part of financial loss on house victim lost as a result of failure to make mortgage payments).

[34]See United States v. King, 915 F.2d 269 (6th Cir. 1990) (cost of developing surveillance film and of hiring security guards to protect bank vault damaged during unsuccessful theft attempt included in cost of repair, the method used to determine "loss" under §2B1.1).

obtained by the defendant but not permanently retained or not taken with the intent to permanently retain it;[35] or (3) the face value of a loan[36] or contract.[37] A number of these cases relied on the literal definition of "loss" -- "the value of the property taken, damaged, or destroyed." Some of these issues have been dealt with by subsequent amendment to the commentary (i.e., interest and the "loss" in a case involving a fraudulent loan).

Some cases raised the question whether the "value" of stolen property, especially property that has no commercial market, is limited to the "black market" value.[38] The more general question of how to determine the "value" of property that has no commercial market was considered in a number of cases.[39] The question whether the wholesale or the

---

[35]See United States v. Johnson, 941 F.2d 1102 (10th Cir. 1991) ("loss" includes fair market value of rental property defendant purchased knowing he could not make the mortgage payments, despite fact that property was returned to seller through mortgage foreclosure); United States v. Westmoreland, 911 F.2d 398 (10th Cir. 1990) (after stealing truck's cargo, defendant truck driver abandoned his employer's truck and reported it stolen; "loss" held to include value of truck as well as cargo, despite fact that truck was recovered); United States v. Parker, 903 F.2d 91 (2d Cir. 1990), cert. denied, 111 S. Ct. 196, 201 (1991) (thieves hijacked armored car containing $357,000 but only took $247,000 from it; "loss" held to be $357,000 (no argument apparently made to include value of the armored car)).

[36]Compare United States v. Brach, 942 F.2d 141 (2d Cir. 1991); United States v. Cockerham, 919 F.2d 286 (5th Cir. 1990); United States v. Johnson, 908 F.2d 396 (8th Cir. 1990) ("loss" is face value of loan); with United States v. Rothberg, 954 F.2d 217 (4th Cir. 1992); United States v. Smith, 951 F.2d 1164 (10th Cir. 1991); United States v. Kopp, 951 F.2d 521 (3d Cir. 1991); United States v. Hughes, 775 F. Supp. 348 (E.D. Ca. 1991)("loss" is actual or intended loss).

[37]United States v. Badaracco, 954 F.2d 928 (3d Cir. 1992) (defendant bank officer approved loans to developers on condition that they award subcontracts to companies owned by defendant's family; "loss" held to be total of contract prices); United States v. Schneider, 930 F.2d 555 (7th Cir. 1991) (fraudulently obtained contract, but contractor would have performed on contract; error to treat "loss" as the contract price).

[38]United States v. Russell, 913 F.2d 1288 (8th Cir. 1990), cert. denied, 111 S. Ct. 1687 (1991) (stolen wholesale liquor sold at a discount; "loss" is retail value); United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990) (research and development information defendant stole from employer and attempted to sell to competitor; "loss" is cost of development minus 50% because of patent protection, reduced by 75% to give defendant benefit of doubt because cost of development was ball park estimate); United States v. Cianscewski, 894 F.2d 74 (3d Cir. 1990) (stolen checks sold at a discount; "loss" is face value of checks); United States v. Asper, 753 F. Supp. 1260 (M.D. Pa. 1990), aff'd on order, 941 F.2d 1203 (3d Cir. 1991) (body parts of endangered animals; "loss" is cost of replacement, taking into account record book value, scientific value, rarity, and taxidermy, but excluding hunting costs).

[39]United States v. Cherif, 943 F.2d 692 (7th Cir. 1991) (confidential bank information; "loss" measured by profits on stock trades made using the information); United States v. Berkowitz, 927 F.2d 1375 (7th Cir.), cert. denied, 112 S.Ct. 141 (1991) (evidence; "loss" measured by replacement costs); United States v. Rivers, 917 F.2d 369 (8th Cir. 1990) (household items received as gifts or having sentimental value; "loss" could be measured by retail value of replacement items, but unsupported hearsay estimates by owner insufficient); United States v. Pemberton, 904 F.2d 515 (9th Cir. 1990) (technical drawings and designs produced under contract; "loss" is 80%

retail value should be used when the goods stolen were taken from a wholesaler was also litigated.[40]

In defining "loss" some courts have relied upon case law relating to valuation of property for the purpose of distinguishing between a felony and a misdemeanor under statutes such as 18 U.S.C. § 641, which provides for felony punishment only if the "value" of the property exceeds $100.[41] Under § 641, value "means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

A number of cases dealt with whether "loss" could be mitigated or apportioned based on the conduct of the victim or a third party. For example, courts considered whether the calculation of "loss" is affected by the victim's lack of entitlement to the property taken,[42] and whether the victim's failure to mitigate losses should reduce the amount of "loss."[43] Related questions were whether the amount of "loss" should be reduced if property was recovered or not physically obtained by the defendant,[44] and whether the amount of "loss" could be mitigated when it was not clear that the victim would actually suffer harm or that the defendant would ever gain from his conduct.[45] Finally, courts considered what the "loss" should be when the victim would have suffered harm in any event, irrespective of the

---

of contract price because drawings 80% complete); United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990) (research and development information; see note 38, supra).

[40]See United States v. Russell, 913 F.2d 1288 (8th Cir. 1990), cert. denied, 111 S. Ct. 1687 (1991) (retail value used).

[41]See United States v. Russell, 913 F.2d 1288 (8th Cir. 1990), cert. denied, 111 S. Ct. 1687 (1991); United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990).

[42]See United States v. Cea, 925 F.2d 56 (2d Cir. 1991) (bank officer who embezzled loan processing fees he set claimed bank not entitled to the fees; "loss" includes fees because defendant profited by them and either bank or customers lost that amount).

[43]See United States v. Phillips, 962 F.2d 739 (7th Cir. 1992) (negligence of victim or failure to mitigate loss does not reduce "loss," but court departed downward two levels because not all "loss" was attributable to defendant); United States v. Hintzman, 937 F.2d 1196 (7th Cir. 1991) ("loss" includes social security payments erroneously sent to and retained by defendant after he notified government of facts showing nonentitlement).

[44]See United States v. West, 942 F.2d 528 (8th Cir. 1991) ("loss" is contract price for falsely represented goods, even if not yet paid for); United States v. Davis, 922 F.2d 1385 (9th Cir. 1991) ("loss" is fair market value of goods defendant ordered but not yet received); United States v. Johnson, 908 F.2d 396 (8th Cir. 1990) ("loss" is face value of loans, even though sale of collateral and insurance covered most of unpaid loans); United States v. Wills, 881 F.2d 823 (9th Cir. 1989) ("loss" includes all cash advances withdrawn for defendant's benefit through use of fraudulent credit cards although some funds were recovered).

[45]See United States v. Beard, 913 F.2d 193 (5th Cir. 1990) ("loss" includes asset hidden during bankruptcy proceeding at time when not clear whether asset belonged to bankrupt estate).

defendant's actions, or when the defendant's actions could not possibly have caused loss even if they were successful.[46]

Generally, the questions relating to mitigating or apportioning "loss" demonstrate the tension between relying on the literal definition of "loss" ("value of property taken, damaged or destroyed") and relying on the underlying factors that "loss" represents, i.e., gain, harm, and intended gain or harm. For example, in many fraudulent bank loan cases, the gain, the actual loss, and the intended gain and loss are all lower than the "value of the property taken" if read literally to be the face amount of the loan.

Some cases raise the question whether gain, harm, and intended gain or harm are equally available to determine "loss" if the factor relied upon is disproportionate to the others. Two cases that raised this question directly dealt with whether it is appropriate to measure "loss" by the defendant's intent when the defendant's intent was not realistically obtainable,[47] or when the defendant's intent was established by his own mid-crime projections of the expected gain.[48] A number of cases generally litigating the method of determining "loss" involved fact patterns in which the amount of "loss" exceeded the defendant's gain, the "loss" exceeded either the amount of actual loss or the amount of gain, or the "loss" based on the defendant's gain exceeded the actual loss.[49]

---

[46]See United States v. Khan, 969 F.2d 218 (6th Cir. 1992) (false claim for social security benefits for which defendant would not have qualified in any event; no enhancement for "loss" permitted); United States v. Phillips, 962 F.2d 739 (7th Cir. 1992) (fraudulently obtained HUD-insured loans to finance renovation and resale of properties to third party who defaulted, causing sale of property in foreclosure at very low price; "loss" not reduced by losses attributable to conduct of HUD or of third parties); United States v. Lara, 956 F.2d 994 (10th Cir. 1992) (false subcontracting bids submitted to government, but value given to government; "loss" is difference between true amount and false amount, despite defendant's claim that actual value of services exceeded false bids); United States v. Schneider, 930 F.2d 555 (7th Cir. 1991) (fraudulently obtained contract but contractor would have performed on the contract; error to treat "loss" as the contract price); United States v. Whitehead, 912 F.2d 448 (10th Cir. 1990) (defendant fraudulently obtained lease of house with option to buy when he had no means to pay rent or mortgage but not clear defendant would have ever exercised the option; "loss" does not include value of house); United States v. Sloman, 909 F.2d 176 (6th Cir. 1990) (scheme to acquire at salvage price property falsely reported to insurance company as total (rather than partial) loss when insurance company would have paid some amount on the claim in any event; "loss" is amount of claim paid).

[47]See United States v. Loban, 945 F.2d 1214 (2d Cir. 1991) (soliciting investments by telephone in violation of injunction; "loss" measured by multiplying number of calls by amount of investment solicited); United States v. Jenkins, 901 F.2d 1075 (11th Cir.), cert. denied, 111 S. Ct. 259 (1990) (securities stolen were non-negotiable and therefore worthless to defendant; "loss" is face value of securities).

[48]See United States v. Koenig, 952 F.2d 267 (9th Cir. 1991) (scheme to manufacture ATM cards to access accounts; defendant told co-conspirator that 1,000 cards could produce $500,000).

[49]See, e.g., United States v. Hernandez, 952 F.2d 1110 (9th Cir. 1991) ("loss" for counterfeit tapes computed by market value, not by gain to defendants or lost profit); United States v. Cambra, 933 F.2d 752 (9th Cir. 1991) (counterfeit steroids sold in violation of Food, Drug, and Cosmetic Act; "loss" determined by amounts obtained by selling the drugs to the public, although the court applied §2F1.1, rather than §2N2.1, on theory that

A number of these cases might be construed as involving the unexpressed question whether the amount settled on as the "loss" for the purpose of determining the offense level represents the seriousness of the offense. Thus, arguments about whether to rely on black market value or replacement value may be seen as going beyond the definition of "value" to the deeper question whether the punishment for the offense should be set by the gain to the defendant or by the harm to the victim when the "loss" amounts for each are different. At least one case, United States v. Khan,[50] seems more a disagreement over including behavior as "relevant conduct" than about whether it is appropriate to rely upon unrealistic intentions of gain in determining "loss." In Kahn, the defendant actually submitted false social security claims, but was not entitled to benefits irrespective of the falsity because he did not have enough quarters of coverage to qualify for them. Although the defendant presumably intended a loss, the Sixth Circuit held that the guidelines do not permit an increase in offense level based on estimated loss when there is an impossibility of actual loss for reasons unrelated to the fraud or its discovery. The submission of false claims for social security benefits, however, was considered only because it was "relevant conduct"; Kahn was actually convicted of submitting false insurance claims.

e. Analysis of Hotline Calls

From September 1990 to August 1991, 92 calls concerning §2B1.1 were received on the TAS Hotline.[51] Most of the calls (61) concerned the definition of "loss." Sixteen calls specifically related to the use of intended or actual loss in determining the offense level. Eleven calls were inquiries about the inclusion of penalties, interest, and fees in the determination of "loss." Eleven calls concerned the application of §1B1.3 (Relevant Conduct) in the determination of "loss." Five calls inquired about the determination of "loss" in cases involving stolen credit cards or automatic teller machine cards. Interestingly, three calls concerned the definition of "loss" in cases involving the theft of archeological

---

government was the victim of fraud); United States v. Russell, 913 F.2d 1288 (8th Cir. 1990), cert. denied, 111 S. Ct. 1687 (1991) (wholesale liquor stolen for resale on black market; "loss" determined by retail value); United States v. Pemberton, 904 F.2d 515 (9th Cir. 1990) (partially completed technical drawings produced under contract stolen; "loss" determined by multiplying contract price times the percentage of the work completed); United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990) (research and development information stolen for resale on black market; "loss" determined by cost of developing the information); United States v. Dempsey, 768 F.2d 1277 (N.D. Ill. 1991) ("loss" includes all proceeds of crime, although defendant split proceeds with co-defendants).

[50]969 F.2d 218 (6th Cir. 1992).

[51]An additional 50 calls were received between 1987 and September 1990. These calls have been archived and were not reviewed.

relics, which are usually priceless, or damage to archeological sites, the impact of which may not be identifiable.[52]

The TAS Hotline received a total of 115 calls concerning §2F1.1 from September 1990 to August 1991.[53] As for theft, most of the calls (57) concerned the definition of "loss." Eighteen calls were general inquiries about the calculation of "loss." Fifteen calls concerned whether "loss" takes into account the existence of collateral or the recovery or repayment of property or funds prior to sentencing. Many of these calls specifically dealt with Application Note 7(b). Ten calls specifically related to the use of intended or actual loss in determining the offense level. Four calls concerned the determination of "loss" in cases involving stolen credit cards. Inquiries regarding the determination of "loss" in cases involving food stamps were received three times. The Hotline received only two calls about the inclusion of penalties, interest, and fees in the determination of "loss." Nonpecuniary loss was cited as an issue in only five calls.[54]

The Attorney Hotline data reflect 11 calls concerning either §2B1.1 or §2F1.1. Eight of these calls were questions regarding the determination of "loss."[55]

f. Case-Coding Information

In an effort to understand how "loss" has been determined in fraud and theft cases, the Working Group examined a sample of 191 cases drawn from the fiscal year 1991 monitoring data.[56] Because the data comprised only cases sentenced pursuant to 1989 and 1990 guideline manuals, the study does not reflect the impact of the 1991 amendment to §2F1.1, Application Note 7, which includes more specific direction for determining "loss" in certain situations.

---

[52]The calls reflected a variety of other issues. For a complete description of the calls, see Appendix D-1 through D-2.

[53]An additional 52 calls were received between 1987 and September 1990. These calls have been archived and were not reviewed.

[54]Several other issues were raised in the calls, a complete description of which is found at Appendix D-3 through D-4.

[55]The remaining calls address the operation of Application Note 13 to §2F1.1 and ex post facto issues.

The procedure for recording calls on the Attorney Hotline is substantially different from that on the TAS Hotline. Because every call is not recorded on the Attorney Hotline, the number of calls recorded may not be reflective of the actual number of calls received. A complete description of the calls is found at Appendix D-5.

[56]For a discussion of the factors involved in the selection of the sample examined, refer to Appendix E of this Report.

The sample data indicate that in both theft and fraud cases, the theory of "loss" most frequently used by sentencing courts was the actual amount taken by the defendant, 73.5 percent (N_w = 1,754)[57] and 51.7 percent (N_w = 1,539), respectively. See Table G-1 in Appendix G. Therefore, especially in §2B1.1 cases, the reliance upon the actual amount taken by the defendant tends to show that the definition of "loss" was not a significant issue in many of the cases studied. This observation is further evidenced by the small number of challenges to the determination of "loss" in the presentence investigation report: the determination of "loss" was challenged in approximately 5.9 percent (N_w = 139) of the §2B1.1 cases. Because §2F1.1 cases typically have greater "loss" amounts and rely less on the actual amount taken by the defendant, the rate of challenges to the determination of "loss" was substantially higher, approximately 20.7 percent (N_w = 615). It should be noted that §2F1.1 also includes cases involving false statements to the government that typically involve no pecuniary loss, such as false statements to immigration agents to gain entry into the United States. These nonpecuniary loss cases comprised approximately 9.8 percent (N_w = 291) of the §2F1.1 cases studied. See Table G-1 in Appendix G.

The Group's examination further disclosed that 33.4 percent (N_w = 797) of the §2B1.1 cases represented misdemeanor convictions, and 9.7 percent (N_w = 287) of the §2F1.1 cases were misdemeanors. A number of federal statutes provide for misdemeanors as well as felony offenses based on the amount of money involved, with a dividing line typically set at $100 (e.g., 18 U.S.C. § 641). The misdemeanor convictions in the sample involved as much as $229,300; conversely, the felony cases in which there was pecuniary loss involved as little as $100.[58]

g. Conclusions

For the majority of cases sentenced under Part 2B or Part 2F, at least under the 1989 and 1990 guidelines, the determination of "loss" appears to be based on the value of the property actually taken and does not appear to result in many difficulties for the court. The high percentage of cases in which there is no challenge to the "loss" determination supports this conclusion. The fact that the determination of "loss" was not challenged often, however, does not necessarily demonstrate that the Commission's intentions as to the meaning of "loss" were followed. Further, there is some confusion reflected in the Hotline calls concerning the definition of "loss" for the less typical cases, with confusion more prevalent under §2F1.1. In addition, the case law reflects some difficulties in proof in unusual cases

---

[57] N_w = weighted N. The reasons for using a weighted sample are explained in note 4, supra.

[58] The $100 felony case was prosecuted under 7 U.S.C. § 2024, relating to misuse of food stamps; another low-amount felony was a case involving theft of $405 in scrap metal, prosecuted under 18 U.S.C. § 641. In the coding sample, the median "loss" amount for all felony §2B1.1 cases was $8,383, and for all felony §2F1.1 cases was $18,000. The median "loss" amount for all misdemeanor §2B1.1 cases in the sample was $1,200, and for misdemeanor §2F1.1 cases $901.

and some anomalies, chiefly stemming from reliance on the literal meaning of "the value of the property taken, damaged, or destroyed" when that amount does not reflect gain, harm, or intended gain or harm. It is not yet clear whether the amendments to the Commentary to §2F1.1 that were made in 1991 and 1992 will answer all the questions that have arisen.

In light of these factors, the Commission may elect to make no changes, either to the guidelines or to the commentary, regarding the determination of "loss" and to await more recent data to determine what, if any problems remain. If the Commission wishes to address the questions that have arisen, the Commission could consider clarifying the commentary relating to intended loss, particularly with respect to the relationship between Part 2B and Part 2F on the one hand and §2X1.1 on the other,[59] which courts appear to have had some difficulty interpreting.[60]

In addition, or alternatively, the Commission could consider whether additional special rules for determining "loss" in particular kinds of cases should be included in Application Note 7, §2F1.1, or elsewhere in the commentary to either the fraud or theft guidelines. Finally, the Commission could consider whether further refinement of the basic definition of "loss" §2B1.1 ("value of the property taken, damaged, or destroyed") would be helpful, such as indicating expressly whether incidental damages should be included or excluded and how it applies when the defendant took property but did not intend to keep it.

B. More than Minimal Planning

1. Introduction

In the 1992 amendment cycle, a proposal was made for changing the specific offense characteristic of "more than minimal planning," which, under the current formulation of a number of Part B and Part F guidelines (e.g., §2B1.1, §2B1.2, and §2F1.1), results in a two-level enhancement.[61] The proposal was to eliminate "more than minimal planning" as a specific offense characteristic in these guidelines, but to reconstruct the loss tables to build

---

[59]Cross-references to §2X1.1 are found in both §2B1.1 and §2F1.1, as well as in §1B1.3 (Relevant Conduct), Application Notes 5 and 7.

[60]See, e.g., United States v. Koenig, 952 F.2d 267 (9th Cir. 1991) (§2X1.1(b) does not apply in case involving intended loss because §2F1.1 applies; November 1991 commentary change not applied retroactively); United States v. Whitehead, 912 F.2d 448, 452 n.3 (10th Cir. 1990) (§2X1.1 "provides little additional guidance in determining the value of loss"); United States v. Strozier, No. 91-3829, 1992 U.S. App. LEXIS 31961 (7th Cir. 1992) (§2X1.1 does not apply when there is intended loss under §2F1.1; no three-level reduction under §2X1.1(b) in any event, even though defendant took only part of amount he intended to take).

[61]Under §2F1.1, the enhancement is for either "more than minimal planning" or "a scheme to defraud more than one victim."

in the two levels gradually, increasing punishment as the amount of "loss" increased. Because of inadequate opportunity to consider the proposal, the issue was assigned to the White Collar Working Group for further study.

Preliminary research in the 1992 amendment cycle suggested that, due to the way in which "more than minimal planning" is defined, there might be disparity in interpreting and applying this specific offense characteristic. The question was raised whether the characteristic as interpreted and applied in fact results in enhanced punishment for all those cases, and only those cases, the Commission intended to reach. Therefore, in conducting its study, the Group had in mind a number of questions: How have courts interpreted "more than minimal planning"? Is there confusion or disagreement about what "more than minimal planning" means? Is the specific offense characteristic consistently applied? Is it the subject of plea bargaining? Is there a meaningful difference between the offenses in which the two-level enhancement was given and those in which it was not? Is that difference one that justifies greater punishment? Is the enhancement given so frequently that it would be administratively easier to assume it exists in computing the offense level but to provide a mitigating factor when it does not exist? How does it interact with other aspects of the guidelines, such as enhancement for role in the offense?

To help answer these questions, the Group undertook essentially four data-gathering steps: First, it compiled and evaluated monitoring data regarding the application of "more than minimal planning." Second, it compiled and analyzed relevant case law pertaining to the meaning and application of "more than minimal planning." Third, it compiled and analyzed TAS Hotline calls about "more than minimal planning." Fourth, the Group looked at a sample of 191 fraud and theft cases in part to determine how the "more than minimal planning" specific offense characteristic was applied. This section of the Report will set forth the results of the empirical research related to "more than minimal planning," an analysis of the case law interpreting and applying that specific offense characteristic, and a description of the possible ways in which the treatment of this factor could be changed.

2. Current Sentencing Provisions Regarding More Than Minimal Planning

A number of Part B and Part F guidelines recognize a two-level enhancement if the offense involved "more than minimal planning," although in §2F1.1 this characteristic has as an alternate "a scheme to defraud more than one victim." "More than minimal planning" is defined to mean "more planning than is typical for commission of the offense in a simple form." U.S.S.G. §1B1.1, Application Note 1(f). The Note, however, appears to offer two other definitions:

> "More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies.

> "More than minimal planning" is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune [sic, probably "opportunistic" was meant].

The guideline further sets forth a series of examples of cases in which "more than minimal planning" is said to exist or not exist.

Given this formulation, it is possible to infer that the specific offense characteristic comprises three prongs, any one of which is sufficient to trigger the two-level enhancement: (1) some degree of planning or forethought beyond simply formulating the intent to commit the crime, something that for lack of a better term will be called "extensive planning" in this Report; (2) concealment; and (3) repeated criminal acts. Alternatively, it is possible to infer that "extensive planning" is the characteristic that was targeted, and that concealment or repeated acts essentially have evidentiary significance, as facts from which planning can be inferred.

Although neither the remaining commentary in §1B1.1 nor the examples provide much insight into which of these two interpretations was intended,[62] the commentary to both §2B1.1 and §2F1.1 makes clearer that "more than minimal planning" was intended to encompass both "extensive planning" and repeated acts, independently. For example, the background commentary to §2B1.1 explains the two-level enhancement as follows:

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

Section 2F1.1 contains similar commentary:[63]

> Empirical analyses of pre-guidelines practice showed that the most important factors that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was

---

[62]Two examples regarding repeated acts are included in the commentary, but both could be read to indicate either that the existence of repeated acts has independent significance or that it has evidentiary significance in proving "extensive planning."

[63]The commentary to the fraud guideline is somewhat more ambiguous than the commentary to the theft guideline, however, because the two-level enhancement under the fraud guideline applies if the offense involved either more than minimal planning or a scheme to defraud more than one victim. Thus, some of the commentary might be read as referring to multiple victims rather than to "more than minimal planning."

sophisticated or repeated. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.

> The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.

Thus, although it is not particularly clear from either the phrase used ("more than minimal planning") or its definition in §1B1.1, the Commiss[illegible]pparently intended (at least) to enhance punishment if the conduct was either suffici[illegible] planned or repeated. The Group's hypothesis was that theft, embezzlement, or fr[illegible] that generates a significant amount of money is likely either to be well planned or to involve repeated acts. Yet, the monitoring data reflect that in fiscal year 1991 17.6 percent (N = 244) of defendants sentenced under §2B1.1, §2B1.2, or §2F1.1 whose crimes involved a high amount of "loss" (more than $40,000) did not receive an enhancement for "more than minimal planning."[64]

Through both its case-coding project and through analysis of the case law, the Group studied how the specific offense characteristic for "more than minimal planning" is actually applied. In conducting its research, the Group considered a number of questions: First, is the degree of planning deemed to constitute "more than minimal planning" sufficiently defined to ensure consistent application? Second, should repeated acts be included in a definition of "more than minimal planning" if it is an independent characteristic (as is "scheme to defraud more than one victim")? Third, should the concealment prong be included at all? Fourth, given the way in which "more than minimal planning" has been applied, does it produce enhanced punishment for those who in the Commission's present judgment deserve it? Fifth, is there a better or easier way of determining offense severity? Sixth, given the apparent general link between the amount of "loss" and the existence of "more than minimal planning," should the specific offense characteristic be eliminated and the "loss" tables changed to increase punishment as the "loss" amounts increase?

The results of the research are set forth more fully below.

---

[64]The number of defendants in this category, 244, represents 9.9 percent of all defendants sentenced in fiscal year 1991 under §2B1.1 (theft), §2B1.2 (receiving stolen property), or §2F1.1 (fraud) who did not receive an enhancement for "more than minimal planning." It also represents approximately 4 percent of all defendants sentenced under those guidelines. (The computations regarding "more than minimal planning" are based on a group of 7,442 cases, from which 1,655 defendants were excluded because they were sentenced under an earlier version of the guidelines or because relevant sentencing information was not available to the Commission. A more detailed explanation of the data is found at p. 26, infra.)

3. Monitoring and Case-Coding Data

a. Monitoring Data

The monitoring data for fiscal year 1991 indicate that of 5,787 cases sentenced pursuant to §2B1.1, §2B1.2, or §2F1.1, approximately 57.5 percent (N = 3,328) received an enhancement for "more than minimal planning."[65] The percentage rates varied significantly, however, depending on the loss amounts and the type of offense. In the loss range of $2,000 or less, 26.9 percent (N = 497) of the defendants received the two-level enhancement, compared to 54.5 percent (N = 364) in the loss range $2,001 to $5,000. The percentage of defendants receiving the enhancement increased fairly steadily up to the loss range of $40,001 to $70,000, in which 80.4 percent (N = 337) received the enhancement. At loss ranges more than $70,000 to more than $200,000, the percentage of defendants who received the enhancement remained more nearly constant, then increased for loss ranges exceeding $350,000 to a high of 95.1 percent at the highest loss range. The distribution is shown in Table H-8 in Appendix H.

The application of the "more than minimal planning" enhancement also depended upon the guideline and/or the substantive offense. For example, the data indicate that the enhancement was applied in 45.9 percent (N = 1,117) of §2B1.1 cases, 45.6 percent (N = 180) of §2B1.2 cases, and 69.1 percent (N = 2,036) of §2F1.1 cases. Further, with respect to §2B1.1 offenses, "more than minimal planning" was applied more often in embezzlement cases (64%, N = 892) than larceny cases (36%, N = 510). For a distribution of the application of "more than minimal planning" by loss amount and offense type, see Tables F-62 through F-67 and F-72 through F-74 in Appendix F.

b. Case-Coding Information

In an effort to understand the application of "more than minimal planning" better, the Working Group examined the reasons stated in the sentencing documents for applying this enhancement.[66] The sample data indicate that when the two-level enhancement was applied (N_w = 2,734), repeated acts was the given reason in 47.6 percent (N_w = 1,301) of the cases; planning was the given reason in 15.9 percent (N_w = 435) of the cases; concealment was the given reason in 5.5 percent (N_w = 150) of the cases; and multiple

---

[65] As noted above, under §2F1.1 the enhancement applies when the offense involved either more than minimal planning or a scheme to defraud more than one victim. The monitoring data do not differentiate between enhancements based on one rather than the other factor. Therefore, it is not possible to determine from the monitoring data alone how many §2F1.1 cases involved more than minimal planning rather than multiple victims. The Group's case-coding project, described below, however, suggests that more than minimal planning is relied upon with much greater frequency than multiple victims.

[66] The data collection effort is described in greater detail in Appendix E, infra. Throughout the description, N_w = weighted N. The reasons for weighting the sample are described in note 4, supra.

reasons were given in 31.1 percent (N_w = 849) of the cases. See Table H-9 in Appendix H. Further analysis indicates that the majority of the cases in which multiple reasons were given involved "multiple criminal acts" in conjunction with "sophisticated planning."[67] Multiple indicia and planning became more important dominant theories as the loss amounts exceeded $200,000. See Table H-11 in Appendix H. In part, the incidence of planning as the dominant theory for recommending an enhancement for "more than minimal planning" depended upon the method by which loss was determined. When intended loss was the theory for determining the loss amount, the enhancement for "more than minimal planning" tended to be based on planning. For example, the dominant method of determining the loss amount was intended loss in four loss categories: §2B1.1 -- more than $200,000; §2F1.1 -- more than $350,000; §2F1.1 -- more than $500,000; and §2F1.1 -- more than $2.5 million. In two of these categories the increase for "more than minimal planning" was based predominantly on planning. In the other two, it was based on multiple indicia. In addition, planning was the dominant explanation for the increase for "more than minimal planning" in fraud cases involving loss of $2,000 or less, in which the dominant explanation for the loss category was that no monetary loss was involved.

The sample data further indicate that the stated reasons for "more than minimal planning" varied significantly by guideline applied. See Table H-9 in Appendix H. Consistent with the Commission's commentary on "more than minimal planning," in the majority of cases sentenced pursuant to §2B1.1 the given reason for "more than minimal planning" was multiple criminal acts (55.8%, N_w = 530). On the other hand, planning (6.4%, N_w = 60) and concealment (4.9%, N_w = 47) were not given as reasons very frequently. While reliance on multiple criminal acts was also central to cases sentenced pursuant to §2F1.1 (43.2%, N_w = 771), planning was given as the reason for the enhancement with a greater frequency than for §2B1.1 cases (21.0%, N_w = 374).[68] Concealment was rarely given as the reason (5.8%, N_w = 103). It should be noted that for both guidelines multiple reasons were stated in approximately one-third of the cases surveyed.

The Working Group also coded cases in the sample, whether or not an enhancement was made for "more than minimal planning," to identify factors that might support a finding of "more than minimal planning" (multiple acts, planning, concealment, multiple victims, use

---

[67]The reader should be aware of the limitations of the data collected. While the presentence report typically stated reasons for the enhancement, those reasons may not have included all of the reasons applicable to the case. Moreover, the coder was asked to code for "multiple criminal acts" and "sophisticated planning," among other factors; under the coding instructions, "sophisticated planning" included any enhancement premised on the degree or nature of the planning of the crime, as opposed to enhancements based on repeated acts or concealment. See also note 69, infra.

[68]It should also be noted that it may be factually easier to determine and less debatable whether there were multiple acts than the degree of planning involved in the offense. Therefore, it is possible that probation officers tended to rely on multiple acts if that factor applied, and did not go on to determine the degree of planning or whether acts of concealment were committed.

of an organization). These analyses demonstrated that: 66.6 percent (N_w = 3,589) of the cases involved multiple acts; 60.5 percent (N_w = 3,258) of the cases involved planning; 41.9 percent (N_w = 2,257) of the cases involved concealment during the offense; 25 percent (N_w = 1,349) of the cases involved multiple victims; and 13.2 percent (N_w = 708) of the cases involved the use of an organization in furtherance of the offense. The incidence of these individual components also varied considerably by guideline applied. Each individual component was more evident in §2F1.1 than in §2B1.1 cases: multiple acts (74% vs. 57%); planning (75% vs 43%); concealment (47% vs. 35%); multiple victims (38% vs. 10%); and use of an organization (19% vs. 6%). See Table H-10 in Appendix H.

In 16 to 23 percent (N_w = 5,388)[69] of the cases coded in which the enhancement was not given, the offense narrative reflected facts that would appear to warrant giving the enhancement. Conversely, the information coded from the presentence reports did not appear to justify an enhancement for "more than minimal planning" in approximately 7 to 10 percent of the cases in which it was given. The former observation was most pronounced in §2B1.1 cases with loss of $2,000 or less that involved both planning and multiple acts. The guidelines call for a two-level enhancement for all these cases, but only 42 percent of the cases in the sample received it.

Finally, the Working Group examined whether "more than minimal planning" is used as a plea bargaining tool. The sample data indicate that the prosecution seldom stipulated to exclude "more than minimal planning" from the guideline calculation. The incidence was approximately five percent for both §2B1.1 and §2F1.1 cases (N_w = 71 and 113, respectively).

c. Sanctions Imposed

From the perspective of punitive sanctions, when the "more than minimal planning" enhancement was applied, defendants were sentenced to longer terms of imprisonment for those defendants sentenced to imprisonment only, longer terms of probation and longer terms of community confinement for those defendants sentenced to probation with conditions of confinement, and longer terms of probation for those defendants sentenced to probation only. (Although the average prison equivalency for such defendants receiving a new split sentence was slightly lower than for defendants who did not receive the

---

[69]Because some of the coding instructions did not conform exactly to the language of the definition in §1B1.1, Application Note 1(f), a range of percentages is presented to reflect a more conservative interpretation of the data as well as an interpretation premised on the assumption that the coding instructions elicited the same components as are contained in Application Note 1(f). The lower boundary of the reported range was determined by including only cases in which there was "planning" as well as another individual component, e.g., "significant affirmative steps . . . to conceal the offense." The upper boundary of the range was determined by including cases in which any of the variables, as coded from the presentence investigation report, was present. In addition, it should be noted that the court may have relied on facts not reflected in the sentencing documents forwarded to the Commission.

enhancement, the difference between them was not statistically signficant.) See Tables H-1 to H-3 in Appendix H.

4. Case Law[70]

Reported cases dealing with the application and interpretation of "more than minimal planning" reflect certain issues, both with respect to the meaning of the term and with respect to its interplay with other portions of the guidelines, such as the adjustment for role in the offense. The first issue is differentiating between the amount of planning that is "typical for commission of the offense in a simple form" ("minimal planning") and "more than minimal planning." The question may arise when the defendant asserts a "double-counting" argument -- that is, that the offense inherently involves the very planning that the court is also relying on to establish the two-level enhancement for "more than minimal planning." Examples of cases involving this effort to distinguish between "minimal" and "more than minimal" planning include United States v. Wilson, 955 F.2d 547 (8th Cir. 1992); United States v. Hearrin, 892 F.2d 756 (8th Cir. 1990); and United States v. Lennick, 917 F.2d 974 (7th Cir. 1990).

The commentary at §1B1.1 does not specifically define what is meant by planning that is "typical for commission of the offense in a simple form." For example, the Commission did not specify what it meant by "the offense."[71] "The offense" might mean the statutory definition of the crime, or it might mean the acts the defendant actually committed that comprise the crime. If "the offense" means the statutory definition of the crime, the court would compare the acts the defendant actually committed to the statutory definition of the offense (or some generic and uncomplicated version of the statutory definition of the offense). On the other hand, if "the offense" means the acts the defendant actually committed, the court would compare the defendant's method of accomplishing those acts with the simplest way those acts could have been accomplished. Either possibility, of course, assumes there is some readily identifiable, simple form of, or simple way of committing, federal crimes such as mail or bank fraud.

The examples provided in the commentary shed only limited light on the issue:

> In an assault, for example, waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. By

[70] A complete description of all relevant cases is set forth in Appendix C-21 through C-38.

[71] "Offense" is defined in §1B1.1, Application Note 1(l), to mean "the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." Given the poor fit between that definition and the phrase "typical for commission of the offense in a simple form," one might argue that this is an instance in which the definition of offense in Application Note 1(l) was not intended to apply.

contrast, luring the victim to a specific location, or wearing a ski mask to prevent identification, would constitute more than minimal planning.

In a commercial burglary, for example, checking the area to make sure no witnesses were present would not alone constitute more than minimal planning. By contrast, obtaining building plans to plot a particular course of entry, or disabling an alarm system, would constitute more than minimal planning.

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

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

To take but one example, embezzlement, one might wonder why the false book entry even for a single taking would not constitute "more than minimal planning," since it is possible to embezzle money without making any false book entries. A situation somewhat analogous to this example was presented in United States v. Lennick, 917 F.2d 974 (7th Cir. 1990). In Lennick, the defendant was convicted of making a false statement to a government agent regarding the ownership of a gun, which he also "documented" by a false receipt. Defendant contended on appeal that the trial court erred in giving the two-level enhancement when it relied upon defendant's creation of a "paper trail." Both the trial and appellate courts noted that perjury in its "simple form" does not require a paper trail, and rejected defendant's argument.[72]

In United States v. Hearrin, 892 F.2d 756 (8th Cir. 1990), the Eighth Circuit, in evaluating the issue of "more than minimal planning," looked to the elements of the offense (conspiracy to commit mail fraud, which, the court said, requires only one overt act) as the standard against which to compare defendant's conduct. Thus, some courts seem to

[72]The defendant asserted that in creating the document he simply anticipated that he would need to support his claim of ownership. The court, however, noted that it could equally be said that an embezzler who creates "false book entries, purchase orders and invoices" was simply anticipating the need to support a claim of ownership of the money taken. 917 F.2d at 979. The court did not go on to consider the example regarding an embezzler who makes a single false book entry.

compare the acts the defendant actually committed to a generic form of the crime. This approach assumes there is some generic form of an offense than can be committed without more than minimal planning. Yet, the First Circuit observed in United States v. Fox, 889 F.2d 357 (1st Cir. 1989), that it "cannot conceive of how obtaining even one fraudulent loan would not require more than minimal planning." Likewise, the Second Circuit, in United States v. Brach, 942 F.2d 141 (2d Cir. 1991), opined that "it is safe to say that fraudulent loans in any substantial amount seldom result from minimal planning." If an offense inherently involves "more than minimal planning," defendants have argued, it is "double counting" to add a two-level enhancement for it. E.g., United States v. Hearrin, supra (conspiracy to commit mail fraud argued to inherently involve "more than minimal planning"). The problem is exacerbated by the inclusion of the concealment prong in "more than minimal planning," as a number of crimes (including embezzlement) are, as the commentary implicitly acknowledges, typically accomplished by some form of concealment. See, e.g., United States v. Werlinger, 894 F.2d 1015 (8th Cir. 1990) (refusing to permit an obstruction of justice adjustment to be based on pre-investigation concealment in an embezzlement case because concealment is inherent in embezzlement).

Although defendants, as far as is reflected in appellate opinions, have been unsuccessful in these arguments, addressing these arguments has created another potential problem. In order to conclude that "double counting" has not occurred, a court may stress the difference between "more than minimal planning" and the planning that is inherent in the offense. Yet, these cases may create problems for those courts that have departed upward for very complex or sophisticated crimes. E.g., United States v. Palinkas, 938 F.2d 456 (4th Cir. 1991). See also United States v. Boula, 932 F.2d 651 (7th Cir. 1991) (interpreting earlier version of guidelines that permitted departure for more than minimal planning or more than one victim). Put altogether, a continuum of planning, repeated conduct, or concealment must run from "minimal" (inherent in the commission of the offense) to "more than minimal" (warranting a two-level enhancement) to "extraordinary" (warranting an upward departure), a degree of fine distinctions that may not have been intended by the Commission.

Similarly, defendants have disputed the ability of a court to depart upward because of the duration of the crime, arguing that the Commission already took that factor into account when it included a two-level enhancement for "more than minimal planning." Two courts, in rejecting such arguments, stated that "more than minimal planning" refers to the planning for a crime, not its execution, despite the clear language in the commentary regarding repeated acts. E.g., United States v. Palinkas, 938 F.2d 456 (4th Cir. 1991); United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990), rev'd on other grounds, 111 S. Ct. 2182 (1991).

Double-counting arguments have also been raised, until recently unsuccessfully in the courts of appeals, with respect to the loss tables and the repeated acts prong of "more than minimal planning," and with respect to the "more than minimal planning" enhancement and the adjustment for role in the offense. See, e.g., United States v. Wilson, 955 F.2d 547 (8th

Cir. 1992); United States v. Palinkas, 938 F.2d 456 (4th Cir. 1991); United States v. Curtis, 934 F.2d 553 (4th Cir. 1991); United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990), rev'd on other grounds, 111 S. Ct. 2182 (1991); United States v. Hearrin, 892 F.2d 756 (8th Cir. 1990). But in United States v. Romano, 970 F.2d 164 (6th Cir. 1992), the Sixth Circuit held that it constituted impermissible double counting to enhance a sentence for "more than minimal planning" if an adjustment for aggravating role in the offense was also given.

With respect to the application of "more than minimal planning," two aspects are noteworthy. First is the apparent focus on all the criminal behavior in which the defendant engaged to determine, in essence, whether the theft or fraud occurred during the course of planned criminal behavior, rather than looking solely at the conduct that fits under Part 2B or Part 2F to determine whether that conduct was planned. Thus, for example, if the defendant engaged in a long course of criminal conduct, a part of which was an act of theft or fraud subject to §2B1.1 or §2F1.1, courts appear to look to the entire course of conduct in which the defendant engaged, rather than to the planning relating to the theft or fraud itself. See, e.g., United States v. Ojo, 916 F.2d 388 (7th Cir. 1990); United States v. White, 903 F.2d 457 (7th Cir. 1990). Since the commentary to both §2B1.1 and §2F1.1 explaining "more than minimal planning" uses only the word "offense" and under §1B1.1 "offense" presumptively includes all relevant conduct, it is unclear whether this result reflects the Commission's intention.

Similarly, questions have arisen about whether an enhancement should be given when the "offense" is planned, but the defendant did not plan it. The response, both on the TAS Hotline and in the case law, has been to give the enhancement (if the conduct constituting "more than minimal planning" otherwise constitutes "relevant conduct"). E.g., United States v. Wilson, 955 F.2d 547 (8th Cir. 1992).[73]

To the extent that courts try to define "more than minimal planning,"[74] they with some frequency differentiate between offenses that warrant this enhancement and offenses that do not by determining whether the defendant's crime was a "spur of the moment" act in response to temptation or sudden opportunity. See, e.g., United States v. Kopp, 951 F.2d 521 (3d Cir. 1991); United States v. Foster, 898 F.2d 25 (4th Cir. 1990); United States v. Fox, 889 F.2d 357 (1st Cir. 1989).

---

[73]The Hotline calls are described at Appendix D.

[74]The approach taken by the Eighth Circuit in United States v. Reyes, 908 F.2d 281 (8th Cir. 1990), cert. denied, 111 S. Ct. 1111 (1991), is unusually frank in that the court expressly concluded that it "need not determine the minimum threshold for establishing more than minimal planning because whatever it is [defendant] far exceeded it." Frequently, appellate courts simply list a number of facts and state that the conclusion that there was "more than minimal planning" was justified, without explaining the relationship between the facts cited and the conclusion reached.

In addition to the cases described above that apparently overlook the "repeated acts" prong in the definition of "more than minimal planning" in an effort to accommodate upward departures based on the duration of the crime, a remarkable development concerning the definition has been the holding of one court in United States v. Maciaga, 965 F.2d 408 (7th Cir. 1992), that concealment must be planned in advance of the offense in order to constitute "more than minimal planning." This approach was rejected by the First Circuit in United States v. Beauchamp, 986 F.2d 1 (1st Cir. 1993), although the First Circuit noted that the enhancement requires that the offense "involve more than minimal planning," and therefore some post-offense acts of concealment might not meet this nexus. Although only one decision was located reversing a finding of "more than minimal planning,"[75] courts, as noted in United States v. Lennick, supra, have recognized a broad range of planning in giving an enhancement for "more than minimal planning."[76]

5. Issues Relating to "More Than Minimal Planning"

These data suggest that there are two basic issues concerning the current enhancement for "more than minimal planning," the first linguistic and the second conceptual. The phrase "more than minimal planning" suggests that the enhancement is based upon something akin to premeditation, yet the definition includes activity other than planning; namely, repeated acts and concealment. This problem is not merely theoretical: At least two decisions, United States v. Burns and United States v. Palinkas, described above, have relied upon the term "planning" to conclude that the duration of the execution of the offense was not contemplated by the Commission in enhancing for "more than minimal planning," despite the commentary regarding repeated acts. In addition, one case, United States v. Maciaga, supra, appears to have engrafted an advance-planning requirement on the concealment prong of "more than minimal planning." Linguistically, it would be clearer to either rename the enhancement or delete the concealment and repeated

---

[75]United States v. Maciaga, 965 F.2d 404 (7th Cir. 1992). In Maciaga, the enhancement was applied due to the defendant's concealment of the crime. The Seventh Circuit reversed because "there is no evidence of any advance planning in Maciaga's efforts at concealment." Id. at 408.

[76]One case that might be considered inconsistent with the general trend in the case law toward broad application of the "more than minimal planning" enhancement was United States v. Rothberg, 954 F.2d 217 (4th Cir. 1992), in which a defendant wanted to obtain a loan to refinance a condominium he jointly owned with his wife, who did not want to obtain the loan. Defendant told the bank his wife was seriously ill, got the bank to relax its requirement that the bank officer be present at the execution of loan documents, and had an imposter appear before a notary public to forge his wife's signature. Although the probation officer suggested that a two-level enhancement would be appropriate, the trial court declined to accept that suggestion. The government did not appeal that aspect of the sentence.

It is worth noting that the standard of review applied by appellate courts may vary, depending on whether the court views the determination of whether there was "more than minimal planning" as a question of fact, of law, or of application of law to fact. Some courts employ the "clearly erroneous" standard, applicable to factual questions. See, e.g., United States v. Lennick, 917 F.2d 974 (7th Cir. 1990).

act prongs from the definition of more than minimal planning and incorporate them separately as alternative ways of qualifying for the two-level enhancement.

The conceptual issue is the substantive content of the enhancement. Should all three prongs of "more than minimal planning" be retained, or should the enhancement focus only on extensive planning and not repeated acts or concealment? Enhanced punishment for repeat offenders may be related to the notion of locus penitentiae: A defendant who engages in repeated criminal acts has, by hypothesis, been presented with a number of opportunities to choose whether to engage in criminal behavior or not but has nonetheless persisted in committing crimes. Such a person may therefore be viewed as more culpable, and perhaps more likely to commit crimes in the future. See, e.g., United States v. Burns, 893 F.2d at 1346 ("a defendant who persists in his criminal activity over a period of years may deserve a harsher sentence than a defendant whose crime was limited in duration because the former has arguably had more opportunities to renounce his illegal schemes").

Whatever the conclusion about the appropriate components of "more than minimal planning," it remains to be considered whether the components are adequately defined. For example, is the "extensive planning" prong adequately described? The commentary defines "minimal planning" only as "the amount of planning necessary for commission of the crime in a simple form." But what constitutes the "simple form" of any crime? Certain offenses seem inherently to involve planning in order to have any chance of success (e.g., fraud), and if an offense inherently involves planning, there is less justification for permitting a case-by-case determination, particularly when it may raise questions about double counting and result in uneven application.[77] Moreover, if the formulation of "more than minimal planning" reflects a desire to mitigate the punishment for "impulse" crimes (thus the phrase "unless . . . each instance was purely opportune"), it may be easier to define what is meant by opportunistic, than to define what is meant by "more than minimal planning."

Last, given the manner in which "more than minimal planning" has been defined and applied, is there a proxy for this characteristic that would be easier and more consistent to apply, such as "loss"?

6. Proposals for Change

a. 1992 Proposal to Incorporate "More than Minimal Planning" into the Loss Table

In the 1992 amendment cycle, a proposal was made to eliminate "more than minimal planning" as a specific offense characteristic but to build the enhancement into the loss tables. That proposal contained a number of possible loss tables, reflecting alternative ways to phase in the two-level increase for "more than minimal planning," and assumes that the

[77]Note, for example, that §2F1.1 provides for a "rebuttable presumption" that "more than minimal planning" exists for some kinds of cases (e.g., certain bank frauds).

alternate enhancement under §2F1.1 for "a scheme to defraud more than one victim" would also be abolished. Consideration of that proposal was postponed to this amendment cycle to allow further consideration by a staff working group.[78]

Eliminating more than minimal planning would probably have both advantages and disadvantages. Arguable advantages include: the administrative gain from increased simplicity; the elimination of inconsistency in applying the enhancement that may now occur; and the enhanced comparability of the punishment for fraud, embezzlement, and tax offenses. The arguable disadvantages include: possible overpunishment in large loss cases that did not involve "more than minimal planning"; possible underpunishment in small loss cases that did involve "more than minimal planning"; and the transaction costs of making any change to the guidelines, including the need to adjust some guidelines that cross-reference the fraud and theft loss tables.

b. Redefine "More than Minimal Planning"

If the Commission's intent was primarily to increase the penalty for sophisticated planning, it might want to eliminate repeated acts and concealment from the definition of "more than minimal planning" and sharpen the definition of the planning prong. Since the standard for "sophisticated planning" is likely to be somewhat subjective, however, there would be a risk of inconsistent application.

c. Phase in "More than Minimal Planning" While Providing for an Increase to a Specified Minimum in Cases Involving Sophisticated Planning or Sophisticated Efforts to Conceal

One of the possible adverse consequences of eliminating "more than minimal planning" may be underpunishment in cases that involve smaller loss amounts (say, less than $40,000) but also involve sophisticated planning or sophisticated efforts to conceal the crime. This adverse effect could be offset by providing a specific offense characteristic that would increase the offense level to a specified level (say, Offense Level 8 or Offense Level 10) when either sophisticated planning or concealment (or multiple victims under §2F1.1) was involved. Although the standards for "sophisticated planning" or "sophisticated efforts of concealment" may be somewhat subjective, the potential adverse effects of such definitions would be limited because they would not apply across the entire range of loss amounts and offense levels. This option would not eliminate the possibility of overpunishing in large loss cases that did not involve "more than minimal planning."

[78]Commissioner Mazzone requested the staff to draft a provision permitting an upward departure based on the number of victims of a crime, particularly as an example of a case in which loss does not adequately reflect the seriousness of the offense.

d. Eliminate "More Than Minimal Planning," Increase Base Offense Levels by Two Levels, and Provide a Mitigator for Opportunistic Crime

Another way to change "more than minimal planning" is to abolish it as a specific offense characteristic, increase the base offense level of both theft and fraud by two, and build in a mitigating factor for single, opportunistic act. The advantage of this approach is that it will not affect the operation of so many other guidelines, and it is fairly simple to achieve. The disadvantage is that it may result in increasing punishment for more people than the Commission originally intended, in that opportunistic crimes may not occur with frequency.

C. Incremental Punishment

1. Introduction

The Working Group explored issues relating to whether in the theft and fraud loss tables the relationship between the increases of loss and the increases in punishment needs adjustment. This exploration included examining the historical development of the loss tables, the concerns raised about the current loss tables, and other possible ways to construct a loss table. In addition, the Group studied the issue of reliance on loss as a primary determinant of the sentence and the definition of "loss." (See Parts II.A.1 (Reliance on Loss) and II.A.2 (Definition of "Loss") of this Report, supra). The Group's consideration of loss issues included an examination of TAS and Attorney Hotline calls, case law relating to loss, and a sample of 191 theft and fraud cases.

2. The Current Loss Tables in §2B1.1 and §2F1.1

This section of the Report recounts the development of the current loss tables in §2B1.1 and §2F1.1, and describes issues that have arisen regarding the current configuration of those tables. The next section sets forth other possible configurations of the loss tables along with an explanation of the interests each configuration would further. The first several examples in section 3 focus on achieving constant multipliers of the minimum loss amount from one offense level increase to the next; the remaining examples do not focus on multipliers.

a. Development of the Current Loss Tables

The starting point for the current loss table was the table published in the September 1986 Preliminary Draft of the guidelines. The table, which applied to both theft and fraud cases, began at offense value 6 for loss amounts of $1,000 or less and ended at offense value

60 for loss amounts of more than $5 million, as shown below; the multiplier column shows the number by which the lower boundary of one loss range must be multiplied in order to reach the lower boundary of the next loss range:

September 1986 Preliminary Draft

Offense Value	Loss Range	Multiplier
6	> $1,000	
8	> $2,000	2.0X
12	> $5,000	2.5X
16	> $10,000	2.0X
20	> $25,000	2.5X
24	> $50,000	2.0X
30	> $100,000	2.0X
36	> $200,000	2.0X
42	> $500,000	2.5X
48	> $1,000,000	2.0X
54	> $2,000,000	2.0X
60	> $5,000,000	2.5X

In the January 1987 Revised Draft of the Guidelines, offense levels were used instead of offense values. The January 1987 draft also divided the 1986 table into separate theft and fraud tables. Despite these changes, the loss magnitudes used in the January 1987 draft were basically the same as those in the 1986 table. The only difference between the January 1987 theft table and the September 1986 draft table was that the theft table ended at $2 million instead of $5 million; the only difference between the September 1986 draft table and the January 1987 fraud table was that the fraud table started at $5,000 instead of $1,000.

In the initial guidelines that went into effect on November 1, 1987, separate fraud and theft loss tables were retained, but the theft table began at $100 instead of $1,000, and the base offense level was reduced to 4. The fraud table began at $2,000 and had a base level of 6. Both tables ended at $5 million. The relationship between offense level increases and increases in loss was the same for both tables at more than $2,000. A composite of the November 1987 theft and fraud tables is depicted below:

November 1, 1987 Guidelines Loss Tables -- Composite of §2B1.1 and §2F1.1

Offense Level	Loss Magnitude	Multiplier
5	> $100	
6	> $1,000	10X
7	> $2,000	2X
8	> $5,000	2.5X
9	> $10,000	2X
10	> $20,000	2X
11	> $50,000	2.5X
12	> $100,000	2X
13	> $200,000	2X
14	> $500,000	2.5X
15	> $1,000,000	2X
16	> $2,000,000	2X
17	> $5,000,000	2.5X

Compared to the January 1987 draft loss tables, both November 1987 loss tables were moved up one offense level, the theft table contained a new loss range starting at $100, and both tables used $20,000 rather than $25,000 as the breaking point for an offense level increase.

In 1989 the Commission expanded the theft and fraud loss tables by including more offense level increases between $40,000 and $5 million and by creating new loss categories above $5 million. While in the 1987 guidelines eight levels were used for amounts from $40,001 to more than $5 million, the 1989 amendments established ten offense levels for these loss ranges. A composite of the resulting loss tables and the multipliers used in moving from one loss magnitude to the next highest are shown below:

1989 Guidelines Loss Tables -- Composite of §2B1.1 and §2F1.1

Offense Level	Loss Magnitude	Multiplier
5	> $100	
6	> $1,000	10.0X
7	> $2,000	2.00X
8	> $5,000	2.50X
9	> $10,000	2.00X
10	> $20,000	2.00X
11	> $40,000	2.00X
12	> $70,000	1.75X
13	> $120,000	1.71X
14	> $200,000	1.67X
15	> $350,000	1.75X
16	> $500,000	1.43X
17	> $800,000	1.60X
18	> $1,500,000	1.88X
19	> $2,500,000	1.67X
20	> $5,000,000	2.00X
21	> $10,000,000	2.00X
22	> $20,000,000	2.00X
23	> $40,000,000	2.00X
24	> $80,000,000	2.00X

In its submission to Congress, the Commission gave the following reasons for the changes in the theft and fraud loss tables:

> The purposes of this amendment are to conform the theft and fraud loss tables to the tax evasion table in order to remove an unintended inconsistency between these tables in cases where the amount is greater than $40,000, to increase the offense levels for offenses with larger losses to provide additional deterrence, and better reflect the

seriousness of the conduct, and to eliminate minor gaps in the loss table.[79]

As the Commission's official explanation to Congress made clear, the increase in the number of offense levels in the 1989 fraud and theft loss tables was intended -- at least in part -- to provide guidance to courts in cases involving larger loss amounts. While the 1987 loss tables ended at $5 million, the 1989 amendments continued up to $80 million. The Commission apparently concluded that losses in the range from $40,000 to $2 million were not punished adequately under the 1987 guidelines, because it chose to increase the number of offense level enhancements between $40,000 and $5 million rather than simply adopt the loss amounts and offense level increases in the tax table.

b. Issues Under the Current Loss Tables

Several concerns have been raised regarding the current loss tables. The Department of Justice, Commissioners, and others have questioned whether the loss tables provide adequate punishment at the higher loss levels. Some Commissioners have suggested that the theft table may be too sensitive to loss magnitudes at lower offense levels and smaller loss amounts. The Tax Division of the Department of Justice has contended that the tax loss tables provide inadequate deterrence at the lower offense levels. Finally, materials prepared in connection with last year's proposed amendments raised questions about the loss tables because of their uneven rate of increase in offense levels in relation to the amounts of loss involved.

The Justice Department's argument for higher offense levels is premised in part on the fact that Congress increased the statutory maximum sentences in bank fraud and bank embezzlement cases. The Justice Department urges that a four-level enhancement be adopted that would apply to offenses affecting financial institutions (except for bank employees who commit isolated acts of theft involving low dollar amounts).

The suggestion that the theft table may be "too sensitive" to increases in loss at the lower end of the loss table may be interpreted as an argument that the starting point for the loss tables is too low -- for example, that the theft loss table should begin at an amount

---

[79]Although this submission states that the differences between the tax loss table and the fraud and theft loss tables were inadvertent inconsistencies, the Commission may have thought that the differences were necessary to offset the two-level enhancements for "more than minimal planning" available under the theft and fraud guidelines but not the tax guidelines. (The tax guidelines permit a two-level increase for the use of sophisticated means to impede discovery of the nature or extent of the offense, which is somewhat analogous to the concealment prong of the "more than minimal planning" enhancement. But, as noted above, concealment does not appear to be relied upon often as the basis for the "more than minimal planning" enhancement, and, according to monitoring data, the two-level increase for "sophisticated means" is rarely applied under the tax guidelines.) A comparison of the 1987 tax loss table with the 1987 fraud table is set forth in Table I-1 in Appendix I.

greater than $100 and the fraud loss table should begin at an amount greater than $2,000. Alternatively, it may be interpreted as a concern that the offense levels are too high in cases that involve relatively small loss amounts and more than minimal planning. For example, the applicable offense level would be 10 for a truck driver who plans to steal some of the merchandise he hauls, takes $6,000 in property, and falsely reports his truck was broken into (base level 4 + 4 offense levels for loss of more than $5,000, + 2 offense levels for more than minimal planning).[80]

The Tax Division has focused its concerns on the relationship between the threat of imprisonment and deterrence at certain lower levels of tax evasion or nonfiling. Specifically, the Tax Division has argued that a person who fails to pay taxes on $140,000 of income should face the certainty of imprisonment, even assuming he or she pleads guilty and obtains a two-level reduction for acceptance of responsibility.

The argument regarding the uneven rates of increase in the loss tables refers to the fact that the rate of increase of offense levels from one loss magnitude to the next highest loss magnitude is not constant. To some extent, disparate multipliers inevitably result from rounding off numbers. It could be argued, however, that proportionate sentencing is better achieved through the use of more nearly constant multipliers. For example, under the current system a four-fold increase in the loss from $400,000 to $1.6 million results in a three-level increase in the offense level and a nine-month increase in the minimum guideline sentence. By comparison, a four-fold increase in the loss from $3 million to $12 million results in a two-level increase in the offense level and a seven-month increase in the minimum guideline sentence.

3. Examples of Revised Loss Tables to Address the Expressed Concerns

Described below are several ways in which the loss tables could be changed in light of the concerns described above. First, five optional configurations of the loss tables in §2B1.1, §2F1.1, and §2T4.1 are set forth. Each option assumes simultaneous changes to all three guidelines, and focuses upon the use of constant multipliers.[81] Each reference to the

---

[80] It may also mean that offenses at the lower end of the loss spectrum are perceived as indistinguishable within a wider range of dollar loss than is currently provided in the loss tables. For example, a defendant who steals $6,000 may be perceived as not materially different from a defendant who steals $2,000, but the former is at Offense Level 8 while the latter is at Offense Level 6. The overlap of sentencing ranges from one offense level to the next, the shorter spans within the sentencing ranges at lower offense levels, and the fact that the sentencing range is the same (0-6 months) for Offense Levels 1 through 8 in Criminal History Category I, however, mitigate this concern.

[81] Uniform loss tables in §2B1.1, §2F1.1, and §2T4.1 will help ensure that charging decisions will not lead to different sentences for similar offenses. For example, cases involving stolen and forged Treasury checks can be sentenced under §2B1.1 or §2F1.1, depending on the statute of conviction. Some embezzlement cases could be charged under statutes that would result in sentencing under either §2B1.1 or §2F1.1. A case involving tax fraud

enhancement for "more than minimal planning" includes the alternate enhancement under §2F1.1 for "a scheme to defraud more than one victim." Next, several other methods for changing the loss tables that do not rely upon constant multipliers are discussed.

The table set forth as Option 1 could be used if the Commission wanted to achieve the following objectives: (1) use a fairly constant rate of increase throughout the loss table; (2) make sentencing depend less on loss amounts at low levels of loss; (3) maintain the specific offense characteristic for "more than minimal planning"; and (4) achieve approximately the same punishment levels as at present in cases involving losses in the range from $40,000 to $200,000. Option 1 uses a multiplier of 1.8 (rounded off) moving from one loss amount to the next highest. Option 1 does not achieve the objective of imposing greater punishment at higher loss amounts, nor would it achieve the objective of requiring imprisonment in tax cases involving $140,000 of income on which taxes were not paid.

---

can be prosecuted under 18 U.S.C. § 287 (false claims) and sentenced under §2F1.1. See, e.g., United States v. Motley, 940 F.2d 1079 (7th Cir. 1991).

Option 1

Offense Level	Loss Range	Multiplier
5	> $1,100	
6	> $2,000	1.82
7	> $3,500	1.75
8	> $6,500	1.86
9	> $12,000	1.85
10	> $21,500	1.79
11	> $40,000	1.86
12	> $70,000	1.75
13	> $125,000	1.79
14	> $225,000	1.80
15	> $400,000	1.78
16	> $725,000	1.81
17	> $1,300,000	1.73
18	> $2,350,000	1.81
19	> $4,250,000	1.81
20	> $7,500,000	1.76
21	> $14,000,000	1.87
22	> $25,000,000	1.79
23	> $45,000,000	1.80
24	> $80,000,000	1.78

In the next series of tables, each table uses a fairly constant multiplier and phases in the two-level increase for "more than minimal planning," but differs from the others with regard to the other objectives that the Commission may wish to consider. Specifically, the tables differ with regard to the starting loss amounts, the ending loss amounts, the multiplier used, and the sensitivity to loss at the lower end of the table.

Option 2 could be used if the Commission wanted to achieve the following objectives: (1) use a fairly constant rate of increase throughout the loss table; (2) eliminate "more than minimal planning" as a specific offense characteristic; (3) make sentencing less sensitive to loss amounts at low loss magnitudes; and (4) end the table at the present amount of $80 million.

Option 2

Offense Level	Loss Ranges	Multiplier
5	> $1,200	
6	> $2,000	1.67
7	> $3,500	1.75
8	> $6,000	1.71
9	> $10,000	1.67
10	> $16,500	1.65
11	> $28,000	1.70
12	> $48,000	1.71
13	> $80,000	1.67
14	> $135,000	1.69
15	> $235,000	1.74
16	> $400,000	1.70
17	> $675,000	1.69
18	> $1,150,000	1.70
19	> $2,000,000	1.74
20	> $3,500,000	1.75
21	> $5,500,000	1.57
22	> $9,500,000	1.73
23	> $16,500,000	1.74
24	> $28,000,000	1.70
25	> $48,000,000	1.71
26	> $80,000,000	1.67

Option 2 uses a multiplier of 1.7 (rounded off) moving from one loss amount to the next highest. **It does not address** the concern of providing greater punishment at higher loss amounts (except for those high-loss cases in which no two-level enhancement would have been given for "more than minimal planning"). Nor does Option 2 achieve the objective of mandated imprisonment in cases involving $140,000 in income on which taxes were not paid.

Option 2 would increase punishment in those cases with loss amounts exceeding $16,500 in which the enhancement for "more than minimal planning" would not have been applied. Conversely, it would tend to decrease the punishment in most cases in which the enhancement for "more than minimal planning" would have been applied. This second consequence is an inevitable result of using higher loss magnitudes at the lower offense levels, the same highest loss amount, and a fairly constant multiplier.

If the Commission wants to use a fairly constant multiplier and build the increase for "more than minimal planning" into the loss table so that the full two-level increase would be applied at loss amounts starting at $40,000, this result could be achieved by employing the table set forth as Option 3. This option uses a multiplier of 1.73 (rounded off). Option 3 would achieve the objective of mandating imprisonment in tax cases involving income of $140,000 on which taxes had not been paid. Option 3 would partially achieve the objective of achieving greater punishment at high loss amounts, with higher offense levels for loss amounts greater than $9.5 million. On the other hand, Option 3 would only reduce the sensitivity to loss at smaller loss amounts to the extent that punishment would be less in cases in which a two-level increase would, under the current guidelines, have been made for "more than minimal planning." In addition, Option 3 would preclude an increase in the offense level for planning in low-loss cases.

Option 3

Offense Level	Loss Range	Multiplier
5	> $500	
6	> $850	1.70
7	> $1,500	1.76
8	> $2,500	1.67
9	> $4,500	1.80
10	> $7,500	1.67
11	> $13,500	1.80
12	> $23,000	1.70
13	> $40,000	1.74
14	> $70,000	1.75
15	> $120,000	1.71
16	> $205,000	1.71
17	> $350,000	1.71
18	> $600,000	1.71
19	> $1,000,000	1.67
20	> $1,800,000	1.80
21	> $3,200,000	1.78
22	> $5,500,000	1.72
23	> $9,500,000	1.73
24	> $16,500,000	1.74
25	> $28,500,000	1.72
26	> $50,000,000	1.75

Option 4 would achieve the following objectives: (1) use a fairly constant multiplier throughout the loss table; (2) eliminate the enhancement for "more than minimal planning," but gradually build the increase into the loss table, with the full two-level increase being applied for loss amounts greater than $40,000; (3) achieve the objective of requiring imprisonment in tax cases involving $140,000 of income on which taxes were not paid; and (4) partially achieve the objective of increased punishment in cases with high loss amounts (by adding two more offense levels to the loss tables). Option 4 uses a multiplier of 1.7 (rounded off). Option 4 would decrease the sensitivity to loss at the lower offense levels

only to the extent that this result is achieved by eliminating the enhancement for "more than minimal planning." Conversely, it would preclude a two-level enhancement for planning in low-loss cases.

Option 4

Offense Level	Loss Range	Multiplier
5	> $600	
6	> $1,000	1.67
7	> $1,700	1.70
8	> $3,000	1.76
9	> $5,000	1.67
10	> $8,000	1.60
11	> $13,500	1.69
12	> $23,500	1.74
13	> $40,000	1.70
14	> $70,000	1.75
15	> $120,000	1.71
16	> $200,000	1.67
17	> $325,000	1.62
18	> $550,000	1.69
19	> $950,000	1.73
20	> $1,500,000	1.58
21	> $2,500,000	1.67
22	> $4,500,000	1.80
23	> $8,000,000	1.78
24	> $13,500,000	1.69
25	> $23,500,000	1.75
26	> $40,000,000	1.70
27	> $70,000,000	1.75
28	> $120,000,000	1.71

Option 5 would achieve the following objectives: (1) use fairly constant multipliers to increase loss amounts; (2) eliminate the enhancement for "more than minimal planning," but build the increase gradually into the loss table; (3) be less sensitive to loss amounts at lower loss levels; (4) mandate imprisonment in tax cases involving $140,000 of income on which income tax had not been paid; and (5) provide for increased punishment in cases involving extremely large loss amounts, by adding four offense levels. Option 5 uses a multiplier of about 1.6 (rounded off).

Option 5

Offense Level	Loss Range	Multiplier
5	> $1,000	
6	> $1,500	1.50
7	> $2,500	1.67
8	> $4,000	1.60
9	> $6,500	1.62
10	> $10,000	1.54
11	> $16,000	1.60
12	> $25,000	1.56
13	> $40,000	1.60
14	> $65,000	1.62
15	> $100,000	1.54
16	> $160,000	1.60
17	> $250,000	1.56
18	> $400,000	1.60
19	> $650,000	1.62
20	> $1,000,000	1.54
21	> $1,600,000	1.60
22	> $2,500,000	1.56
23	> $4,000,000	1.60
24	> $6,500,000	1.62
25	> $10,000,000	1.54
26	> $16,000,000	1.62
27	> $25,000,000	1.56
28	> $40,000,000	1.60
29	> $65,000,000	1.62
30	> $100,000,000	1.54

The following table is designed to aid the Commission's comparison of the options that are premised upon building the two-level increase for "more than minimal planning" into the loss table. (Rather than showing two columns for the current loss table, one with a two-level increase for "more than minimal planning" and one without the two-level increase, the table assumes loss amounts above $40,000 have been given the two-level increase and loss amounts of $40,000 or less have not.)

Comparison of Options That Build In A "More Than Minimal Planning" Enhancement

O.L.	Current Loss Range	Option 2 Loss Range	Option 3 Loss Range	Option 4 Loss Range	Option 5 Loss Range
5	> $100	> $1,200	> $500	> $600	> $1,000
6	>$1,000	> $2,000	> $850	> $1,000	> $1,500
7	> $2,000	> $3,500	> $1,500	> $1,700	> $2,500
8	> $5,000	> $6,000	> $2,500	> $3,000	> $4,000
9	> $10,000	> $10,000	> $4,500	> $5,000	> $6,500
10	> $20,000	> $16,500	> $7,500	> $8,000	> $10,000
11		> $28,000	> $13,500	> $13,500	> $16,000
12		> $48,000	> $23,000	> $23,500	> $25,000
13	> $40,000	> $80,000	> $40,000	> $40,000	> $40,000
14	> $70,000	> $135,000	> $70,000	> $70,000	> $65,000
15	> $120,000	> $235,000	> $120,000	> $120,000	> $100,000
16	> $200,000	> $400,000	> $205,000	> $200,000	> $160,000
17	> $350,000	> $675,000	> $350,000	> $325,000	> $250,000
18	> $500,000	> $1,150,000	> $600,000	> $550,000	> $400,000
19	> $800,000	> $2,000,000	> $1,000,000	> $950,000	> $650,000
20	> $1,500,000	> $3,500,000	> $1,800,000	> $1,500,000	> $1,000,000
21	> $2,500,000	> $5,500,000	> $3,200,000	> $2,500,000	> $1,600,000
22	> $5,000,000	> $9,500,000	> $5,500,000	> $4,500,000	> $2,500,000
23	> $10,000,000	> $16,500,000	> $9,500,000	> $8,000,000	> $4,000,000
24	> $20,000,000	> $28,000,000	> $16,500,000	> $13,500,000	> $6,500,000
25	> $40,000,000	> $48,000,000	> $28,500,000	> $23,500,000	> $10,000,000
26	> $80,000,000	> $80,000,000	> $50,000,000	> $40,000,000	> $16,000,000
27				> $70,000,000	> $25,000,000
28				> $120,000,000	> $40,000,000
29					> $65,000,000
30					> $100,000,000

The use of a multiplier to construct the alternative loss tables in Options 1 through 5 is an example of an exponential (i.e., nonlinear) relationship between the threshold dollar loss and the number of levels added for loss.[82] In these options, offense levels are added for the amount of loss as the loss increases, but the amount of loss necessary to trigger the addition of an offense level is not the same from one level to the next, but increases as well. Thus, in the loss table in §2B1.1, the difference between the fourth and fifth loss levels is $5,000, the difference between the fifth and sixth levels is $10,000, and the increase between the sixth and seventh levels is $20,000. In this instance, the difference in loss amounts doubles each time.[83] Of course, as the offense levels get higher, the sentencing range expands and the range of sentencing options changes. Thus, a one-level increase at the low end of the loss table has a much different impact from a one-level increase at the high end, especially for Offense Levels 1 through 8 in Criminal History Category I where the sentencing range remains 0-6 months.

The use of a constant multiplier is an attractive and intuitive approach to constructing the loss table. Other exponential relationships, however, could be constructed to achieve the result of associating larger increases in loss amounts with higher levels in the loss table. For example, squaring the dollar loss for one level to achieve the loss in the next higher level results in an exponential relationship between level and dollar value. Another exponential relationship could be formed by specifying constant differences between the natural logarithms of dollar loss amounts. A variant on this approach would be to specify that the natural logarithms of the differences between loss levels be constant.

Another approach would be to reduce the significance accorded loss magnitude as an indicator of the seriousness of property offenses. Monitoring data show that most cases under either §2B1.1 (75%) or §2F1.1 (59%) involve loss amounts of $20,000 or less. See Tables G-2 and G-4 in Appendix G. Arguably, low-loss cases differ significantly from cases involving high amounts in various ways in addition to the amount involved. If such characteristics other than loss amounts could be identified that distinguish groups of offenders,[84] fewer loss categories could be used, and punishment levels within a category

---

[82]The exponential form of the relationship between dollar loss and levels can be expressed as:

$$\$_v = m^v \$_1$$

When $\$_v$ is the threshold dollar value associated with level v of the loss table (e.g., $2,000 or more), m^v is the multiplier raised to the power v, and $\$_1$ is the threshold dollar value associated with the first level of the loss table.

[83]A constant or linear increase, on the other hand, would always involve differences in loss amounts of the same value, regardless of the position in the loss table. Thus, the dollar difference between the fifth and sixth levels would be the same as the difference between any other pair of adjacent levels.

[84]For example, low-loss crimes might generally involve less sophistication and be more likely to be committed impulsively than high-loss crimes.

could be set independently of the others but might overlap depending upon the offense/offender characteristics used to calculate the final offense level.

This approach would permit punishment within a group of similar offenders to be set according to characteristics common to the group but not generally found in other groups, and would have the advantage of allowing possible future guideline changes to be compartmentalized. For example, changes in punishments for the high-loss category would not necessarily require consideration of the impact on the other loss categories.

On the other hand, dividing cases into a smaller number of categories by loss amounts might be considered arbitrary. In addition, it may be that the characteristics that distinguish one category from another are already accounted for by other parts of the guidelines, e.g., specific offense characteristics and role adjustments.

4. Severity of Punishment

Related to the issue of appropriate incremental punishment within the theft, fraud, and tax guidelines is the question whether the punishment under these guidelines is appropriate compared to that for other crimes. The Group did not address this issue for three reasons: First, the Commission is undertaking a just punishment study that might examine the issue. Second, to some extent, this question involves consideration of past practice in sentencing economic offenses, which, for the reasons set forth in Part II.F.3 of this Report (Comparisons to Past Practice), below, the Group could not address. Third, the topic was too complex to be effectively studied in the short time the Group had to complete its work.

To the extent data were generated by the Group that might begin to shed light on the severity of sentences for economic offenders, they are described in Part II.F.3 of this Report (Comparisons to Past Practice), below. That section includes a comparison of the Parole Guidelines with the average sentences in §2B1.1 and §2F1.1 cases that included some condition of confinement.

D. Application in Embezzlement Cases of Abuse of Trust Adjustment

1. Introduction

The Working Group studied the interpretation and application in embezzlement cases of the adjustment for abuse of position of trust (U.S.S.G. §3B1.3).[85] The application notes state that the defendant's position must "in some substantial way" facilitate the

[85]Although the Commission previously requested comment on this issue, see 55 Fed. Reg. 5,739 (1990), response was minimal.

commission of the crime and not merely provide an opportunity for its commission. Currently, the commentary uses embezzlement by an ordinary bank teller as an example of a case in which an increase for abuse of trust is not warranted. Case law interpreting the abuse of trust adjustment has raised questions about how clear the commentary is, and whether it provides an appropriate basis for distinguishing between offenders who have abused their trust and those who have not.

To help address this issue, the Group undertook essentially three steps: First, it compiled and analyzed relevant case law pertaining to the application of the abuse of trust adjustment. Second, it compiled and evaluated monitoring data regarding application of the adjustment. Third, it compiled and analyzed TAS and Attorney Hotline calls pertaining to this issue. This section of the Report will set forth the results of the statistical research related to the abuse of trust adjustment, an analysis of the case law interpreting and applying that adjustment, a description of the problem areas, and a description of options that might be considered to address these issues.

2. Background of §3B1.3 (Abuse of Position of Trust)

The adjustment for abuse of position of trust, U.S.S.G. §3B1.3, was derived from an enhancement for "abuse of authority" found in other guideline systems.[86] The essence of the adjustment was embodied in those situations in which the position of the offender imbued him or her with discretionary authority to which others give deference, and the offender abused that authority in committing the crime. By contrast, embezzlement by a bank teller is excepted due to the fact that the teller's position is ministerial in nature. That is, in carrying out the functions associated with his or her position, a bank teller generally lacks the discretion that is inherently given to higher bank officials such as a vice president.[87] By committing embezzlement, therefore, a bank teller does not ordinarily abuse discretionary authority. Abuse of discretionary authority was intended to trigger the adjustment; the distinction between abuse of discretionary and of ministerial functions explains the bank teller exception.

---

[86]Relevant state law provisions in existence when the Sentencing Guidelines were adopted include: violation of position of public trust or of recognized professional ethics (Oregon Parole Guidelines); the defendant by the duties of his office or by his position, was obliged to prevent the particular offense committed or to bring the offenders committing it to justice (Illinois Penal Code); the defendant held public office at the time of the offense, and the offense related to the conduct of that office (Illinois Penal Code); the defendant utilized his professional reputation or position in the community to commit the offense or to afford him an easier means of committing it (Illinois Penal Code); the defendant took advantage of a position of trust or confidence to commit the offense (California Penal Code).

[87]At least one response submitted to the Group through the Probation Officers Advisory Group, however, indicated that in some banks, tellers may be given a wide range of duties and a fair amount of discretion.

Other guideline provisions convey this notion. For example, §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan) provides for a two-level increase if the defendant was "a fiduciary of the benefit plan." Application Note Three, applying the statutory definition found in 29 U.S.C. § 1002(21)(A), defines "fiduciary of the benefit plan" to mean a "person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan." Application Note Five states that if this adjustment is applied, §3B1.3 (Abuse of Trust) is not applicable.

Similarly, §2F1.2 (Insider Trading) permits application of §3B1.3 only if the defendant "occupied and abused a position of special trust." Application Note One states that "[e]xamples might include a corporate president or an attorney who misused information regarding a planned but unannounced takeover attempt. It typically would not apply to an ordinary 'tippee.'" (The liability of a "tippee" for trading on inside information is premised upon having a legal duty to disclose the information or refrain from trading on it.[88]) The bank teller exception found in §3B1.3 is consistent with these guidelines because, although there is a relationship of trust between the teller and the bank, the teller's authority is limited.[89]

3. Monitoring Data

The monitoring data for Part 2B and Part 2F offenses included in the Group's sample for fiscal year 1991 reflect that the abuse of trust adjustment is given relatively infrequently, and that the frequency of application varied with the offense type. For example, under guideline §2B1.1, the highest rate of application was for embezzlement (20%, N = 178) and the lowest was for larceny (6%, N = 86). The highest rate of application for all Part 2B offenses included in the Group's sample was for §2B4.1 (commercial bribery) at 26 percent (N = 5).[90]

---

[88]See Dirks v. SEC, 463 U.S. 646 (1983); Chiarella v. United States, 445 U.S. 222 (1980).

[89]Arguably, §2F1.2 and §2B1.1 are not completely analogous because §2F1.2 governs only offenses that inherently involve breach of a special duty owed by the defendant whereas §2B1.1 also includes offenses other than embezzlement.

[90]The total number of cases under §2B4.1 was only 19, compared with 892 for §2B1.1 with embezzlement as the primary offense type and 1,434 for §2B1.1 with larceny as the primary offense type. The data are set forth more fully at Tables F-62 through F-71 in Appendix F.

In terms of the sanctions imposed, only 9.1 percent (N = 16) of embezzlement cases in which the abuse of trust adjustment was applied resulted in a sentence of straight probation (i.e., probation with no condition of confinement), compared to 39.4 percent (N = 283) of embezzlement cases in which the abuse of trust adjustment was not applied. See Table J-2 in Appendix J.[91] In 70.9 percent (N = 124) of the embezzlement cases in which an abuse of trust adjustment was given, the defendant received some form of imprisonment (either prison and supervised release or the new split sentence), compared to 20.6 percent (N = 148) of defendants who did not receive the adjustment. Moreover, the average term of imprisonment for both types of prison sentences was longer for defendants who received the adjustment (13.8 months compared to 9.5 months, overall). See Table J-1 in Appendix J.

Within the group of embezzlement offenses sentenced under §2B1.1, the percentage of defendants receiving the abuse of trust adjustment was higher than the average for this group at loss amounts exceeding $20,000, although the absolute number of cases in these loss ranges is about one-third the number of cases in the loss ranges $20,000 and below. In some of the higher loss ranges, the absolute number of cases is very low.[92]

Information provided to the Group by probation officers shows a wide variation of views about whether the distinction drawn by the bank teller exception is clear, and whether it provides an appropriate basis for distinguishing among offenders for the purposes of enhancing punishment. The majority of responses, however, indicated that the commentary to §3B1.3 was not clear, particularly with respect to the rationale underlying the bank teller exception.[93]

4. Problems with §3B1.3 (Abuse of Position of Trust)[94]

a. Issues Raised by the Courts

In United States v. Odoms, 801 F. Supp. 59 (N.D. Ill. 1992), Judge Zagel of the district court for the Northern District of Illinois held that the commentary regarding the

---

[91]The average term of confinement for defendants who were sentenced to probation with a condition of confinement was slightly higher for defendants who received the enhancement that for those who did not (4.8 months vs. 3.5 months). See Table J-2 in Appendix J.

[92]See Tables F-62 through F-71 in Appendix F.

[93]This information was received through the Probation Officers Advisory Group. The responses were relatively few and not necessarily geographically representative.

[94]For a general consideration of the abuse of trust adjustment and the problems that courts have had with it, see Andersen, *Enhancement for "Abuse of a Position of Trust" Under the Federal Sentencing Guidelines*, 70 OR. L. REV. 181 (1991).

"bank teller exception" was in conflict with the plain meaning of the guideline and therefore should be disregarded. In Odoms, the court applied the enhancement to a postal employee, whose job as clerk involved preparing and affixing forwarding address labels, who was convicted of stealing food stamps from the mail. The Odoms court, noting that the "bank teller exception" obscured rather than enlightened application of the abuse of trust guideline, maintained that courts struggle with the bank teller exception[95] and that some

> presume that embezzlement necessarily involves an abuse of trust and therefore the application of the guideline to an embezzling bank teller would be double counting.[16] Others find that an ordinary bank teller is not in a position of trust. Several dissenting opinions are based on the lack of satisfactory or meaningful distinction between bank tellers and the defendant.[17]
>
> [16]See United States v. Jiminez, 897 F.2d 286, 287 (7th Cir. 1990) (in dicta, the court uses §3B1.3 and commentary as one example of an explicit exception, which it interprets as "enhancement for abuse of trust not applicable to embezzlement"). Courts have applied the abuse of trust guideline in embezzlement cases, however. See, e.g., United States v. Ehrlich, 902 F.2d 327 (5th Cir. 1990). One court pointed out that the Sentencing Commission did not preclude the application of §3B1.3 from embezzlement cases, and that the example of "ordinary bank teller" would be superfluous if the exclusion were intended to cover all embezzlement. United States v. Drabeck, 905 F.2d 1304, 1306 (9th Cir. 1990).
>
> [17]United States v. McMillen, 917 F.2d 773, 777 (3d Cir. 1990) (Pollak, J., dissenting) (record unclear if a teller at the same institution "could have embarked upon a reasonably similar scheme of embezzling the funds and covering it up"); United States v. Lange, 918 F.2d 707, 710 (8th Cir. 1990) (Heaney, J., dissenting) (postal worker who handled certified mail not different from bank teller); United States v. Castagnet, 936 F.2d 57, 63 (2d Cir. 1991) (Altimari, J., dissenting) (junior ticket agent in same position as bank teller).

801 F. Supp. at 63.

In addition, in United States v. Drabeck, 905 F.2d 1304, 1306 (9th Cir. 1990),[96] the Ninth Circuit expressed confusion regarding the premise of the guideline when it stated:

> [W]e are somewhat at a loss to understand why the Sentencing Commission believes that an ordinary bank teller who embezzles should not receive the enhancement. Unlike many other Guideline sections, the section on

[95]See United States v. Milligan, 958 F.2d 345, 347 (11th Cir. 1992) (difficult but possible to distinguish the ordinary bank teller).

[96]This opinion was originally vacated when the Ninth Circuit elected to rehear the case en banc. 915 F.2d 1404 (9th Cir. 1990). The district court's decision was then affirmed on order. 944 F.2d 910 (9th Cir. 1991). Thereafter, the Ninth Circuit vacated its decision to rehear the case en banc, 946 F.2d 630 (9th Cir. 1991); and the panel reinstated the original appellate decision as a memorandum disposition. 946 F.2d 629 (9th Cir. 1991).

> embezzlement does not already include abuse of trust in the specific offense characteristic, nor does it specifically mention in its Commentary whether section 3B1.3 applies . . . . We can only conclude that the United States Sentencing Commission must have meant that a position of trust occupied by an "ordinary" teller does not contribute to the crime of embezzlement or its concealment in "substantial" enough manner.

(footnotes omitted). These statements illustrate the challenge facing courts in applying this guideline.[97]

As a result of the apparent difficulty in determining the Commission's intent in enhancing punishment when the defendant abused his position of trust, courts have relied upon various factors to determine whether to apply the adjustment.[98] The factors identified by courts as relevant to that determination are: (1) the extent to which the position provides the freedom to commit a difficult-to-detect wrong, and whether an abuse could be simply or readily noticed;[99] (2) the defendant's duties compared to those of other employees;[100] (3) the defendant's level of specialized knowledge;[101] (4) the defendant's level of authority in the position;[102] and (5) the level of public trust placed in the defendant.[103]

b. Issues Raised in Hotline Calls

The TAS and Attorney Hotlines, from January 1990 to July 1992, received 76 questions regarding the abuse of trust or special skill adjustment.[104] In 52 calls (68%), the callers inquired whether the adjustment would apply to the defendant based on the specific facts of the case (i.e., the position held by the defendant at the time of the offense). In

---

[97]As noted in Andersen, supra note 94 at 189 n.42, terms such as "position of trust" are not defined, nor is it clear from either the guideline or the commentary whether the ordinary bank teller who commits embezzlement does not qualify for an enhancement because he or she does not occupy a "position of trust," or because embezzlement does not involve an "abuse" of that trust, or because the abuse of trust did not "significantly facilitate" the offense.

[98]A compilation of relevant case law is set forth in Appendix C-39 through C-46.

[99]See, e.g., United States v. Hill, 915 F.2d 502 (9th Cir. 1990).

[100]See, e.g., United States v. Parker, 903 F.2d 91 (2d Cir. 1990).

[101]See, e.g., United States v. Ehrlich, 902 F.2d 327 (5th Cir. 1990), cert. denied, 111 S. Ct. 788 (1991).

[102]See, e.g., United States v. McMillen, 917 F.2d 773 (3d Cir. 1990).

[103]See, e.g., United States v. Fousek, 912 F.2d 979 (8th Cir. 1990).

[104]Of these calls, 74 were from the TAS Hotline and two were from the Attorney Hotline.

many of the calls the caller questioned whether the defendant's position was analogous to that of the "ordinary bank teller." The frequency of calls by occupation or status of the defendant is described below:

1. postal employees: Seventeen calls involved United States Postal Service employees convicted of stealing from the mail;

2. bank officials: Four calls concerned persons holding positions of authority in the bank, such as bank vice presidents and senior loan officers;

3. bank employees: Four calls involved the application of the adjustment to other employees of a bank, including an administrative assistant, a bookkeeper, and a lead teller;

4. corporate officers: Three calls concerned company presidents or corporate financial officers who committed fraudulent acts involving company funds or, in one call, obtained a loan to the company;

5. parents/baby-sitters: Four calls involved a defendant responsible for the welfare of a child that the defendant ultimately victimized;

6. attorney/investment broker: Two calls involved attorneys, one charged with drug distribution and the other with an unspecified offense; one call involved a person who represented himself as a securities investor;

7. DEA informant: One call involved an informant charged with the distribution of cocaine; in the other two calls the crimes committed by the informants were unspecified;

8. security guard/armored car driver: One call involved an armed car driver who stole money from the armored car, one involved a security guard charged with conspiracy to import drugs, and the third involved an unspecified criminal offense;

9. public officials: Two calls (crimes not described);

10. miscellaneous: The remaining nine calls involved a variety of occupations such as government contractors, an investigator for a public defender's office, an employee of the FTC, a Federal Reserve employee, a grocery retailer, and an insurance salesman.

Additionally, 12 callers (16%) requested a general explanation of §3B1.3.[105] The TAS Hotline received three calls (4%) inquiring whether applying the abuse of trust adjustment constituted double counting when the offense involved a breach of a fiduciary relationship and, according to the defense attorney, the offense level already punished the defendant for breach of trust.

5. Discussion

An examination of the abuse of position of trust guideline, the commentary to it, and related guidelines and commentary leads to two possible interpretations of the intent underlying the abuse of trust adjustment. The first interpretation is that the Commission did not intend to enhance for mere violation of any trust placed in the defendant, but rather intended the adjustment to apply only when the abuse of trust is exceptional, i.e., when the defendant used discretionary authority vested in him or her by virtue of his or her position to significantly facilitate a crime. The second interpretation is that the Commission intended the adjustment to apply whenever the defendant's position makes the offense easier to commit and/or more difficult to detect.

a. Exceptional Abuse of Trust Required

As stated earlier, the essence of the adjustment was embodied in those situations in which the position of the offender imbued him or her with discretionary authority to which others give deference. Thus, the adjustment would not apply when the defendant abused a position in which his or her authority is ministerial in nature, such as when a bank teller commits embezzlement. The commentary and the guideline itself support this construction. That is, application of §3B1.3 requires that the defendant "abuse a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense . . . ." (emphasis added). This requirement of significant facilitation not only assures a nexus between the abuse of a position of trust and the criminal offense, but also suggests that not all abuses of trust in committing a crime qualify for the adjustment.

Judge Reinhardt, dissenting in United States v. Foreman, 905 F.2d 1335, 1341 (9th Cir. 1990), recognized the importance of this point when he stated that it must be "conceded that section 3B1.3 applies to offenders who abuse positions of public trust; not merely to those who occupy such positions or even to those who use such positions." He continued by noting that the "commentary [Application Note One], like the guideline it amplifies, clearly calls for an inquiry into the extent to which the abuse of trust contributed--actually contributed--to the concealment of the offense" and that "the majority's approach gives no effect to the further requirement that the abuse have significantly facilitated or substantially contributed to the concealment." Id. at 1342.

---

[105]A total of nine calls (12%) concerned the application of the adjustment found in §3B1.3 for use of a special skill. These calls specifically referred to the facts of the case and requested advice about whether the defendant's education or ability fell within the meaning of the enhancement.

When courts do focus on this element, they readily find the requisite facilitation, arguably undermining the Commission's intent in requiring this showing to be made.[106] For example, the Second Circuit, in United States v. Parker, 903 F.2d 91 (2d Cir. 1990), cert. denied, 111 S. Ct. 281 (1991), affirmed the application of the abuse of position of trust adjustment to the defendant, an armed security guard at a check-cashing firm, who provided to co-conspirators the information needed to rob a company vehicle. The defendant conceded that because of "his position he 'could have confirmed the details of car, personnel[,] and route that were already known by [the co-conspirator], and upon which he had planned this robbery.'" Id. at 104. Focusing on the facilitation requirement set forth in Application Note One, the court held the adjustment proper since the defendant's co-conspirator had not worked at the company for two months and it "could only [have] facilitate[d] his planning and execution of the crime to have confirmation from an insider . . . ." Id.

Similarly, the defendant in United States v. Lange, 918 F.2d 707 (8th Cir. 1990), contended that his thefts as a mail handler were like embezzlement by an ordinary bank teller. The Eighth Circuit disagreed, noting that the defendant, as a substitute express and certified mail handler one day a week, had "direct access to express and certified mail," which "[p]ostal employees in general did not have" and that these types of mail were more likely to "contain things of value than mail in general." Id. at 710.

The functions of both the mail handler in Lange and the "ordinary bank teller," however, are ministerial in nature. In his dissent, Judge Heaney explained why there is no rational distinction between these two jobs, concluding:

> A bank teller's position provides certain access to large amounts of cash on a daily basis. Monitoring of cash transactions by the bank and its customers limits somewhat the teller's opportunities for undetected theft. Lange's position as an express and certified mail handler provided him with occasional access to uncertain quantities of cash and valuables one day each week. Monitoring of the valuable contents of the mail by its senders and recipients limited Lange's opportunities for undetected theft. Thus, Lange's job merely provided an opportunity for crime that was also afforded to every other handler of express and certified mail, much as a bank teller's job provides an opportunity for crime that is also afforded to every other bank teller. Lange's access to express and certified mail no more "substantially facilitated" his

[106] See, e.g., Andersen, supra note 94 at 192, 193: "Prosecutors have proven adept at distinguishing criminal defendants from ordinary bank tellers. In fact, the courts have yet to find a defendant who occupies a position similar to that of an ordinary bank teller. . . . [T]he adjustment is becoming one that is applied whenever the defendant commits a crime within the scope of his or her employment."

thefts therefrom than a bank teller's access to bank deposits would substantially facilitate his embezzlement of those funds.

United States v. Lange, 918 F.2d at 712 (Heaney, J., dissenting) (emphasis added).

Judge Shadur of the district court of the Northern District of Illinois, recognizing the distinction between a position that is ministerial in nature and one that is vested with a special level of responsibility, held in United States v. Arrington, 765 F. Supp. 945 (N.D. Ill. 1991), that §3B1.3 does not apply to "every low-level postal employee carrying out garden-variety responsibilities," such as the defendant.[107] To apply the adjustment that broadly would "distort the meaning of the 'abuse of trust' concept." 765 F. Supp. at 946. The court, analogizing a postal worker to a bank teller, found the Commission's bank teller exception important because it signified the Commission's awareness that a teller's position is not a "highly-skilled occupation, even though by its very nature it provides the employee with extraordinary opportunities for criminal activity." Id. at 949.

The Third Circuit in United States v. McMillen, 917 F.2d 773 (3d Cir. 1990), also focused on the degree of the abuse of trust. In this case, the district court refused to apply the abuse of position of trust adjustment to the defendant, a branch manager of a federal savings and loan, who completed fraudulent loan applications, approved them, and deposited the proceeds into an account for his own benefit. The district court stated that the defendant "was not employed in a position of trust . . . [and that] the opportunity to commit this crime was equally available to other employees." Id. at 774. The Third Circuit reversed and held that the adjustment should have been given because the defendant was a branch manager, acted in a supervisory capacity, and had the authority to perform most acts without consultation.

b. Position of Trust Makes the Offense Easier to Commit

It also is possible to interpret §3B1.3 to apply when the defendant's position makes the offense easier to commit. A review of case law germane to this issue reveals a propensity to focus on the degree of supervision of the defendant in determining whether the defendant occupied a position of trust. This supervision-related inquiry was expanded to include the "extent to which the position provides the freedom to commit a difficult-to-detect wrong, and whether an abuse could be simply or readily noticed."[108]

Relying on the amount of supervision of the defendant, the Ninth Circuit in United States v. Drabeck, 905 F.2d 1304 (9th Cir. 1990), applied the abuse of position of trust adjustment to an unsupervised nighttime bank janitor who had removed $6,300 in American

[107]The defendant in Arrington was a "casual mailhandler"--someone charged with various tasks involving the sorting, processing, and stamping of mail--who embezzled $14 in United States coins from a first-class package.

[108]See United States v. Hill, 915 F.2d 502 (9th Cir. 1990).

Express traveler's checks from the bank's coin vault, which was either unlocked or defective. Although Drabeck argued that it was impermissible to apply §3B1.3 to his position, which must be "lower than a bank teller on this hierarchy of fiduciary duty[,]"[109] the Ninth Circuit disagreed. Adopting the reasoning of the district court, the Ninth Circuit held that the "lack of supervision over the defendant distinguishe[d] him sufficiently from an ordinary bank teller such that the exception from the enhancement that the Commentary affords the teller is inapplicable to him." Id. at 1306. The district court had noted that the bank teller worked during the day and was subject to supervision and daily audits whereas Drabeck worked at night, without supervision, and had access to the "bank and to the assets of the bank at a time and under circumstances that not even tellers have access." Id.

The Ninth Circuit later supplanted its lack of supervision analysis when it adopted the "freedom to commit a difficult-to-detect wrong" test. See United States v. Hill, 915 F.2d 502 (9th Cir. 1990). The court concluded that such a freedom had two indicia: "the inability of the trustor objectively and expediently to determine the trustee's honesty" and "the ease with which the trustee's activities can be observed." Id. at 506. Finding that Hill's position as a truck driver responsible for transporting five military families' belongings across country satisfied the indicia, the Ninth Circuit affirmed the application of the abuse of position of trust adjustment. The court further supported its holding by finding that "relative to all people in a position to conspire to steal goods from interstate commerce (i.e., the public at large), [Hill] was in a superior position as a result of a trust relationship." Id. at 508.

6. Conclusion

In terms of the purposes of punishment, enhanced penalties for persons who abuse their trust could focus on two grounds. First, the notion of just deserts would support such an enhancement on the theory that a person who, in addition to violating the general trust among individuals, violates a specific trust in order to commit or conceal a crime is more morally blameworthy and thus deserving of greater punishment. If just deserts is the focus, the exception for bank tellers could be interpreted as drawing a line based on the degree of trust and the degree of abuse. The language of §3B1.3 further supports this reading because it requires that the abuse of trust "significantly facilitated" the commission of the offense (emphasis added). In addition, the commentary states that persons who abuse their trust "generally are viewed as more culpable."

Alternatively, the enhancement could focus on general deterrence. If, by virtue of the defendant's position of trust, there is increased opportunity to commit a crime and decreased likelihood of detection, enhanced punishment is warranted to deter others from committing such offenses. If general deterrence is the focus, the bank teller exception could be explained as drawing a line based on the level of authority (the bank teller's lower level of authority would not significantly increase the opportunity to commit crime) and the

[109] United States v. Drabeck, 905 F.2d at 1305.

degree of supervision (the bank teller's higher degree of supervision makes it less likely that a difficult to detect crime would be committed).

In the absence of a clear indication which rationale the Commission intended as the primary focus, some courts have interpreted the enhancement to focus on one rationale while other courts interpret the enhancement to focus on the other rationale, resulting in a composite that is not only inconsistent but does not necessarily comport with the Commission's intent. As it now stands, bank tellers do not receive an abuse of trust adjustment, but postal clerks (at least in some circuits), janitors, and even a former junior airline ticket agent do.

If it was the Commission's intention to enhance for exceptional abuses of trust, the current state of the case law is particularly undesirable, since it seems difficult to argue that a postal clerk is invested with more trust than a bank teller. Conversely, a clearer statement of the Commission's intention to embrace positions in which the defendant is free to commit difficult-to-detect wrongs, if that rationale is favored by the Commission, would help ensure more uniform application of the adjustment.

7. Options

· Explain the commentary: This approach would involve revising the commentary to §3B1.3 to explain in greater detail the theory underlying the abuse of trust adjustment. Given the congressional mandate to eliminate unwarranted disparity in sentencing, this option seems desirable because it might lead to more consistent application.

· Delete the bank teller example from §3B1.3 and add a specific offense characteristic to Part 2B: This approach would seek to enhance punishment in the Chapter Two guidelines for offenses that inherently involve some violation of trust, i.e., embezzlement. If the specific offense characteristic applied under Part 2B, then §3B1.3 would not apply. Specific treatment in Part 2B might permit a more precise explanation of the adjustment in the context of embezzlement.

As is clear from the facts that theft and embezzlement are currently assigned the same base offense level under §2B1.1 and that the abuse of trust adjustment does not apply to all acts of embezzlement, the Commission's view thus far has been that embezzlement is no more serious an offense than theft. It is possible, particularly in light of cases broadly applying the abuse of trust adjustment, to view embezzlement as more serious than theft because of the fact that embezzlement involves violation of a trust relationship. A specific offense characteristic could be broadly enough defined to apply to all acts of embezzlement if the Commission chose to treat embezzlement as more serious than theft.[110]

[110]Since under §2B1.1 theft and embezzlement are punished the same, the guideline itself does not take into account abuse of trust, and applying the adjustment to all acts of embezzlement should not constitute double counting. See United States v. Lange, 918 F.2d 707 (8th Cir. 1988). See also United States v. Georgiadis, 933

· No change: The Commission could conclude that there is insufficient data of a pressing problem to warrant change at this time.[111]

E. Consolidation of §2B1.1 and §2F1.1[112]

Due to time constraints, the Group did not devote a great deal of time to the issue of consolidating §2B1.1 and §2F1.1. Presented below, however, is a summarization of what this approach would entail and the benefits and detriments of consolidation.

1. Benefits of Consolidation

Consolidating §2B1.1 and §2F1.1 guidelines would simplify the guidelines and might serve the substantive interests of ensuring similar sentences for similar crimes.

Fraud, theft, and embezzlement offenses are generally committed for financial reasons. Many acts of fraud could be charged as thefts and vice versa. In addition, some acts of embezzlement might be charged as false statements, resulting in sentencing under §2F1.1 rather than §2B1.1. For those cases in which the guideline selected for application depends on the charging decisions of prosecutors, consolidation of the guidelines would prevent a change in the sentencing range depending on the choice of the guideline.

Sections 2B1.1 and 2F1.1 depend heavily upon "loss" to determine the offense level. The concept of "loss" under §2B1.1 is related to the concept of "loss" under §2F1.1. Indeed, the starting point for defining "loss" under §2F1.1 is the definition under §2B1.1. Consolidation of the guidelines would make it easier to clarify the similarities and

---

F.2d 1219, 1225 (3d Cir. 1991); United States v. Christiansen, 958 F.2d 285, 287 (9th Cir. 1992). The Seventh Circuit, however, in United States v. Jimenez, 897 F.2d 286, 297 (7th Cir. 1990), stated in dicta that the adjustment for abuse of trust is not applicable to embezzlement. See also United States v. Herrera, 878 F.2d 997, 1001 n.3 (7th Cir. 1989) (§3B1.3 designed to prevent double counting, thus it may not be employed if an abuse of trust is included in the base offense level).

[111]Another proposal, set forth in Andersen, supra note 94 at 206, is to amend §3B1.3 to state that it applies "only where the commentary to a certain guideline specifies its applicability," and to discard the bank teller exception in favor of particularized examples in the commentaries to the relevant Chapter Two guidelines. Monitoring data, however, demonstrate that in fiscal year 1991 §3B1.3 enhancements were given in cases sentenced under 52 Chapter Two guidelines. Further, it seems logical to infer that although offenses involving an abuse of trust may predominantly fall under one of several guidelines (e.g., §2B1.1 (embezzlement)), it would be impossible to predict every factual situation that might arise; thus, it would be necessary to amend every Chapter Two guideline, in addition to §3B1.3, to effect this proposed change. Although greater specificity might be accomplished in this fashion, the magnitude of necessary amendments appears to render this proposal unwieldy.

[112]In addition, consideration could be given to consolidating the theft guideline, §2B1.1, and the guideline for receiving stolen property, §2B1.2. Due to time constraints, this possibility was not explored in any detail.

differences between "loss" under the two guidelines. In addition, consolidation might help prevent the development of divergent doctrines under separate guidelines as courts interpret the concept of "loss."

Consolidation of §2B1.1 and §2F1.1 is facilitated because the two guidelines have some common specific offense characteristics. The most important specific offense characteristics are those relating to "loss" amounts. The "loss" amounts start at a lower level (more than $100) in §2B1.1, and are added to a lower base offense level of 4. But for offenses with "loss" amounts greater than $2,000, the offense level arrived at by adding the base offense level to the increments for "loss" is the same under each guideline.

The second most important specific offense characteristic is that relating to "more than minimal planning." The only difference between the two guidelines is that §2F1.1 has an alternative means of achieving the two-level increase, i.e., "a scheme to defraud more than one victim." This difference is not particularly important because "more than minimal planning" may be established by repeated acts over a period of time (unless each instance was "purely opportune"), and thus presumably subsumes many multiple-victim frauds.

Another specific offense characteristic common to both guidelines relates to offenses that jeopardize the safety and soundness of a financial institution. Other specific offense characteristics are different but many of those that are not common to both guidelines are not frequently applied[113] and could be dealt with by a combination of: (1) increasing the §2B1.1 base offense level to 6; (2) cross-references; and (3) application notes dealing with departures.

2. Detriments of Consolidation

Concerns have been voiced, particularly by probation officers, that there are too many changes to the guidelines. Although consolidation would involve primarily structural rather than substantive changes, a new guideline format would have to be learned.

---

[113]Section 2B1.1 provides for a one-level increase (or an increase to offense level 7) for the theft of firearms and controlled substances. According to monitoring data for fiscal year 1991, this offense characteristic was applied in 0.9 percent of the cases, about half of which involved "loss" of less than $2,000. In the same time period, the two-level increase under §2B1.1 for theft from the person of another was applied in about 1.2 percent of the cases, in about half of which the "loss" was less than $2,000.

Under §2F1.1, the two-level increase (or increase to offense level 13) for risk of serious bodily injury was applied in about 0.1 percent of the cases in fiscal year 1991. Likewise, the increase to offense level 12 for use of foreign bank accounts or transactions to hide fraudulent conduct was applied in 0.1 percent of the cases during that period. Finally, the two-level increase (or increase to offense level 10) for misrepresenting oneself as acting on behalf of a charity, religion, political party, or government was applied in 1.4 percent of the cases in that time period.

In addition, some concern has been voiced about the lumping of dissimilar conduct into one guideline. To the extent there are differences between fraud cases and theft and embezzlement cases, sentencing them all under one guideline might result in overgeneralizing in evaluating severity.[114] The Group's examination of cases suggests that differences among the cases sentenced under §2F1.1 are more pronounced than the differences between the typical cases sentenced under §2B1.1 and those sentenced under §2F1.1. The typical case under both guidelines is an economic crime involving a relatively small amount of money.

3. Possible Approaches

To consolidate §2B1.1 and §2F1.1 would involve three primary components. First, a decision must be made whether to retain offense levels 4 and 5 for theft offenses, now available due to the difference in base offense levels and loss tables for §2B1.1 and §2F1.1, and whether to sentence both offenses under either the §2B1.1 base offense level and loss table or the §2F1.1 base offense level and loss table.

The second component would involve integrating the definition of "loss." The third component is determining how to describe the applicability of the specific offense characteristics that are found in either §2B1.1 or §2F1.1, but are not common to both.

As noted, many of the specific offense characteristics not common to both guidelines are not applied frequently. Thus, eliminating such specific offense characteristics would likely have slight impact. By increasing the base offense level for §2B1.1 to 6, the impact of eliminating specific offense characteristics not now common to both §2B1.1 and §2F1.1 could be lessened even more. Likewise, cross-referencing other guidelines and providing departure language could help reduce further any impact of eliminating noncommon offense characteristics.[115]

F. Miscellaneous Issues

1. Summary of Departure Case Law: §2B1.1; §2F1.1

A review of the case law relating to upward or downward departures in cases sentenced under §2B1.1 or §2F1.1 disclosed several areas of interest. In a number of cases,

---

[114]See, e.g., United States v. Kopp, 951 F.2d 521 (3d Cir. 1991), and United States v. Schneider, 930 F.2d 555 (7th Cir. 1991) (opining that theft and fraud are different types of offenses and therefore analysis of "loss" may not be identical).

[115]For example, §2B1.1 provides for an increase to offense level 14 if the crime involves an organized scheme to steal cars or car parts. Since a like provision exists under §2B6.1, a cross-reference to the latter section would deal with such offenses.

an upward or downward departure was given because "loss" did not reflect the seriousness of the offense, due to: (1) the psychological impact of the crime on the victims;[116] (2) the duration or sophistication of the crime;[117] (3) the motivation for committing the crime;[118] (4) the incalculability of "loss";[119] (5) the unusual degree of disruption caused by the crime;[120] (6) the sensitive position of the defendant;[121] or (7) the fact that the "loss" was partially caused by the victim or a third party.[122]

Upward departures were allowed in two cases based on the refusal of the defendants to return stolen property. In United States v. Bryser,[123] the Second Circuit stated that there is "little incentive in the Guidelines for defendants to return" stolen property because such action does not reduce the amount of "loss" attributable to the defendant. In United States v. Valle,[124] the Eleventh Circuit stated that it would "make a mockery of our system of justice" to permit defendants to keep their ill-gotten gain yet serve no more prison time than if they had surrendered the money they stole.

Other factors leading to upward departures included inadequacy of the "loss" amount, when the loss table stopped at $5 million;[125] high-speed chase;[126] abuse of a corpse;[127]

---

[116]United States v. Perkins, 929 F.2d 436 (8th Cir. 1991); United States v. Benskin, 926 F.2d 562 (6th Cir. 1991); United States v. Astorri, 923 F.2d 1052 (3d Cir.), cert. denied, 112 S. Ct. 444 (1991).

[117]United States v. Palinkas, 938 F.2d 456 (4th Cir. 1991); United States v. Benskin, 926 F.2d 562 (6th Cir. 1991); United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990), rev'd on other grounds, 111 S. Ct. 2182 (1991).

[118]United States v. Scott, 915 F.2d 774 (1st Cir. 1990).

[119]United States v. Garcia, 900 F.2d 45 (5th Cir. 1990).

[120]United States v. Garcia, 900 F.2d 45 (5th Cir. 1990); United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990), rev'd on other grounds, 111 S. Ct. 2182 (1991).

[121]United States v. Fousek, 912 F.2d 979 (8th Cir. 1990).

[122]United States v. Phillips, 962 F.2d 739 (7th Cir. 1992).

[123]United States v. Bryser, 954 F.2d 79, 89 (2d Cir. 1992).

[124]United States v. Valle, 929 F.2d 629 (11th Cir.), cert. denied, 112 S. Ct. 401 (1991).

[125]United States v. Roth, 934 F.2d 248 (10th Cir. 1991); United States v. Harotunian, 920 F.2d 1040 (1st Cir. 1990).

[126]United States v. Chiarelli, 898 F.2d 373 (3d Cir. 1990).

[127]United States v. Roberson, 872 F.2d 597 (5th Cir.), cert. denied, 493 U.S. 861 (1989).

and inadequacy of criminal history.[128] A fact that was considered as a reason for a downward departure was that the defendant's crime represented a single "aberrant act."[129] Defendants also (unsuccessfully) argued that a downward departure should be given due to the fact that the defendant was the single parent of an infant[130] or that there was a great disparity between the actual loss and the intended loss.[131]

A complete description of relevant cases is set forth at Appendix C-47 through C-59.

2. Recent Developments Concerning Fraud

a. Financial Institution Fraud

In its October 15, 1992, annual report to the Commission on the operation of the guidelines, the Justice Department again recommended amendments to increase the sentences for financial institution fraud to reflect the increases in the maximum terms of imprisonment (from 20 to 30 years) for ten major bank fraud and embezzlement offenses.[132] The Justice Department recommends that the relevant guidelines include a specific offense characteristic that calls for a four-level increase "if the offense affected a financial institution."[133] The Justice Department recommends that the enhancement not apply in cases involving "isolated incidents of theft involving low dollar amounts," in response to concerns that such an enhancement would cause harsh punishments.

b. Computer Fraud and Abuse

Generally, the Justice Department recommends that the Commission adopt a guideline that specifically sanctions computer offenses because they "often harm intangibles, such as privacy rights or the unimpaired operation of networks, as well as the kinds of property values which the general fraud table measures." The Working Group did not

---

[128]United States v. Berkowitz, 927 F.2d 1376 (7th Cir.), cert. denied, 112 S. Ct. 141 (1991); United States v. Whitehead, 912 F.2d 448 (10th Cir. 1990).

[129]United States v. Carey, 895 F.2d 318 (7th Cir. 1990); United States v. Russell, 870 F.2d 18 (1st Cir. 1989).

[130]United States v. Johnson, 908 F.2d 396 (8th Cir. 1990).

[131]United States v. Koenig, 952 F.2d 267 (9th Cir. 1991).

[132]Letter to the Chairman from Paul L. Maloney (October 15, 1992), the relevant parts of which are set forth in Appendix B.

[133]In its 1991 annual report to the Commission, the Justice Department requested an enhancement of "at least several additional levels."

address this issue since a separate working group has been established to deal with computer fraud. It should be noted, however, that the Computer Fraud Working Group is on a two-year cycle, and that any interim changes to the fraud or theft guidelines would affect computer offenses as well.

3. Comparisons to Past Practice

For this Report, a comparison of guideline sentencing in white collar cases to past practice was not performed. Each of the two past-practice data sets available for this task has limitations that preclude its immediate use for general comparisons between current and past practices. The first data set, the Administrative Office's FPSSIS data, has been judged by senior Commission staff to be a generally unreliable source of information about monetary loss. The second data set, known as the bank embezzlement disparity data set, was collected because of the problems with the FPSSIS data. Unfortunately, these data were collected for a specific study and their limited nature (single-count bank embezzlements) makes it difficult to draw from them more general inferences about white collar sentencing. As the bank embezzlement data set evidences, it is not impossible to collect reliable information about the role of loss in pre-guideline sentencing practices; however, it is a time-consuming activity that could be best pursued with a longer-term study.

It is possible to compare average sentences imposed under the Sentencing Guidelines, by various loss ranges, with the Parole Guideline ranges for similar loss categories. Since the Parole Guidelines applied only to defendants who were sentenced to imprisonment for more than one year, the comparison is necessarily limited because it does not take into account sentences of less than one year or the extent to which probation was granted under pre-guidelines sentencing.

The table at Appendix I-2 shows, by loss ranges, the average sentence imposed[134] in fiscal year 1989-90 under §2B1.1 and §2F1.1 for defendants with a Criminal History Category of I, along with the ranges under the Parole Guidelines for defendants with "very good" offender characteristics.

[134]The "average sentence imposed" includes both imprisonment and alternative means of confinement. The figures given do not take into account reductions in the time actually served due to good-time credit.

III. TAX OFFENSES -- Chapter Two, Part T

A. Tax Offenders and the Commission's Expansion of Non-Prison Alternatives

1. Overview of the 1992 Alternatives Amendments

On April 30, 1992, the Commission submitted to Congress amendments to Chapter Five of the Guidelines Manual and, correspondingly, the Sentencing Table, that are relevant to the work of the White Collar Working Group. Those amendments, effective November 1, 1992, are:

- a change in the sentencing range for Offense Levels 7 and 8 in Criminal History Category I from the current ranges of 1-7 and 2-8 months, respectively, to 0-6 months. The amendment permits the court to consider a sentence of "straight" probation (i.e., probation without confinement conditions) at these two additional offense levels.

- a revision to the definition of a "split sentence" in Zone B of the Sentencing Table that requires service of one month's imprisonment rather than at least half of the minimum of the sentencing range.

Consequently, effective November 1, 1992, the guidelines permit the following sentencing options in Zones A, B, and C:

Zone A: (sentencing ranges of zero to six months):

- straight probation;
- probation with confinement conditions;[135] or
- imprisonment.

Zone B: (sentencing ranges with minimum terms of one to six months):

- probation with confinement conditions;
- split sentence (requiring service of at least one month's imprisonment followed by supervised release with either community confinement or home detention); or
- imprisonment.

[135]Confinement conditions are intermittent confinement, community confinement, or home detention.

Zone C: -(sentencing ranges with minimum terms of eight to ten months):

- split sentence (requiring service of at least half the minimum term of imprisonment followed by supervised release with either community confinement or home detention); or
- imprisonment.

2. Department of Justice and Internal Revenue Service Perspectives

The Tax and Criminal Divisions of the Department of Justice expressed concern late in the 1992 amendment cycle about then-pending proposals to expand judicial sentencing flexibility for first offenders convicted of less serious offenses. At that time, the Commission was considering changing the sentencing ranges for Offense Levels 7 and 8 in Criminal History Category I from 1-7 and 2-8 months, respectively, to 0-6 months; creating a new "split sentence" in Zone B that would require service of one month's imprisonment rather than half the minimum of the sentencing range; and moving Offense Level 11, Criminal History Category I, into this new Zone B.

In an April 22 letter to Chairman Wilkins, the Justice Department claimed that the proposed changes would "virtually eliminate any meaningful deterrence" just when the "impact of the guidelines is beginning to be felt in criminal tax cases."[136] The Department stressed that data showing that 13 cases in fiscal year 1990 would have been affected by the amendment to Offense Levels 7 and 8 is "not insignificant from an enforcement perspective" in light of the fact that the cases involve tax losses between $2,001 and $10,000 based on unreported income of roughly $7,000 to $36,000. Furthermore, the Justice Department said:

> The prospect of imprisonment, even if only for a short period of time, is a more effective deterrent to most people contemplating a violation of the revenue laws than is the prospect of probation or a fine. Consequently, it is extremely important to the enforcement effort that the expenditure of limited resources on investigation and prosecution result in sentences of imprisonment in order to deter those in all categories of tax offenders from violating the internal revenue laws. Application of the new Sentencing Table will result in a significant number of tax violators not being sentenced to terms of imprisonment and will greatly reduce or virtually eliminate the deterrent potential of these prosecutions.[137]

---

[136]Letter to Honorable William W. Wilkins, Commission Chairman, from James A. Bruton, Acting Assistant Attorney General, Tax Division, and Paul L. Maloney, Senior Counsel for Policy, Criminal Division, April 22, 1992.

[137]Id.

The Justice Department recommended that the Commission exempt tax and antitrust offenses from operation of the proposed amendments to Offense Levels 7 and 8, Criminal History Category I, and require continued use of the Sentencing Table in effect on November 1, 1991, for those offenses.

In the end, the Commission voted to modify the sentencing ranges for Offense Levels 7 and 8 in Criminal History Category I and redefine the split sentence in Zone B, but not to make any changes to Offense Level 11. The amendments were sent to Congress on April 30, 1992.

In June 1992, the Commission identified economic offenses in general, and tax offenses in particular, as priority areas of study during the 1992-93 amendment cycle. A staff working group was formed to research the issues.

In August 1992, Commissioner of the Internal Revenue Service Shirley Peterson sent letters to members of the House and Senate Judiciary Committees expressing her concern about the impact of the proposed amendments scheduled to become effective on November 1, 1992.[138] Commissioner Peterson wrote that the amendments "reduce the already low potential of terms of imprisonment for certain tax offenders" and requested that the Judiciary Committee intercede on behalf of the IRS to override these revisions or, alternatively, exempt tax offenses from their operation.

The IRS calculated that an individual convicted under 26 U.S.C. § 7203 (willful failure to file a tax return), a misdemeanor offense sentenced under §2T1.2, who receives a two-level reduction for acceptance of responsibility and has a tax loss between $10,001 and $20,000 (representing unreported income of approximately $35,700 to $71,400) is currently eligible for a sentence of probation without confinement conditions.[139] Under the 1992 amendment, the maximum amount of tax loss that could result in a sentence of straight probation increases to between $40,001 and $70,000 (representing unreported income of approximately $142,800 to $250,000).

"The deterrent effect of a sentencing scheme which makes possible a sentence of probation only for a failure to file case in which $250,000 of income goes unreported is problematical at best," Commissioner Peterson wrote. She added, "Indeed, rather than discouraging violations of the internal revenue laws, such a lenient approach could well

---

[138]Letter from Commissioner Shirley D. Peterson to Senator Strom Thurmond, August 14, 1992.

[139]Guideline 2T1.2 provides two options to calculate the base offense level: 5, or one level less than the level from §2T4.1 (Tax Table) corresponding to the tax loss, whichever is greater. According to the tax table, a tax loss of more than $10,000 but not more than $20,000, minus one level results in an offense level of 8. A subsequent two-level reduction for acceptance of responsibility results in a final offense level of 6. (Under §2T1.2, "tax loss" for nonfiling offenses is the amount of tax owed and not paid, but not less than ten percent of the amount by which the taxpayer's gross income exceeded $20,000.)

encourage taxpayers to risk detection and prosecution because they conclude that there is much to be gained through successful noncompliance and little to be lost if they are caught and punished."

On September 18, 1992, Senators Biden and Thurmond (Chairman and Ranking Minority Member, respectively, of the Senate Judiciary Committee) sent a joint letter to Chairman Wilkins expressing their approval that the Commission was undertaking a comprehensive analysis of the tax guidelines and was working closely with the Internal Revenue Service and Department of Justice. The Senators urged the Commission to pursue the matter diligently and report to Congress in the coming year on any strengthening amendments in the tax area that the Commission deems warranted.[140]

3. Historical Sentencing Patterns for Tax Offenders

The "phase-in" of guideline sentencing for tax offenders has been gradual, with the number of tax cases sentenced under the guidelines remaining relatively small compared to the number of tax cases sentenced yearly prior to the guidelines. For example, in fiscal year 1991 a Chapter Two, Part T guideline was the primary guideline in only 333 taxes, compared to 1,338 tax cases sentence under pre-guideline's law in 1986.[141] Table K-3 in Appendix K provides yearly totals and a breakdown of specific tax guidelines applied for reporting years 1989-1990.

a. Pre-guidelines Tax Sentences

The Administrative Office of the U.S. Court's FPSSIS data system is helpful in identifying sentencing characteristics for tax offenders sentenced prior to implementation of the guidelines. Searching the FPSSIS database by the 16 most commonly prosecuted

---

[140]After the initial draft of this Report was prepared, the Working Group received a submission on this issue, dated November 2, 1992, from the Tax Division and IRS.

[141]As of October 21, 1992, the Commission had received records for 560 cases sentenced under the tax guidelines in fiscal year 1992. The extended "phase-in" period for tax cases is presumably due to the longer statute of limitations for tax offenses and the tendency for there to be a longer investigative phase in these than many other cases. The reader should be aware, however, that the pre-guidelines tax cases were counted by primary offense type (i.e., cases in which the tax count has the highest statutory maximum sentence of the counts in the case), whereas guidelines tax cases were counted by the "guideline high" method (i.e., cases in which the tax count produces the highest offense level of the counts in the case). The difference in counting methods may explain some of the gap between the pre-guidelines and the guidelines numbers of tax cases. The Group, however, determined that the difference in counting methods could not explain most of the gap, particularly when one takes into account that the guidelines figures were drawn from only 80 percent of the full sample of guidelines cases, 20 percent being excluded due to incomplete documentation. Another possible explanation for the difference between the annual numbers of pre-guidelines and guidelines cases is that prosecutors are simply bringing fewer tax cases; the Group, however, encountered no specific support for this hypothesis.

criminal tax statutes (26 U.S.C. §§ 7201 - 7216), a snapshot of pre-guidelines sentencing patterns emerges.[142]

Approximately 50 percent of criminal tax offenders sentenced from 1984-1990 received terms of imprisonment. The remaining 50 percent received probationary sentences under pre-guidelines practice. The median prison sentence imposed during those years fluctuated from a low of 6.0 months in 1986 (N = 1,338 cases) to a high of 12.0 months in 1988 and 1990 (N = 1,233 cases and N = 745 cases, respectively).[143] See Table K-2 in Appendix K for a breakdown of pre-guidelines sentencing patterns for tax offenders from 1984-1990.

b. Guidelines Tax Sentences

This section details guideline sentencing patterns drawn from the Commission's monitoring data. The data portrayed represent defendants whose highest adjusted offense level resulted from a Chapter Two, Part T guideline. See Table K-1 in Appendix K.

Direct comparisons between pre-guidelines and guidelines sentencing data are inappropriate. The FPSSIS "prison" indicator in pre-guidelines data generally includes confinement conditions such as night or weekends in a local facility. Although some reporting variations among districts exist, the most accurate approximate comparison would be to combine with the prison option the confinement options recognized by the guidelines other than imprisonment (i.e., "split" sentence and probation with confinement conditions) and to compare that aggregate to the pre-guidelines prison numbers.

For example, the guidelines high rate of confinement of 63.8 percent in 1989 (N = 113) and low rate of 55.5 percent in 1991 (N = 209) could be compared with the pre-guideline confinement rate that averaged 48.5 percent from 1984-1990. One significant observation is that the rate at which convicted tax offenders receive a sentence of confinement increased under the guidelines compared to pre-guidelines practice. Correspondingly, the rate of straight probationary sentences for tax offenders dropped from an average of 51.5 percent pre-guidelines to 38.7 percent under the guidelines. See Tables K-1 and K-2 in Appendix K.

As to specific guidelines, 47.1 percent of the 51 offenders sentenced under §2T1.1 (Tax Evasion) in fiscal year 1991 received a sentence of imprisonment. Additionally, 2 percent of offenders sentenced under §2T1.1 in 1991 received a split sentence, while 39.2

[142]The statistics are presented as either "prison" or "probation" because from FPSSIS data it is difficult to identify when alternatives to incarceration were used. See footnote * to Table K-2 in Appendix K for a more detailed explanation of the data limitations.

[143]It should be noted that these statistics relate only to the sentence imposed, not the amount of time actually served.

percent received a sentence of probation with confinement conditions. Finally, 11.8 percent of these offenders received a sentence of straight probation. See Tables F-8 and F-9 in Appendix F for a detailed breakdown of sentencing patterns for the tax guidelines.

Significantly, 79.2 percent of all offenders sentenced under §2T1.1 in 1991 received a sentence that included some form of confinement. This rate of confinement comports with the Commission's stated intention in the Guidelines Manual to reduce the rate at which tax evaders received sentences of straight probation.[144]

Guideline 2T1.2 (Willful Failure to File Return), while the most frequently used tax guideline in 1991, shows a decidedly different sentencing pattern from §2T1.1. In great measure, this may stem from the nature of the offenses sentenced under the two guidelines — §2T1.1 is referenced for 26 U.S.C. § 7201, a felony carrying a statutory maximum sentence of five years; §2T1.2, on the other hand, is referenced for 26 U.S.C. § 7203, a misdemeanor offense that carries a maximum sentence of one year.[145]

Of the 66 offenders sentenced under §2T1.2 in 1991, 16.7 percent received a sentence of imprisonment, 40.9 percent a sentence of probation with confinement conditions, and 42.4 percent a sentence of straight probation. See Table F-8 in Appendix F.

The guideline with the third greatest number of cases in 1991, §2T1.3 (Fraud and False Statements Under Penalty of Perjury), shows a prison sentence imposed in 43.2 percent of the 44 cases sentenced under the guideline. The rate at which split sentences and sentences of probation with confinement conditions were imposed also tracks sentencing patterns in §2T1.1 with rates of 2.3 percent and 34.1 percent, respectively. Judges imposed straight probation in 18.2 percent of the cases sentenced under §2T1.3. See Table F-8 in Appendix F.

4. Tax Offenders and the 1992 Alternatives Amendments

Predicting the impact of amendments to the guideline sentencing table that permit sentences of straight probation at two additional offense levels in Criminal History Category I is speculative at best for two main reasons. First, it is impossible to anticipate how judges will use their new sentencing flexibility. While a probationary sentence without confinement

---

[144]"Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax evasion and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced." U.S.S.G. §2T1.1, comment. (backg'd.)

[145]This statute also embraces a felony offense for willful violations of 26 U.S.C. § 6050I, but those offenses are sentenced under a different guideline.

conditions is now an option for offenders at Offense Levels 7 and 8, Criminal History Category I, imprisonment for a period of between one to six months and probation with conditions of confinement are also sentencing options. Second, tax sentencing — even five years after implementation of the guidelines — remains to a great extent under the ambit of the pre-guidelines system.[146] No doubt due to the extensive time required to identify, investigate, and prosecute violations of the federal tax laws, the relatively small proportion of tax offenders currently sentenced under the guidelines limits the precision of any predictions.

It also should be recalled that the newly defined Zone A by and large encompasses persons convicted of offenses other than tax violations. Tax offenders represent 0.9 percent of all offenders sentenced under the guidelines in fiscal year 1991. Furthermore, tax offenders sentenced at Offense Levels 7 and 8, Criminal History Category I, constitute 1.5 percent and 3.7 percent, respectively, of the total number of all offenders sentenced at those two levels.

To identify characteristics of tax offenders who will be eligible for the expanded sentencing options effective November 1, 1992, a profile of "Guideline Tax Offenders" is included at Appendix K. The profile, constructed by tax guideline, is divided by offenders in Criminal History Category I whose final offense levels were 0-6 (current Zone A), 7-8 (formerly in Zone B but after November 1, 1992, part of Zone A), 0-8 (the amended Zone A), 9-10 (Zone B effective November 1, 1992), and 11-12 (Zone C effective November 1, 1992).

5. Options for Increasing Tax Offense Levels

If the Commission concludes that federal tax enforcement efforts will be diminished by its 1992 amendments to the sentencing table, several options for enhancing punishment for tax offenders present themselves. One overarching consideration, however, is the extent to which any potential increases in offense levels for tax guidelines or the tax loss table will affect the current symmetry of "loss" amounts in the tax, fraud, and theft guidelines.

Two methods of enhancing punishment for some tax offenders are contingent upon making other changes to the guidelines, discussed in other parts of this Report:

- Consolidating Selected Tax Guidelines: Under a consolidation plan for §2T1.1, §2T1.2, and §2T1.3 detailed in Part III.B. (Simplification of Tax Guidelines) in this Report, a uniform base offense level of 6 would increase all "failure-to-file" cases by one level. Thus, for example, a nonfiling case currently sentenced at Offense Level 8 would increase to Offense Level 9.

[146] See note 141, supra.

- Incorporate "More than Minimal Planning" Enhancement into Loss Tables for Theft and Fraud and Amend Tax Table Correspondingly: This option is linked to a proposal detailed elsewhere in this Report to incorporate the two-level enhancement for "more than minimal planning" into the §2B1.1 and §2F1.1 loss tables. If this specific offense characteristic is eliminated, and the tax loss table increased to make it consistent with the theft and fraud loss tables, the sentencing ranges would increase by up to two offense levels in certain tax cases as well.

Three potential methods of enhancing punishment for tax offenders are independent of other possible changes to the guidelines:

- Change the Tax Loss Table: This option would involve revising the tax table in §2T4.1 in one of two ways. The first and easiest method is to retain the current gradations of tax loss and increase each of the corresponding offense levels by one or more levels. The second method is to reconfigure the gradations of tax loss in the table and increase the offense levels accordingly.

- Add Specific Offense Characteristics: This approach would seek to identify aggravating factors in addition to tax loss that make tax offenses more serious than other economic offenses.

- Introduce a Presumptive Offense Level With Enhancement for Loss: This method would assign tax offenses a presumptive severity level and permit the government to increase the level according to pre-established increments by proving tax loss. Correspondingly, a defendant would have the opportunity to mitigate the sentence somewhat if the actual tax loss was less than a particular amount established by the Commission. One benefit of this approach is that it would relieve probation officers from determining the actual tax loss in every case.

B. Simplification of Tax Guidelines

1. Introduction

In the 1992 amendment cycle, a proposal was published in the Federal Register regarding consolidation of certain tax guidelines. The proposal was not adopted by the Commission because of the lack of opportunity to consider the issue in detail, and the matter was assigned to the White Collar Working Group for study. The Group's consideration of the issue dovetails with the Commission's decision to study the impact on tax offenses of the expansion of non-prison alternatives.

This portion of the Report will set forth: an overview of current sentencing provisions under the tax guidelines; a description of problems that have arisen in interpreting and applying those guidelines; a description of the ways in which the tax

guidelines could be simplified, including adopting a uniform definition of tax loss and consolidating the tax guidelines; and a description of the benefits and detriments of each proposal.

It is important when reading the following sections to recall the relative paucity of information on this topic. During fiscal year 1991, a Part T guideline was the primary guideline for only 333 cases, and only a smattering of relevant court decisions was located in a review of the case law. By contrast, 155 calls were received by the TAS Hotline regarding the tax guidelines.

2. Current Sentencing Provisions Under Tax Guidelines

As now written, there are 13 tax guidelines: nine dealing with income tax offenses, such as evasion, failure to file, and false statements in a return (§2T1.1 - §2T1.9); two dealing with alcohol and tobacco tax offenses (§2T2.1 - §2T2.2); and two dealing with customs tax offenses (§2T3.1 - §2T3.2). The proposal published in 1992 dealt only with income taxes. Because of the different nature and low number of cases involving alcohol, tobacco, or customs tax, the Group devoted its time to considering changes to the income tax guidelines.

Within the guidelines for income tax offenses, the base offense level is typically established by requiring a choice between a specified offense level and the level obtained by reference to the tax loss table (§2T4.1, spanning from Offense Level 6, at $2,000 or less, to Offense Level 24, at more than $80 million). Thus, "tax loss" may be a major determinant of the sentence. What constitutes "tax loss" varies from guideline to guideline, as a uniform definition is not currently used. Generally, a choice of methods for determining tax loss is available in each guideline; however, one method common to some of the more frequently prosecuted offenses (evasion, failure to file, and conspiracy to evade taxes) is "actual tax loss," the computation of which requires the court to determine what taxes were due and owing but not paid by the defendant. The varying methods of fixing the base offense level and the varying definitions of tax loss are depicted in the table below:

Guideline	Method to Determine OL	Definition of Tax Loss
§2T1.1 (Evasion)	Tax loss table only (OL 6 or higher)	Greater of actual tax loss or 28% (34% for corporation) of understatement of greater of gross and taxable income, plus 100% of false credits
§2T1.2 (Failure to File)	5 or 1 level less than tax loss	Actual tax loss, but not less than 10% of gross income exceeding $20,000
§2T1.3 (Perjury)	6 or, if committed to evade, tax loss	28% (34% for corporation) of understatement of greater of gross and taxable income, plus 100% of false credits
§2T1.4 (Aiding Tax Fraud)	6 or tax loss	28% (34% for corporation) of understatement (resulting from aider's advice) of greater of gross and taxable income, plus 100% of false credits resulting from aider's advice
§2T1.5 (False Returns)	Base level 6	
§2T1.6 (Failure to Pay Over Taxes)	Tax not collected or paid over	
§2T1.7 (Failure to Deposit Taxes)	4 or tax not deposited	
§2T1.8 (Withholding Statement Offenses)	Base level 4	
§2T1.9 (Conspiracy to Evade Taxes or Obstruct IRS)	10 or tax loss	Greater of actual tax loss and 28% (34% for corporation) of understatement of greater of gross and taxable income, plus 100% of false credits

The commentary does not explain in detail the reasons for the current configuration of the tax guidelines. The splitting of offenses into separate guidelines apparently was done primarily for ease of drafting. The commentary to §2T1.1 (evasion) explains the reliance on tax loss as follows:

> This guideline relies most heavily on the amount of tax evaded because the chief interest protected by the statute is the collection of taxes. A greater

evasion is obviously more harmful to the treasury, and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from tax evasion increases, the sanction necessary to deter also increases.

3. Problems of Practice and Application

In actual practice, two types of problems have occurred in applying the tax guidelines. First, probation officers have apparently experienced some difficulty determining the actual tax loss (the criminal deficiency due and owing, but not paid by the defendant). Second, courts have had some difficulty determining which definition of "tax loss" to apply. To some extent, these two types of problems compete with each other because the special guideline rules defining "tax loss," drafted to simplify the requisite calculations, sometimes create problems for courts trying to apply the guidelines.

The apparent difficulties in determining actual tax loss stem in part from the complexity of and constant changes to the tax laws. A probation officer may, for example, find himself or herself trying to determine whether a particular expense was deductible under tax laws in effect several years earlier. Probation officers have also reported some problems in obtaining relevant information from the Internal Revenue Service in a timely fashion in order to assist them in determining tax loss.[147] The first source of problems can be readily documented; the second is more subjective and difficult to verify given the relative infrequency of tax cases to date.

In an effort to simplify sentencing in tax cases, the Commission has attempted to truncate the problem of determining actual tax loss by drafting a number of substitute definitions of "tax loss." Thus, for purposes of §2T1.2, an alternative definition of "tax loss" is "not less than 10 percent of the amount by which the taxpayer's gross income for the year exceeded $20,000." And for the purposes of §2T1.3, "tax loss" is defined as "28 percent of the amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax."

These substitute definitions of "tax loss" can lead to complications in applying the tax guidelines. One type of complication can arise because some of the definitions of "tax loss" do not correspond to the amount of tax owed, as calculated under the Internal Revenue

[147]The Working Group received some input from the Probation Officers Advisory Group. Although the sample received is small and not geographically representative, at least one district reported no difficulty in obtaining information from the IRS.

Code. These complications can be seen from Hotline calls, hypothetical examples, and reported decisions.[148]

a. TAS Hotline Calls[149]

Many calls to the TAS Hotline (111) have related to the definition and calculation of "tax loss." A number of callers wanted to know whether actual tax loss should be used when known, or whether the alternative calculations under §2T1.2 and §2T1.3 should be used. One question related to the method of determining "gross income," specifically whether gross receipts should be used or some lesser amount. One caller wanted to know which guideline to apply for failure to pay an excise tax.

The Working Group received some comments of probation officers through the Probation Officers Advisory Group. While the offices that provided comments were not many or geographically representative, they tended to divide between offices that had not had enough tax cases to offer comment and offices that found the present tax guidelines confusing and cumbersome.[150]

b. Hypothetical Examples

Some of the complications that can arise because of the differing definitions of "tax loss" can be shown by variations drawn from a single set of facts. Each of these examples involves a taxpayer, Mary Smith, who worked as an employee, earning $120,000 in a year. The taxes on this income were withheld by Smith's employer. On the side, Smith engaged in a business that had a gross revenue of $800,000, with business expenses of $780,000 (the cost of the goods sold), leaving a profit of $20,000.

---

[148]An added complication, not discussed below, relates to a conflict between the guideline language in §2T1.3 and the commentary explaining that guideline. An example will clarify the conflict. Suppose that a defendant correctly stated his or her gross income but improperly claimed charitable contributions of $100,000. The defendant later is prosecuted for making a false statement. As written, §2T1.3, the applicable guideline, literally calls for a determination whether gross income or taxable income is greater, then for a calculation of the understatement of the one that is greater, with the "tax loss" being 28 percent of that understatement. In the example above, gross income is greater than taxable income, but gross income is not understated. Therefore, under the plain language of the guideline, the "tax loss" is $0. In conflict with the plain words of the guideline, Application Note 4 states that one should determine whether the understatement of gross income or taxable income is greater, and then multiply the greater understated amount by 28 percent. Based on Application Note 4, the guideline tax loss in the example above is $28,000.

[149]For a complete description of the Hotline calls, see Appendix D-6 to D-11.

[150]Through the Probation Officers Advisory Group, some offices indicated that the tax guidelines are cumbersome to apply because they require multiple calculations in order to determine which of the alternative methods of determining "tax loss" results in a higher offense level.

Example I:- Defendant fails to file any return and is prosecuted for failure to file.

Actual tax loss:	$5,600[151]
Guideline tax loss:	$14,000 or $90,000

The guideline tax loss is greater than the actual tax loss because §2T1.2 provides that "tax loss" is "not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded $20,000." The term "gross income" is not defined in the guidelines. The Internal Revenue Code defines gross income for a manufacturing, merchandising, or mining business as "the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources." 26 C.F.R. § 1.61-3. Using the Internal Revenue Code definition, the gross income would be $140,000 ($120,000 from salary and $20,000 business profit), for a guideline tax loss of $14,000. But if the term "gross income" were interpreted to mean gross receipts, the gross income would be $920,000 ($120,000 from salary and $800,000 in business receipts) and the guideline tax loss would be $90,000.

Example II: Defendant files a return reporting income as an employee, but does not report her business income on the return. She is prosecuted for tax evasion.

Actual tax loss:	$5,600
Guideline tax loss:	$5,600 or $224,000

Under §2T1.1, the first definition of "tax loss" is "the total amount of tax that the taxpayer evaded or attempted to evade." Under this definition, the guideline tax loss is equal to the actual or intended tax loss. The second definition of "tax loss" is "the 'tax loss' defined in §2T1.3." Under §2T1.3, the "tax loss" is 28 percent of the amount by which the gross income was understated. As noted, "gross income" is undefined in the guidelines, but using the Internal Revenue Code definition (sales minus cost of goods sold), the guideline tax loss under §2T1.3 would be 28 percent of $20,000, i.e., $5,600, the actual tax loss. But if the guideline term "gross income" is interpreted to mean gross receipts, then the guideline tax loss would be 28 percent of the unreported gross receipts of $800,000, i.e., $224,000.

[151]This calculation assumes correct withholding on the taxpayer's employment income and a 28 percent tax rate on the $20,000 business profit. Thus, no further taxes would be owed on the employment income, but 28 percent of $20,000 ($5,600) would be owed in taxes on the business profit.

Example III: Defendant files a return reporting both her salary and her business income and pays the taxes due on both. She fails to report the capital gain on the sale of property with a sale price of $800,000 and a basis (in this case, cost) of $780,000. She is prosecuted for tax evasion.

Actual tax loss:	$5,600[152]
Guideline tax loss:	$5,600 or $224,000

Section 2T1.1 requires that the "tax loss" as determined under §2T1.3 is to be applied if it is greater than actual tax loss. Under §2T1.3, the "tax loss" is 28 percent of the amount by which gross income was understated. Under the Internal Revenue Code, "gross income" in the context of dealings in property means the "gains derived" from the dealings, 26 U.S.C. § 61. In this case, the "gains derived" are $20,000, resulting in an actual tax loss of $5,600. But if "gross income" is interpreted as gross receipts, the guideline tax loss is 28 percent of $800,000, i.e., $224,000.

Example IV: Defendant files a return reporting both income as an employee and business income, but falsely claims her business expenses were $1,500,000, rather than $780,000, using part of the claimed loss ($800,000 gross revenue from the business minus $1,500,000 claimed business expenses) to offset her business income ($20,000) and planning to carry forward the remainder of the claimed business loss. She is prosecuted for making a false statement.

Actual tax loss:	$5,600
Actual plus intended tax loss:	$201,600
Guideline tax loss:	$0

If defendant were prosecuted for tax evasion, the guideline tax loss would be the total amount that the defendant attempted to evade, i.e., $201,600.[153] But because defendant was prosecuted for making a false statement, the guideline tax loss under §2T1.3 is "28 percent of the amount by which the greater of gross income and taxable income was

[152]This calculation assumes a 28 percent tax rate on the $20,000 capital gain.

[153]This sum represents $5,600 (28% of $20,000) plus $196,000 (28% of $700,000 claimed loss carried forward to the next year). This calculation assumes that the $700,000 loss carried forward would be offset against income on which taxes would be owed.

understated." The gross income, $920,000, is greater than the taxable income. Since the gross income was correctly stated, the guideline tax loss is zero.[154]

These hypotheticals demonstrate several issues in applying the tax guidelines: the impact of not defining certain terms (such as "gross income"); the possible divergence between actual tax loss and guideline tax loss; and some possible problems in interpreting the guidelines.

c. Case Law

Reported decisions show problems that have arisen from the guidelines' use of different definitions for "tax loss." These problems have tended to arise when the determination of "tax loss" under the guidelines did not coincide with an actual or intended loss of tax revenue to the Internal Revenue Service. The major decisions are discussed below.

In United States v. Schmidt, 935 F.2d 1440 (4th Cir. 1991), the defendant promoted fraudulent tax shelters in the form of trusts, pursuant to which taxpayers' incomes were reported on trust returns rather than individual returns and the trusts improperly deducted amounts that would have been disallowed as deductions on the taxpayers' individual returns. The defendant was convicted of conspiring to defraud the Internal Revenue Service, which results in sentencing under §2T1.9. Under §2T1.9, the base offense level is the "[o]ffense level determined from §2T1.1 or §2T1.3, as applicable" or ten. Under §2T1.3, the "tax loss" is defined as 28 percent of the amount by which the greater of gross and taxable income is understated. The government argued that the taxpayers' income was understated by the total amount of gross income reported on the trust accounts ($1,144,593), and therefore the "tax loss" was 28 percent of that amount. The defendant argued that the "tax loss" was 28 percent of the amount of deductions improperly claimed on the trust returns. Although the district court accepted the government's argument, the Fourth Circuit reversed, stating:

> The choice before us is thus between punishing a crime whose gravity is represented by the actual loss of tax revenue to the IRS and one whose gravity is represented by the full extent of participation in a tax evasion scheme regardless of the tax consequences to the government. A fair reading of Section 2T1.3(a) supports only the former. The government simply is not suffering a "tax loss" merely because the taxpayer reports his income on a trust return rather that an individual return. Certainly such a theory would die of

[154]But see United States v. Hirschfeld, 964 F.2d 318 (4th Cir. 1992), discussed infra.

its own weight the minute the Service attempted to collect its "loss" by asserting a claim to all of the income reported on the trust tax returns.

United States v. Schmidt, 935 F.2d at 1451.[155]

The Schmidt decision indicates that when guideline definitions of "tax loss" do not match the actual tax loss as computed under the Internal Revenue Code, courts may interpret the guideline definition to reach a result more in line with the actual impact on tax revenue. This outcome is particularly likely to occur in conspiracy cases sentenced under §2T1.9, as evidenced by United States v. Telemaque, 934 F.2d 169 (8th Cir. 1991), and United States v. Krause, 786 F. Supp. 1151 (E.D.N.Y. 1992).

In Telemaque, supra, a tax protester participated in a scheme whereby like-minded tax protesters "would file a fraudulent Form 1099 with the Internal Revenue Service falsely reporting the payment of income to a person who had committed 'any wrong against you' and then would file a tax return fraudulently claiming a refund for the money reported paid on the 1099." 934 F.2d at 170. As a result, "fraudulent tax returns claiming refunds in excess of a billion dollars were filed." Id. The trial court applied §2T1.9, which provides for a base offense level determined from §2T1.1 or §2T1.3, "as applicable," but did not apply either §2T1.1 or §2T1.3. Rather than sentence based on the amount of tax loss, the court used the alternative base offense level of ten.[156]

Krause, supra, involved a tax protester who filed an income tax return seeking a refund, listing his earnings as $32,595,126 and claiming a refund in the amount of $23,472,858, amounts that were patently false and known to the IRS to be false. Krause was charged with making false statements rather than tax evasion, as there was no tax loss, and with obstructing and impeding the administration of the IRS. The applicable sentencing guideline was §2T1.3, which provides as alternative base offense levels either 6 or the level from the tax table corresponding to the "tax loss" if the offense was committed in order to facilitate evasion of a tax. The defendant's legal advisor argued that the offense was not committed in order to facilitate evasion of a tax, and therefore the base offense level would be 6. The government argued that $32,599,808 listed on the defendant's tax return as the amount of federal income tax withheld, was a "false credit against tax." The district court

[155]One judge dissented on this issue, stating that, while the Commission "chose, perhaps unfortunately, to call its calculation 'tax loss,'" that term was "not intended to be an accurate accounting of the government's revenue deprivation." The judge added that the "majority permits the appellants to profit from their own wrongdoing by offsetting unreported individual income fraudulently and illegally reported on trust returns." United States v. Schmidt, 935 F.2d at 1453 (Hall, J., dissenting).

[156]The district court did, however, apply a two-level increase for encouraging others to violate the Internal Revenue Code, a three-level increase for role in the offense, and a three-level increase for targeting official victims, and then made an upward departure of two levels "because of the extent of the intended monetary loss and disruption to the government." United States v. Telemaque, 934 F.2d at 171.

found that no tax loss was intended or incurred and that no tax credit was intended or incurred, and therefore the alternate base offense level of 6 applied.

In United States v. Hirschfeld, 964 F.2d 318 (4th Cir. 1992), a lawyer falsely reported in his 1984 return a deduction of $2.1 million. No actual tax loss was sustained for 1984 because the defendant had no gross income against which to apply the deduction in 1984, but there was evidence that the defendant intended to carry forward the loss created by the deduction to reduce taxable income in future years. The district court calculated the tax loss under §2T1.3 as 28 percent of the false deduction reported on the 1984 return. The Fourth Circuit affirmed the district court's determination, and, relying on the background commentary to §2T1.3, stated that "it was appropriate for the district judge to consider the potential loss of future tax revenue determined by the percentage of the amount of income that would be sheltered by the false deduction." 964 F.2d at 325.

Although Hirschfeld properly determined the intended tax loss, it may be questioned whether it correctly applied the guideline as written. The guideline defines "tax loss" as 28 percent of the "amount by which the greater of gross income and taxable income was overstated, plus 100 percent of the total amount of any false credits claimed against tax." Hirschfeld's gross income and taxable income were both zero. Thus, Hirschfeld did not overstate his income. Nor did Hirschfeld claim any false tax credit. Accordingly, it would seem that the "tax loss" caused by Hirschfeld was zero, resulting in use of the alternative base offense level of 6.

The Fourth Circuit in Hirschfeld relied on, but did not quote, the background commentary to §2T1.3. That commentary reads as follows:

> Existence of a tax loss is not an element of these offenses. Furthermore, in instances where the defendant is setting the groundwork for evasion of a tax that is expected to become due in the future, he may make false statements that underreport income that as of the time of conviction may not yet have resulted in a tax loss. In order to gauge the seriousness of these offenses, the guidelines establish a rule for determining a "tax loss" based on the nature and magnitude of the false statements made. Use of this approach also avoids complex problems of proof and invasion of privacy when returns of persons other than the defendant and co-defendants are involved.

The background commentary speaks of "false statements that underreport income." But Hirschfeld's false statement related to a false deduction; it was not a false statement that underreported income. Therefore, if the Commission intended to cover cases like Hirschfeld when it drafted §2T1.3, the language of the guideline and commentary does not ensure that result.

Schmidt and Hirschfeld arguably involved misapplication of the guidelines, in the former case to the advantage of the defendant, in the latter case to the advantage of the

government. In each case, there was a difference between actual or intended tax loss under the Internal Revenue Code and "tax loss" as defined by the guidelines. Given the disparity, the Fourth Circuit in both cases applied a concept of "tax loss" that mirrored actual or intended loss of tax revenue, as determined under the Internal Revenue Code.

An additional complication with the definition of "tax loss" is evidenced in United States v. Brimberry, 961 F.2d 1286 (7th Cir. 1992), which involved the measurement of "tax loss" when assets were hidden to avoid collection of taxes. In Brimberry, the defendant had a civil tax deficiency of $7 million, which together with penalties and interest came to $19 million. When the IRS began an enforcement action to collect the deficiency, the defendant falsely reported under oath that she had no assets from which the tax deficiency could be paid. In fact, she had a number of assets, worth approximately $77,000. The defendant was prosecuted for making false statements, which falls under §2T1.3. The trial court determined that the "tax loss" was $7 million, while the defendant argued that the "tax loss" was the value of the hidden assets, the amount the IRS could actually recover from her. The Seventh Circuit upheld the trial court's determination, relying on "the plain reading of the relevant Guideline sections," which the court found "unambiguous," although the appellate court agreed that "in cases, like this one, involving hidden assets, defining 'tax loss' as the amount of tax deficiency could lead to some strange results." 961 F.2d at 1292.

4. Proposals for Simplifying Guidelines

Option 1. The Commission could decide to take no action at this time, but to continue to accumulate cases, Hotline calls, and case law to build an information base for future consideration of amendments to the tax guidelines.

Option 2. The Commission could reconsider the amendment to the tax guidelines proposed during the 1992 amendment cycle,[157] which had a number of purposes:

- to eliminate disparity between actual tax loss and "tax loss" as defined by the guidelines;
- to simplify the guidelines by combining §2T1.1, §2T1.2, and §2T1.3;
- to increase the base offense level in nonfiling cases, making it equal to the base offense level in tax evasion cases; and
- to provide rules of thumb for determining "tax loss" for the purposes of sentencing when it is difficult to calculate actual tax loss.

[157]Note that this option addresses the concerns about simplifying the definition of "tax loss," but does not directly address the Justice Department's concern about the expanded availability of non-prison sentences. Consolidation of §2T1.1, §2T1.2, and §2T1.3, however, would increase offense levels in nonfiling cases, a major concern of the IRS.

Under the 1992 proposed amendment, the general rule would be that "tax loss" under the guidelines would be "the amount of tax that was the object of the evasion or fraud, or that the defendant owed and willfully did not pay." To simplify the determination in cases in which actual tax loss was unknown, the following rules of thumb were provided:

- If the taxpayer improperly claimed a deduction (i.e., an item that reduces the amount of taxable income) or an exemption, the "tax loss" is the amount of the improper deduction or exemption multiplied by the applicable tax rate(s).[158]

- If the taxpayer improperly claimed a tax credit (i.e., an item that reduces the amount of tax directly), the "tax loss" is the amount of the improper tax credit.

- If the taxpayer filed a return in which he or she underreported gross income, there would be a rebuttable presumption that the "tax loss" is equal to the underreported income multiplied by the applicable tax rate(s).

- If the defendant failed to file a tax return, there would be a rebuttable presumption that the "tax loss" is the gross income, minus the applicable amount for personal exemption and the amount of the applicable standard deduction, multiplied by the applicable tax rate(s).

- If the taxpayer improperly claimed a deduction designed to provide a basis for tax evasion or tax fraud in the future, there would be a rebuttable presumption that the "tax loss" is the amount of the deduction multiplied by the applicable tax rate for the year for which the return was filed.

The first three paragraphs in effect replicate the intended results under the current §2T1.3 rule for those cases involving improperly claimed deductions or exemptions, improperly claimed tax credits, and underreporting of income when actual tax loss is difficult to calculate. In order to determine the "tax loss" for purposes of the guideline, probation officers would need to determine the following information:

- the amount of the improperly claimed deduction or exemption and the applicable tax rate(s);

- the amount of the improperly claimed tax credit; and

- the amount of underreported gross income and the applicable tax rate(s).

---

[158]Further simplification could be achieved by setting a tax rate in the guideline, such as the 28 percent figure now found in several tax guidelines. This step would eliminate the need for a probation officer to determine the applicable tax rate. On the other hand, it may move away from the actual tax loss and would necessitate changing the guidelines if the tax rates change.

The fourth paragraph provides an alternative to the current rule in §2T1.2. In order to determine the guideline tax loss, the probation officer would need to determine the defendant's gross income, the applicable amount for personal exemption, and the amount of the applicable standard deduction.

The fifth paragraph provides a rule of thumb to be used in a case like Hirschfeld, in which the defendant claimed a deduction to provide a basis for tax evasion or tax fraud in the future. In order to determine the guideline tax loss, the probation officer would need to determine the magnitude of the improperly claimed deduction and the applicable tax rate for the year in which the return was filed.

Option 3. The Commission could eliminate the problem that arose in Hirschfeld by providing alternative definitions of "tax loss" in §2T1.3. That is, "tax loss" in §2T1.3 could be defined as the greater of (1) the amount of the tax that was the object of the fraud, or (2) the "tax loss" determined under the present rule in §2T1.3. A possible drawback of the approach is that it might be perceived as unfair when the guideline tax loss is substantially greater than the actual tax loss. Further, if this approach were adopted, it would probably make sense to combine §2T1.1 and §2T1.3 since "tax loss" is so defined under §2T1.1.

Option 4. The Commission could engage in a more thoroughgoing consolidation of tax guidelines. For example, the Commission could consolidate §§2T1.1, 2T1.2, 2T1.3, 2T1.4, 2T1.5, and 2T1.9. Under this approach, cases involving conspiracy to impair, impede or defeat tax, cases involving aiding, assisting, procuring, counselling, or advising tax fraud, and cases involving fraudulent returns, statements, or other documents would be consolidated with cases under §2T1.1, §2T1.2, and §2T1.3. Specific offense characteristics could be used to achieve the desired added punishment for certain conduct. This approach would reduce seven guidelines to one guideline, but such a reduction might make that single guideline unduly complicated.

C. Tax Offenses Involving Illegally Derived Income

1. Introduction

Several of the tax guidelines (§2T1.1 (evasion), §2T1.2 (failure to file), and §2T1.3 (perjury)) provide for a two-level increase, with a floor of offense level 12, if the defendant failed to report or correctly identify the source of income of more than $10,000 in one year derived from illegal activity. In January 1992, the Commission published for public comment a Justice Department proposal, proposed amendment 14, to change this specific offense characteristic as it relates to tax counts in which the underlying criminal activity is drug-related. The proposed amendment provided for an increase of five offense levels, with a floor of offense level 17, for income from drug-related crime. Under the proposed amendment, the specific offense characteristic was not otherwise to be changed, except that it was to be added to §2T1.4 as well.

In April 1992, the Justice Department sent to the Commission a modified version of proposed amendment 14. The modified amendment proposed changing the specific offense characteristic in §2T1.1, §2T1.2, and §2T1.3 to provide that if the criminal activity related to drug trafficking, the offense level would be raised to the greater of 12 or the offense level applicable to the underlying drug-related activity.[159] The modified proposal did not change the specific offense characteristic as it relates to any other criminal activity.

The modified proposal further noted that, under grouping rules §3D1.2(c) and §3D1.4, when a defendant is convicted of both a tax and a drug count, the counts are grouped because the specific offense characteristic for illegally derived income embodies conduct that constitutes the drug offense. According to the Justice Department, the count with the lower offense level is a "free crime," since no additional penalty will be imposed for it. The Justice Department therefore proposed a two-level increase for tax offenses grouped with other counts under §3D1.2(c).[160]

Consideration of tax offenses was deferred to the 1992-93 amendment cycle, and various issues relating to the sentencing of tax offenders were assigned to the White Collar Working Group for study.

2. Monitoring Data

During fiscal year 1991, there were 26,820 cases for which the Commission received complete documentation of sentencing, of which 264 involved tax offenses under §2T1.1, §2T1.2, or §2T1.3. Of these 264 cases, six (2%) receiving an enhancement for illegally derived income involved unreported or misrepresented income derived from uncharged[161] drug trafficking.[162] There were 32 cases in which there were both a tax count and a count for drug-related crime. A total of 86 cases received the enhancement for illegally derived income, most of which involved gambling or embezzlement as the criminal activity from which the income was derived. As noted in Part III.A. of this Report, even as of fiscal year

---

[159]Memorandum from Acting Assistant Attorney General for the Tax Division James A. Bruton to Commissioner Paul Maloney, April 8, 1992. See Appendix B.

[160]In his October 15, 1992, letter to Chairman Wilkins comprising the Justice Department's annual report to the Commission, Commissioner Maloney reiterated the view that the proposal relating to the grouping rules "deserves continued consideration." See Appendix B.

[161]If the drug trafficking conduct were charged, the counts would be grouped and the offense level for that conduct would apply if it were higher than that for the tax offense. But see United States v. Astorri, 923 F.2d 1052 (3d Cir.), cert. denied, 112 S. Ct. 444 (1991) (holding that tax evasion count could not be grouped under §3D1.2(c) with count for mail fraud that generated the income on which taxes were evaded).

[162]The Working Group determined that there were six such cases by first identifying cases in which the specific offense characteristic for illegally derived income was applied, and then examining the files from the Monitoring Unit for potentially relevant cases.

1991 many tax cases were sentenced under pre-guidelines law, presumably due to the longer statute of limitations and investigative periods for tax offenses. Thus, predicting the future incidence of tax cases involving particular characteristics (e.g., illegally derived income) is difficult.

3. Case Law

With respect to the issue of illegally derived income, the Third Circuit's decision in United States v. Astorri, 923 F.2d 1052 (3d Cir.), cert. denied, 112 S. Ct. 444 (1991), is significant. In Astorri, the Third Circuit held that a tax evasion count premised upon the failure to report income derived from mail fraud could not be grouped with the mail fraud count under §3D1.2 (c), despite the fact that the two-level enhancement under §2T1.1 for illegally derived income had been given. The court reasoned that the specific offense characteristic for illegal income did not constitute conduct embodied in the fraud count because the government did not have to prove the tax evasion in order to convict of fraud. 923 F.2d at 1056. The court concluded: "To include this specific offense characteristic as 'conduct' in the fraud count negates its separate inclusion within the tax evasion guideline." Id. at 1057.

4. Discussion

The Group did not have sufficient time to conduct adequate research into the issues presented by the Justice Department's modified proposal.[163] This section of the Report, therefore, sets forth the issues presented by this proposal but does not attempt a detailed analysis of them.

Changing the specific offense characteristic as it relates to income derived from drug-related activity will result in a higher offense level for certain tax violators. If the grouping rules remain unchanged, however, the impact of the increased offense level will be felt only if the defendant is not charged with a drug offense or if that drug offense results in a lower offense level than the tax count. As noted, there were only six tax cases in fiscal year 1991 involving uncharged drug-trafficking activity. One issue, then, is whether the frequency of such cases in the future would increase if the proposed change is made, due to the fact that the elements of a drug offense, if charged, must be established beyond a reasonable doubt, but the drug-relatedness necessary to establish the specific offense characteristic need only be proved by a preponderance.

Other issues presented by this aspect of the proposal are whether pure real-offense sentencing for tax cases is warranted, and whether there is reason to single out tax cases involving income generated by drug-related criminal activity for treatment different from the treatment of tax cases involving income from other criminal activity.

---

[163]Furthermore, the most recent Justice Department/IRS proposal relating to tax does not contain a specific focus on enhancing tax sentences for income derived from drug-related activity.

With respect to the grouping rules, the "free-crime" question is one that transcends tax violations. Therefore, unless major changes to the grouping rules are contemplated, the issue is whether tax violations are different from other crimes. Because the grouping rules apply to all offenses, proposals must be carefully scrutinized to determine whether they are tax-specific if there is a desire to change the grouping rules as they relate to tax offenses and only to tax offenses.

IV. AREAS OF PRELIMINARY STUDY

A. Offenses Involving Counterfeit Currency

1. Introduction

The Group was asked to consider whether the punishment level for offenses involving counterfeit currency is too low.[164] Because of the press of other issues, the Group conducted a preliminary examination of the issue to determine whether further study was warranted. In order to conduct this examination, the Group obtained statistical data about the sentencing of counterfeiting offenses, analyzed relevant case law and media articles, and consulted with the Department of Justice and Secret Service.

Generally the Group's research did not disclose clear evidence of a significant current problem in sentencing counterfeiting offenses. It did, however, elicit some information regarding counterfeiting offenses that might provide the basis for soliciting comment about the possibility of adding one or more specific offense characteristics to the counterfeiting guideline.

2. Current Sentencing; Problems Disclosed by Available Data

Sentencing for the offense of counterfeiting currency is governed by §2B5.1, part of the guidelines governing property offenses. The base offense level is 9, and is increased in accordance with the loss table in the fraud guideline (§2F1.1) for items exceeding $2,000 in face value. In addition, a floor of level 15 is provided if the defendant manufactured or produced counterfeit obligations or if he or she possessed counterfeiting devices or materials.

This guideline applies to counterfeiting offenses involving all bearer obligations of the United States, and thus encompasses criminal activity other than counterfeiting United States currency. The monitoring data compiled by the Commission do not differentiate between counterfeiting currency and counterfeiting other bearer obligations. Although it is the sense of the Group that most offenses under this guideline are likely to involve counterfeiting currency, that cannot be conclusively determined without looking at a representative sample of the cases sentenced under this guideline to determine the nature of the offense.[165] It is possible that, in terms of the factors examined by the Group, the

---

[164]For brevity's sake, these offenses will be referred to as "counterfeiting," but they encompass a number of statutes and behavior, such as producing, possessing, or passing counterfeit currency.

[165]The statutes that criminalize counterfeiting currency, like the guideline, encompass all bearer obligations. Thus, searching by statute as well as primary offense type will not eliminate this problem.

offenses involving currency are not significantly different from offenses involving other bearer obligations.

With one exception, discussed below, neither the sentencing data nor the case law disclosed clear indicia of any general problem with the severity level of punishment for counterfeiting. Specifically, sentences tended to be at the low end of the range (especially for high loss amounts), and there were only two upward departures (out of 367 cases), both due to inadequacy of criminal history category.[166] See Table at F-34 and F-35 in Appendix F. The only specific indication in the case law of concern about inadequate sentences is found in United States v. Salama, 974 F.2d 520 (4th Cir. 1992), involving a defendant sentenced to 27 months' imprisonment for counterfeiting. The trial court made the following statement during the sentencing hearing, indicating dissatisfaction with the counterfeiting guideline: "I guess there is a lot of things that trouble me about the Guidelines. One thing about the Guidelines is when you see a situation like this, in which I find myself shocked that the Guidelines level is as low as it is. This is a major crime." Id. at 522.

The case against Salama included evidence that for several months Salama was learning the counterfeiting business from an experienced counterfeiter, pursuant to which he purchased printing supplies and equipment and prepared photographs and plates. It does not appear from the opinion that any counterfeit money was actually produced or passed. It can further be inferred that Salama's offense level was 17, which was computed by starting with a base of 15 (since Salama possessed counterfeiting devices), adding 4 offense levels for Salama's role as an organizer, and subtracting 2 levels for acceptance of responsibility. In Criminal History Category I at Offense Level 17 the sentencing range is 24 to 30 months. As the Fourth Circuit noted, the trial judge selected a sentence in the middle of the guideline range, despite his comment about being shocked by the low level of punishment provided by the guidelines.

The Group's hypothesis was that sentences would be at the high end of the range if judges believed the punishment levels are too low. In counterfeiting cases for loss amounts of more than $20,000 (offense level increase of 4 or more based on amount), this result has not occurred. The percentage of cases sentenced at the middle to upper part of the range (or above the range) is not particularly different for counterfeiting than for economic offenses generally, although for loss amounts between $2,000 and $10,000 a slightly greater percentage of defendants received sentences in the middle to upper part of the range (or above the range). (For a profile of cases sentenced under §2B5.1, see Table at F-34 and F-35 in Appendix F.)

Further inquiry was made to determine whether increasing or changing problems with counterfeiting offenses might foreshadow a need for increasing punishment or changing the

[166]The Secret Service indicated that counterfeiting is a crime in which many defendants are "repeat offenders," whether or not previously convicted.

method for determining sentence in the future. Current periodicals were consulted for relevant articles. The Justice Department was contacted to obtain input from persons within the Justice Department or the Secret Service familiar with the investigation and prosecution of counterfeiting offenses. At the suggestion of the Justice Department, the Special Agent in Charge of the Counterfeiting Division of the Treasury Department provided information to the Group about the nature of counterfeiting offenses in recent years, and any particular factors associated with their severity that might not be reflected in the current guidelines. There were several aspects of the information learned from these sources that suggest the possibility of soliciting comments about changes to the counterfeiting guideline.

First is the impact of technological advances on counterfeiting. In the words of the Special Agent in Charge, counterfeiting has become a crime of opportunity rather than of expertise, as the ease with which fabricating currency has increased due to devices such as multi-color copiers. The same technology results in enhanced quality of counterfeit currency, which makes it more difficult to detect. Thus, a strong need for general deterrence was emphasized by the Secret Service.

Second is the phenomenon of engaging in counterfeiting activities in foreign countries. The Secret Service expressed the view that passing counterfeit United States currency outside the United States raises an additional concern beyond damage to the federal treasury, that of weakening confidence in the dollar overseas, a risk that may implicate the national security. According to figures supplied by the Secret Service, approximately 30 million dollars of United States currency identified as counterfeit was located outside the United States in 1991.[167] Because the Commission's monitoring data do not indicate the presence or absence of this factor, it is not possible to determine the number or percentage of cases in which this factor is present without examining individual case files.

Although the data presently available do not strongly indicate that either the base level for counterfeiting or the technique of adding offense levels based on the face value of the currency results in inappropriately low sentences, the Commission might wish to seek further comment on this issue to ensure that the guidelines provide an adequate disincentive for committing the offense.[168] Part of this consideration could include individual scrutiny of case files from the Monitoring Unit to produce a profile more specifically tied to

---

[167]Media reports also reflect the problem of counterfeiting activities outside the United States in the past few years. For example, an April 1991 article in the New York Times reported that one-third of all counterfeit dollars seized in the United States in 1990 were printed in Colombia. A 1992 article in Time described the circulation of counterfeit $100 bills in Iraq.

[168]The Commission might also inquire whether a loss-driven guideline might be counterproductive, by encouraging investigators to wait for more counterfeit currency to be produced in order to ensure a higher sentence.

counterfeiting currency, and a consideration whether there is any reason to differentiate currency from other bearer obligations.

With respect to counterfeiting in foreign countries, it is possible to consider adding a specific offense characteristic or mentioning this factor in the commentary as a basis for departure. It may be preferable, however, to evaluate individual counterfeiting cases from the Monitoring Unit to determine how many cases actually involve such activity and whether those cases are sufficiently more serious to warrant a specific offense characteristic.

3. Conclusion

The Group's preliminary look at the counterfeiting guidelines did not disclose firm evidence of a significant problem with the severity of punishment. The Commission, however, may wish to solicit further comment or information, given concerns expressed by the Secret Service about the increased need for general deterrence and the problem of counterfeiting activity in foreign countries.

B. Monitoring of Sentencing Data for Antitrust Offenses Committed by Organizations

The Group proposes to begin monitoring cases involving antitrust offenses committed by organizations in order to augment the current antitrust data base in two areas: the amount of monopolist's gain from antitrust offenses and the incidence of various culpability score factors. Section 2R1.1 has applied to organizational defendants since November 1987, and since November 1, 1991, Chapter Eight of the guidelines has applied to organizational defendants, resulting in the increased availability of court documents for study. Such monitoring will permit evaluation of the operation of the culpability score "floor" in §2R1.1(d)(2), and the use of the base fine amount of 20 percent of the volume of commerce.

V. APPENDICES

Appendix A:
Purpose Statement

White Collar Working Group
Preliminary Purpose Statement

I. INTRODUCTION

The White Collar Working Group was established to study the operation of the Sentencing Guidelines in the area of certain economic and regulatory crimes, specifically fraud, theft, tax, and antitrust.[1] Because sentencing of white collar offenses is such a broad area of study, selection and prioritization of issues are necessary, and completion of all work in the one-year track set for the Group may not be possible. The first step, however, will be to develop a profile of current sentencing practices for the offenses this Group has been assigned to study.

The Group will then concentrate upon two areas that were identified in the 1992 amendment cycle as topics for study: (1) the fraud and theft guidelines; and (2) tax offenses. In addition, the Group will attempt to identify other issues warranting further study.

II. PROFILE OF CURRENT SENTENCING OF WHITE COLLAR OFFENSES

The Group will study sentencing patterns for theft, fraud, tax, and antitrust offenses under the current guidelines. This study will inform the Group's consideration of issues previously identified, and help identify other issues that should be studied as well. Two possible areas of specific inquiry include a comparison (based on published data) of guidelines and pre-guidelines sentences for white collar offenses, and a consideration of the impact on white collar sentencing of the expanded availability of non-prison sentences.

---

[1] Although the jurisdiction of this Group has been so defined, "white collar" is not a term with a fixed meaning; in the vernacular, it may include offenses that are assigned to other working groups, such as bribery and environmental crimes, and exclude some offenses assigned to this Group, such as theft. It may well be that some of the "white collar" issues this Group is studying are equally relevant to the consideration of guidelines outside the parameters of this Group. As the work of the Group progresses, it will consider whether, with respect to any given issue, adequate evaluation can be done without looking at data for other "white collar" offenses not assigned to this Group for study. Furthermore, the Group's jurisdiction is defined solely in terms of offenses, not offenders, although the term "white collar" to some would exclude a person with a significant criminal history. The Group will also be alert to the possible significance of including in the category of "white collar" all offenders who have committed certain crimes.

III. ISSUES RELATING TO FRAUD AND THEFT GUIDELINES

A. Broader Policy Issues

1. Reliance on Loss: A broad question is whether these guidelines rely too heavily on "loss" as a determinant of the severity of the offense. Consideration of this question would include inquiry about whether such factors as the sophistication of the scheme, potential loss, risk of injury, or type of victims are adequately weighted in determining the offense level.

2. Incremental Punishment: A narrower issue concerns the calibration between the amount of loss and the offense levels under the present structure of the loss tables. For instance, the offense level for the theft of $2,000 is one higher than the level for the theft of $1,000 (a one-level increase for $1,000 of loss), whereas the offense level for the theft of $10,000,000 is also only one higher than the level for the theft of $5,000,000 (a one-level increase for $5,000,000 of loss). The Group will consider whether the magnitude of offense level increases in relationship to the amount of the loss needs adjustment.

3. Severity of Punishment: In addition, the Group will consider absolute as well as comparative punishment levels; that is, whether the punishment level is low enough at the low end of the loss spectrum and high enough at the high end.

B. Structural and Definitional Issues

1. More Than Minimal Planning: The Group will study the specific offense characteristic of more than minimal planning. Some preliminary research presented during the 1992 amendment cycle suggested the possibility of disparity in applying this specific offense characteristic, and suggestions have been made that the characteristic should be eliminated or redefined. For example, larger fraud cases might be considered to inherently involve more than minimal planning, and therefore this characteristic could be reflected in the higher offense levels. Consideration may also be given to deleting the element of "multiple acts" from this specific offense characteristic, so that the enhancement would focus more clearly upon punishing sophisticated criminals, who arguably pose a greater danger.

2. Definition of "Loss": The Group will consider the definition of "loss," including the discussion of loss in application note 7 to §2F1.1. At present, the fraud and theft guidelines start with the same definition of "loss" (the value of the property taken, damaged, or destroyed), but for certain offenses, such as submitting a fraudulent loan application and contract procurement fraud, the fraud guidelines use a "net" loss figure (gross loss minus the value of collateral and payments made before the crime is discovered) unless a greater intended loss can be established. According to the training staff,

questions have arisen about when to use actual, intended, or net loss, and how to determine intended loss.

3. Application of "Abuse of Trust" Enhancement in Embezzlement Cases: Another question for study is how in embezzlement cases to interpret and apply the enhancement for abuse of a position of trust or use of a special skill (§3B1.3). The application notes state that the defendant's position must "in some substantial way" facilitate the commission of the crime and not merely provide an opportunity for its commission. Currently, the commentary uses embezzlement by an ordinary bank teller as an example of a case in which an increase for abuse of trust is not warranted. The distinction drawn in this application note will be evaluated to determine whether it provides a clear and appropriate basis for distinguishing between offenders who have abused their trust and those who have not.

4. Combining Fraud and Theft Guidelines: The Group will consider a suggestion made during the 1992 amendment cycle to consolidate the fraud and theft guidelines. Although fraud and theft offenses can differ significantly, they have several common characteristics, including generally being committed for financial gain. The guidelines covering these offenses (§2F1.1 Fraud and Deceit; §2B1.1 Theft and Embezzlement; 2B1.2 Receipt of Stolen Property; and 2B1.3 Property Destruction) have similar structures and common specific offense characteristics, and use loss as a major determinant of the severity of the offense.

IV. TAX GUIDELINES

A. Impact of Expansion of Non-Prison Sentences: As noted, the Group will compile a profile of offenses, including tax offenses. One of the issues that the Group will consider is the impact on tax offenses of the expanded availability of non-prison sentences resulting from guideline amendments adopted during the 1992 amendment cycle.

B. Uniform Definition of Tax Loss: As presently written, two different definitions of tax loss are used in the tax guidelines, depending on the offense charged. (Compare 2T1.2 with 2T1.3.) The group will consider whether increased uniformity of application is likely to follow from adopting a single definition.

If changes are proposed for determining or weighing loss under the fraud and theft guidelines, the Group will consider whether such changes would also suggest comparable changes to the base offense levels or the computation of loss under the tax guidelines.

C. Consolidation of Tax Guidelines: The Group will consider whether consolidation of the tax guidelines would

simplify them and make them easier to apply. For example, by using a uniform definition of tax loss, one could consolidate the guidelines for tax evasion (§2T1.1), failure to file a return (§2T1.2), and false statements on a tax return (§2T1.3). The Group will consider other ways of consolidating the guidelines in the tax area to reduce the number and complexity of the guidelines.

D. Proposed Narco-Tax Amendment: Consideration will be given to the suggestions of the Tax Division of the Justice Department for determining the sentence in a tax case involving illegally derived income. These suggestions include how to define the specific offense characteristic for illegally derived income and how to group counts when the defendant is convicted of both a tax offense relating to illegally derived income and a substantive offense for the conduct that generated that income.

V. ISSUES FOR LONGER TERM STUDY

A number of issues have been suggested as possible subjects for study in a later amendment cycle. The group would like to give some preliminary thought to these issues and sketch out a plan for future study if that is deemed warranted by the preliminary findings. These issues include: (1) the adequacy of the base offense level for counterfeiting; (2) the measure of loss in copyright/trademark cases; and (3) the appropriateness of the loss proxies and measurements of culpability in antitrust cases.

VI. RESEARCH AND COLLECTION OF DATA

The following is a preliminary outline of sources that will be used to prioritize the issues that have been listed and identify any other issues or concerns that should be addressed by this group.

A. Monitoring data
   - descriptive statistics
   - case review and departure analysis

B. Case law review
   - definition of loss for tax, fraud, and theft
   - departures
   - more than minimal planning
   - abuse of trust

C. TAS reports
   - hotline calls analysis
   - feedback from training

D. Compilation of public comment and input from outside experts

- DOJ (including Tax Division, U.S. Attorneys Advisory Subcommittee on Sentencing, and AUSAs from selected offices)
- Criminal Law Committee suggestions
- Judges Task Force
- P.O. Advisory Group
- Practitioners Advisory Group
- ABA Sentencing Guidelines Committee
- selected defense attorneys
- selected judges
- Internal Revenue Service

E. Legislative initiatives and relevant legislative history

- tax, fraud, and theft statutes
- recent statutory changes

F. Literature review
- state guideline systems
- research or articles on fraud, theft, tax, or loss

G. Substantive research
- previous working group reports
- other Commission projects
- Commission interviews

Appendix B:
Public Comment

Appendix C:
Case Law Summaries

Appendix C. Case Law Summaries

SUMMARIES OF CASES BY CIRCUIT
Definition of "Loss"

First Circuit

1. United States v. Pavao, 948 F.2d 74 (1st Cir. 1991): Defendant posed as a DEA agent in order to get money from victims, pretending to be assisting one victim in avoiding arrest and escaping harm. Defendant obtained $8,760 as an "investment," which victim lost, and obtained services by promising to pay a salary to two victims (who then quit their real jobs), but not honoring promise. "Loss" held to include part of the value of a house one victim lost as a result of failure to make mortgage payments, on theory that part of the reason why the victim was unable to make payments was the defendant's fraudulent obtaining of her services. (Appears that $15,000, half of the lost investment in the house, was thereby attributed to defendant, putting defendant in the "over $20,000" loss category.)

Statute of conviction: 18 U.S.C. § 912 (personation of federal officer). MOC: plea. Guideline: §2F1.1. Range = 27 - 33 mos.; sentence = 27 mos.[1]

2. United States v. Curran, 967 F.2d 5 (1st Cir. 1992): Trustee in bankruptcy embezzled money from bankrupt's estate and deposited it to his own account. Issue is whether "loss" includes amount of interest that would have been earned had it been deposited to bankrupt estate's account. Court of appeals holds that this amount of interest would be included. Relies on Application Note 2 to §2B1.1, that "'loss' means the value of the property taken." Court of appeals notes that the interest was a "'loss in funds' to the victim, for, had Curran not taken the [principal sum], the interest earned 'would have been available to creditors' of the bankruptcy estate." (Note that inclusion of interest bumped defendant into next OL ($192,000 vs. "more than $200,000"), that amount of interest was determined by auditor's testimony at trial, and that defendant did not seek to challenge the interest calculation.)

Statute of conviction: 18 U.S.C. § 153 (embezzlement by bankruptcy trustee). MOC: trial. Guideline: §2B1.1. OL, CH, range not specified. Sentence = 30 mos.

---

[1]Sentences throughout represent only incarceration and probation; fines, restitution, and supervised release are omitted.

3. United States v. Parker, 903 F.2d 91 (2d Cir.), cert. denied, 111 S. Ct. 196, 201 (1990): Heist of money delivery car by current and former security guards, during which thieves took only $247,000 of the $357,000 in the car. Issue is whether "loss" includes only the amount the thieves actually took (for a 2-level increase), or the entire amount in the hijacked car (for a 3-level increase).

Court of appeals holds that "loss" is the total amount of money in the car ($357,000) because the thieves "took" it when then exercised control over the car, even if the thieves left part of the money in the car. Court relies upon definition of "loss" in Application Note 2 of §2B1.1, "the value of the property taken, damaged, or destroyed," and concludes that the defendants exercised dominion and control over both the car and its contents, and therefore "took" the cash. It appears that the prosecutor did not argue that the value of the car itself should be included in the "loss." (Note that two guards were shot in this theft.)

Statutes of conviction: 18 U.S.C. § 1951 (conspiracy to commit interstate robbery, and commission of interstate robbery); 18 U.S.C. § 2314 (interstate transportation of stolen property); 18 U.S.C. § 2315 (receipt of stolen property); 18 U.S.C. § 924(c) (use of a firearm during a crime of violence). MOC: trial. Guideline for robbery count: §2B3.1. Sentences = 78, 121, 63 mos., depending on defendant, and consecutive 60 mos. on gun count.

4. United States v. Cea, 925 F.2d 56 (2d Cir. 1991): Bank officer embezzled loan processing fees (approximately $750,000), which he also (as bank officer) set. Issue is whether "loss" is limited to amount of fee that bank was entitled to obtain from customers (i.e., limited to costs) or includes entire amount taken by defendant. Court of appeals holds that "loss" is entire amount taken by the defendant because he profited in that amount, and either the bank or the customers lost that amount. Relies on commentary to §2B1.1 that the value of the property is important because it reflects both gain to the defendant and harm to the victim. Court also notes that under 18 U.S.C. § 3742(e), standard of review requires due deference to trial court's application of the guidelines to the facts.

Statute of conviction not specified, but probably 18 U.S.C. § 656 (embezzlement by bank officer). MOC: plea. Guideline: §2B1.1. OL = 16. CH, range not specified. Sentence = 25 mos.

5. United States v. Brach, 942 F.2d 141 (2d Cir. 1991): Defendant obtained loan ($250,000) by making false representations, then repaid it after criminal complaint was filed. Issue is whether "loss" includes face value of loan. Court of appeals holds that "loss" is the face amount of the loan because the defendant put the bank at risk for that amount. Court indicates that sentencing court may consider "probable harm." Further notes that "[i]n cases involving embezzlement or theft, we have interpreted Application Note 2 literally and

affirmed sentencing adjustments based on the value of what was taken, not on the ultimate harm suffered by the victim."

Statute of conviction: 18 U.S.C. § 1343 (wire fraud). MOC: plea. Guideline: §2F1.1. OL = 16; CH not specified. Range = 21 - 27 mos.; sentence = 27 mos.

6. United States v. Lohan, 945 F.2d 1214 (2d Cir. 1991): Defendant convicted of contempt for fraudulently soliciting investments in commodities, in violation of an injunction entered against him for Commodities Exchange Act violations. Trial court applied §2F1.1 and determined "loss" to be $1 million to $2 million, representing a "conservativ[e]" estimate of the amount of loss defendant attempted to inflict on his customers, arrived at by multiplying the number of cold calls (750 to 1,000) made to potential investors by defendant's employees times the amount of each solicited minimum investment ($3,000). Court of appeals upholds this determination of "loss," rejecting defendant's claim that "loss" should be set at $87,000, the amount of his customers' actual loss. (Defendant did not challenge reliance on §2F1.1 as the appropriate guideline.) Court of appeals states that "actual loss is not the touchstone for enhancing a sentence to reflect the victims' 'loss,'" and that "probable or intended loss that the defendant was attempting to inflict" may be used instead, relying on Application Notes 7 and 8 to §2F1.1. Court notes:

> Had all these telephone solicitations succeeded, [defendant] would have obtained between $2,250,000 and $3,000,000. Through these solicitations, [defendant] was "attempting to inflict" upon his victims a "probable or intended" loss of that amount. That loss, which the presentence report "conservatively" reduced to one million to two million dollars, fully justified the district court's nine-level enhancement of [defendant's] sentence.

Statute of conviction: 18 U.S.C. § 401(3) (contempt). MOC: plea. Guideline: §2F1.1. OL = 21; CH = III (court of appeals reversed trial court's setting of CH as I). Range not specified; sentence = 37 mos. (vacated in order to resentence defendant as CH III offender).

Third Circuit

7. United States v. Cianscewski, 894 F.2d 74 (3d Cir. 1990): Defendant and his wife (who was acquitted) possessed stolen Treasury checks with a face value of $9,631.18 and sold them for $3,210. Issues are whether loss tables are biased against persons in lower socio-economic status, and whether "loss" includes face amount of stolen checks. Court of appeals holds that loss tables are socio-economically neutral, in that they treat theft of same amount the same, regardless of socio-economic standing of the defendant; also holds that "loss" includes face value of checks.

As to "loss," court reasons that when stolen property is sold by a defendant at a discount, "the 'market value' of the stolen checks does not adequately measure the harm of his actions on the victim." Therefore, a sentencing court may rely on the replacement cost to the victim, which "in this case [is] the face value of the stolen checks." Court relies in part upon language in Application Note 2 to §2B1.1 (prior to the June 1988 amendment, deleting this language) that "[l]oss is to be based upon replacement cost to the victim or market value of the property, whichever is greater."

Statutes of conviction: 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 1708 (possession of stolen mail); 18 U.S.C. § 510 (selling stolen Treasury checks). MOC: trial. Guideline: §2F1.1. OL = 13; CH = VI. Range = 33 - 41 mos.; sentence = 41 mos.

8. United States v. Kopp, 951 F.2d 521 (3d Cir. 1991): Defendant submitted false documents to bank to get loans of $14 million for real estate partnership. Documents included forged leases, designed to misrepresent the amount of money earned on the property, which was pledged as collateral. After foreclosure, collateral sold for more than the amount of the loans. Issue is whether "loss" includes the face value of the loans. Trial court held that face amount of loans should be counted since defendant would not have received the loans had he told the truth. Court of appeals reverses, holding that only actual loss can be counted unless it can reasonably be proved that the defendant intended a greater loss.

Court of appeals engages in lengthy analysis of fraud and theft guidelines, including the extensive amendments of them and the commentary to them. Court concludes that, because theft and fraud are substantively different, "loss" for purposes of fraud is not necessarily the same as "loss" for purposes of theft. Specifically, theft (with the possible exception of embezzlement) inherently involves an intent to take and keep, for nothing, whatever was actually taken, whereas fraud may involve (as in this case) an intent to keep less than what was actually given by the victim and a giving of value in return for what was taken. Court notes in several places that amendments to commentary are "equally ambiguous" as the "troublesome" language they replaced and that "Commission only succeeded in confusing courts further."

Statute of conviction: 18 U.S.C. § 1344 (bank fraud). MOC: plea. Guideline: §2F1.1. OL = 19; CH = I. Range = 30 - 37 mos.; sentence = 33 mos. (vacated).

9. United States v. Badaracco, 954 F.2d 928 (3d Cir. 1992): As president and CEO of bank, defendant approved loans to developers on condition that they subcontract work to companies owned by defendant's family. Amount of subcontracts so awarded was $293,000. Defendant convicted of making false statements to the bank, under 18 U.S.C. § 1006, by falsely representing that he had severed ties with companies who received the subcontracts. Issue on appeal is whether "loss" is the face value of the subcontracts or, as defendant

argued, only his profit from the contracts. Court of appeals, relying on Application Note 8 to §2F1.1 (1990 version), held that "gross gain" is the measure of "loss," here $293,000. Court distinguishes Kopp, supra, on ground that the gravamen of § 1006 is the benefit received by the bank officer, not the harm caused to the bank. Court concludes that this case is more like embezzlement, which is in the theft guideline because it involves a breach of fiduciary duty that justifies always using the amount taken whether or not the defendant intended to repay. Court also distinguishes Schneider, infra, on ground that in this case, since bank did not deal directly with defendant's companies, bank would not have benefitted from the transaction and therefore bank's potential loss would not have reflected defendant's gain. Court indicates that because defendant was challenging the interpretation of "loss," the review would be "plenary."

Dissent on issue of "loss," concluding that only defendant's profit on the contracts should be counted. (Dissent notes that defendant did not contest including all profit to the family companies rather than the profit that would inure to defendant's personal benefit.) Dissent states that reliance on contract price distorts the severity of the offense because the "realistic benefit" to the defendant was far less than the contract price: "The 'gain' the majority uses is purely fictional, but the increased period of incarceration is starkly real."

Statute of conviction: 18 U.S.C. § 1006 (false statements to bank). MOC: plea. Guideline: §2F1.1. OL = 18; CH = 1. Range = 27 - 33 mos.; sentence = 21 mos. (reversed and remanded for resentencing due to fact that enhancement was made for "more than minimal planning" in manner that violated plea agreement).

10. United States v. Asper, 753 F. Supp. 1260 (M.D. Pa. 1990), aff'd on order, 941 F.2d 1203 (3d Cir. 1991): Defendant convicted of trafficking in body parts of endangered animals, which, as contraband, have no legal market. Trial court, relying on testimony of taxidermist, bases "loss" on the cost of replacement and acquisition of the wildlife. Court takes into account the scientific value, record book ranking, and rarity of the wildlife trophies, but excludes hunting costs (since it is possible to obtain trophies from the countries of origin without going on a hunting expedition), and discounts taxidermy costs (which the court thought were excessive). Court sets "loss" at $30,800, compared to two estimates by taxidermist of $86,000 and $101,383. Court rejects testimony that value at public auction is $8,050, because the trophies cannot be sold at a public auction.

Statutes of conviction: 16 U.S.C. §§ 1531 - 1543 (Endangered Species Act); 18 U.S.C. § 545 (smuggling goods into United States). MOC: trial. Guideline: §2Q2.1. OL = 18; CH = I. Range = 27 - 33 mos.; sentence not specified in this opinion.

Fourth Circuit

11. United States v. Rothberg, 954 F.2d 217 (4th Cir. 1992): Defendant falsified loan documents to obtain $480,000 loan to refinance a condo jointly owned with his wife, in part by having signature of his wife (who did not want to obtain the loan) forged on the financing documents. When forgery was discovered, title company paid the lender the face amount of the loan and accrued interest ($480,112.71) and purchased wife's interest in the property ($178,000), thereby incurring "expenses and fees" of $49,000. Trial court refused to enhance for "loss" because defendant intended no loss and actual loss was too speculative to be determined. Court of appeals holds that evidence is sufficient to permit a calculation of actual loss, which should be used rather than the face value of the loan. Court concludes that finding that defendant did not intend any loss is not clearly erroneous.

Statutes of conviction: 18 U.S.C. § 1344(2) (bank fraud); 18 U.S.C. § 1014 (false statement to bank). MOC: not specified. Guideline: §2F1.1. OL = 6 (vacated); CH = I. Range = 24 - 30 mos.; sentence = 6 mos.' probation (vacated and remanded for resentencing).

Fifth Circuit

12. United States v. Beard, 913 F.2d 193 (5th Cir. 1990): Defendant, an attorney who filed for bankruptcy, lied during bankruptcy proceedings about the existence of a particular asset, a $175,000 check, received after filing for bankruptcy, that represented payment for legal services he had rendered. Court of appeals holds that §2F1.1 is the proper guideline because, although defendant was convicted of perjury, his actions constituted a "fraud upon the court." "Loss" was determined by the trial court to include the full value of the asset, despite defendant's argument that the status of the asset was unknown at the time of his offense, and therefore at that time all or most of the asset belonged to him. Issue of amount of loss not litigated at the appellate level.

Statute of conviction: 18 U.S.C. § 152 (perjury in bankruptcy proceeding). MOC: plea. Guideline: §2F1.1 (date of sentencing = Oct. 1989). OL = 16. CH, range not specified. Sentence = 27 mos.

13. United States v. Cockerham, 919 F.2d 286 (5th Cir. 1990): Bank president participated in scheme to secretly share proceeds of loans ($291,000) from his bank by forming partnerships with loan customers. Issue is whether "loss" includes the face value of the loans. Court of appeals holds that face value counts, despite fact that loans were repaid, relying on Application Note 2 to §2B1.1 that loss is "the value of the property taken, damaged, or destroyed."

Statute of conviction not specified. MOC: plea. Guideline: §2B1.1 OL, CH, range not specified. Sentence = 20 mos. (on guidelines counts only).

Sixth Circuit

14. United States v. Sloman, 909 F.2d 176 (6th Cir. 1990): Defendant was insurance claims adjuster who falsely reported that boat was a total loss as a result of a fire ($140,000), then secretly bought it back in the salvage sale ($34,001) and repaired it ($5,000). "Loss" held to be the amount of the claim paid ($140,000) minus the salvage price ($34,001, which the insurance company received as a result of the salvage sale). Court of appeals rejects defendant's theory that loss was $50,000 because the insurance company would have been required to settle the claim at $90,000 (lost value of boat as damaged) even if he had told the truth about the extent of the damage. Court reasons that defendant's fraudulent acts prevented the insurance company from settling the claim for any amount based on partial damage, and resulted in an out-of-pocket loss of $105,999, which represented the proper basis for determining sentence.

Statutes of conviction: 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 371 (conspiracy to commit mail fraud); 18 U.S.C. § 1343 (wire fraud). MOC: trial. Guideline: §2F1.1. OL = 16; CH = I. Range = 21 - 27; sentence = 27 mos.

15. United States v. King, 915 F.2d 269 (6th Cir. 1990): Defendants burglarized bank and damaged vault in unsuccessful attempt to enter it. Issue is whether "loss" includes cost of developing surveillance film and of hiring security guards to protect vault ($640). Court of appeals holds that cost of repair includes additional protective measures during period of repair and thus is part of "loss." (Note that addition of $640 increased offense level by one.)

Court views issue as whether "loss" includes incidental or consequential damages. Relies on Application Notes 2 and 3 to §2B1.1 to conclude that "cost of repair" includes reasonable costs of increased security pending completion of repairs. Court reasons that the harm to the bank exceeded physical damage and included the increased vulnerability of the assets in the vault while it was being repaired.

Statute of conviction: 18 U.S.C. § 2113(a) (entering bank with intent to commit larceny). MOC: plea. Guideline: §2B2.2. OL = 13; CH = I. Range = 12 - 18 mos.; sentence = 12 mos.

16. United States v. Jones, 933 F.2d 353 (6th Cir. 1991): Defendant obtained credit cards by making false representations, then charged items at eight stores, for which she did not

pay. Issue is whether "loss" includes interest on the charges made on the cards. Court of appeals holds, that given agreements that fixed interest, it was not clearly erroneous to include interest in the "loss." Court reasons that "[m]oney has a time value," which was spelled out in the credit card agreement, and therefore was an incidental and consequential damage (under King, supra) that could be included in "loss." Court appears to treat issue as one of fact. (Note that when interest was included loss was $10,080.04, qualifying for OL increase of 3 for loss exceeding $10,000.)

Statute of conviction: 18 U.S.C. § 1029(a)(2) (credit card fraud). MOC: apparently plea. Guideline: §2F1.1. OL = 9. CH, range not specified. Sentence = 3 years' probation, with 6 mos. served in community treatment center.

17. United States v. Khan, 969 F.2d 218 (6th Cir. 1992): Defendant convicted of mail fraud for submitting false claims to insurance company, totaling $450,000. As "relevant conduct," trial court included defendant's submission of false claims for social security benefits. Unbeknownst to defendant, he did not have enough quarters of coverage to qualify for social security benefits; therefore, he was denied benefits and his false statements did not have, and could not have had, any impact on government's decision. Trial court nonetheless increased "loss" amount by $69,000, which it estimated as the "loss" relating to the social security claims.

Court of appeals holds that guidelines do not permit an increase in offense level based on estimated loss when there is an impossibility of actual loss. Court concludes that application notes and decided cases relating to intended "loss" assume that actual loss was possible if defendant's scheme had succeeded. Court further indicates that SOCs are a restrained way of "fine tuning" the sentence, and that adjustments under Chapter 3 and departures are appropriate alternatives to ensure that sentence reflects seriousness of conduct. Court specifically notes that government could have sought an upward departure in this case.

Statute of conviction: 18 U.S.C. § 1341 (mail fraud). MOC: trial. Guideline: §2F1.1. OL, CH, range not specified. Sentence not specified for defendant who appealed; 10 mos.' home confinement, resulting from downward departure, for defendant who did not appeal.

Seventh Circuit

18. United States v. Berkowitz, 927 F.2d 1376 (7th Cir.), cert. denied, 112 S. Ct. 141 (1991): Defendant charged with tax counts asked government to review documents in discovery, then stole boxes of the evidence; defendant was then charged with obstruction and theft. Issue is how to determine value of documents stolen by defendant. Court of appeals

upholds determining "loss" by figuring the cost of replacing the documents, including labor involved in recreating them. Relies on Application Notes 2 (permitting use of replacement cost) and 3 (loss need not be determined precisely) to §2B1.1; rejects defendant's argument that the government was required to mitigate its loss.

Statutes of conviction: 18 U.S.C. § 641 (theft of government property); 18 U.S.C. § 1503 (obstruction of justice). MOC: trial. Guideline: §2B1.1 (as to § 641). OL, range, not specified. CH = I (court departed to CH III). Sentence = 63 mos. (upward departure due to inadequacy of criminal history score).

19. United States v. Schneider, 930 F.2d 555 (7th Cir. 1991): Mail fraud case involving fraudulent contract bid. Court of appeals holds that loss cannot be measured by the amount of the bid when the party letting the contract paid over no money prior to termination of the contract.

Court reasons that bid reflects neither loss to the victims nor gain to the defendants. Further notes that, under Application Note 9 to §2F1.1, the guidelines "permit an increase in offense level for nonmonetizable losses," so that the defendants could not offset the loss by showing they would have conferred a net gain on the government. Implies that measure of loss includes termination costs, expenses in reletting the contract, and higher contract price attributable to delay in letting the contract. Note that defendants in this case intended to perform on the contract.

Statute of conviction: Not specified, but described as conspiracy to defraud and defrauding two federal agencies. MOC: apparently trial. Guideline: §2F1.1. OL, CH, range not specified. Sentence = 15, 30 mos., depending on defendant.

20. United States v. Hintzman, 937 F.2d 1196 (7th Cir. 1991): Defendant received social security benefits by failing to disclose that he was employed. Issue is whether "loss" includes amounts government erroneously continued to pay him after he had notified government that he was employed. Court of appeals holds that "loss" includes these amounts because defendant knew he was not entitled to the money and did not return the checks sent to him. Court states interpretation of "loss" under §2B1.1 is a question of law.

Statute of conviction: 18 U.S.C. § 1001 (false statement to government). MOC: trial. Guideline: §2F1.1. OL, CH, range not specified. Sentence = 15 mos.

21. United States v. Cherif, 943 F.2d 692 (7th Cir. 1991): Defendant convicted of mail and wire fraud for scheme to obtain confidential information from bank by which defendant was formerly employed and use it to trade on stock market. Trial court used the insider trading guideline (§2F1.2) to increase OL by the amount defendant gained through stock

trades on inside information. Issue is whether it was appropriate to treat case as insider trading, given that defendant was not convicted of insider trading offense and gain he received did not come from the victim, i.e., the bank. Court of appeals holds it proper to treat case as involving insider trading, and to count both defendant's gain and the gain to others to whom defendant recommended trades based on his inside information.

Statutes of conviction: 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 371 (conspiracy to commit mail and wire fraud); 18 U.S.C. § 1001 (false statement to government). MOC: trial. Guideline: §2F1.2 (as to mail and wire fraud). OL, CH, range not specified. Sentence = 24 mos.

22. United States v. Phillips, 962 F.2d 739 (7th Cir. 1992): Defendants devised scheme to obtain HUD-insured loans on properties they wanted to renovate and sell as condominiums. Scheme involved using cooperative straw buyers who would then resell the properties to defendants at an increased cost, the repurchase being financed with the HUD-insured loans. Loan documents included false representations of income, indebtedness, and extent of payment of earnest money to the "sellers," the last being documented with bogus cashier's checks and forged promissory notes. A total of $662,920.50 in loans was obtained. Properties were sold by defendants to a third person, who defaulted on the loans, forcing HUD to repurchase the properties for $814,266.68. Properties were then sold at foreclosure sale for $156,000, leaving out-of-pocket loss for HUD of $658,268.68. Trial court used out-of-pocket loss to determine OL, but departed downward two levels because some of HUD's losses were not attributable to defendants.

Issue on appeal is whether the OL should have been increased at all for any of HUD's losses. Defendants argued that the losses were unintended, unforeseeable, and directly caused by the new owner and by HUD (which, defendants argued, sold the property too cheaply, given appraised value of $780,000). Court of appeals upholds district court's determination that OL should be enhanced for "loss," stating that the failure of the victim to mitigate loss or the negligence of intervening actors does not affect the determination of "loss." Court adds, however, that the fact that some losses are attributable to the victim or third parties may result in "loss" overstating the seriousness of the offense, and thus warranting a downward departure. (Because the government did not appeal the departure, the court of appeals did not determine the correctness of the departure.) Concurring judge notes that this case did not require the court of appeals to choose between net loss and face value of the loan, but that (s)he would choose net loss were the issue to be raised.

Statutes of conviction: 18 U.S.C. § 1010 (false statements to HUD); 18 U.S.C. § 371 (conspiracy to make false statements). MOC: plea (as to two defendants who challenged their sentences). Guideline: §2F1.1. OL = 18 (includes two-level downward departure based on loss overstating seriousness of offense). CH, range not specified. Sentence = 21 mos. or 24 mos., depending on defendant.

23. United States v. Dempsey, 768 F. Supp. 1277 (N.D. Ill. 1991): Wire and mail fraud involving commodities. Issue is whether "loss" is measured by the amount of restitution. Trial court holds that "loss" is not the same as restitution, and OL may be increased for full "loss" ($4,575) despite the fact that the defendant split the proceeds with his co-defendants (thereby netting $1662.51). Court cites Application Note 2 to §2B1.1, that "loss" is the value of the property taken, and notes that all the illegal gain was derived from the illegal activity, even if defendant in question shared his ill-gotten gains with another. (Note that loss must exceed $2,000 to qualify for OL increase.)

Statutes of conviction: 18 U.S.C. § 1962 (RICO); 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud); unspecified violations of Commodities Exchange Act. MOC: trial. §2F1.1 (as to mail fraud). OL, CH, range, and sentence vary by defendant (nine in all).

Eighth Circuit

24. United States v. Johnson, 908 F.2d 396 (8th Cir. 1990): Defendant used false identification documents to obtain loans. Issue is whether "loss" is face amount of loans ($21,692) or actual loss on the transactions (approximately $4,000). Court of appeals holds that "loss" is face value of loan, despite fact that loans were secured and most of loan amount was recovered by the sale of the collateral or by insurance (paid when the collateral, which was repossessed, was stolen). Court states that focus should not be on whether the bank recovers some of its potential loan loss, but rather on the amount of possible loss that the defendant attempted to inflict on the bank, relying on Application Note 7 to §2F1.1 that "probable or intended loss" should be used if it is greater than actual loss. (Note that the defendant had prior history of loan defaults and judgments and, although single parent of infant, used the money to buy two sports cars; opinion might be read to imply that the defendant was involved in theft of the car that was repossessed.)

Statute of conviction: 18 U.S.C. § 1014 (false statement in bank loan application). MOC: plea. Guideline: §2F1.1. OL, CH, range not specified. Sentence = 15 mos.

25. United States v. Russell, 913 F.2d 1288 (8th Cir. 1990), cert. denied, 111 S. Ct. 1687 (1991): Defendants pleaded guilty to possession of property stolen from an interstate shipment (cases of liquor), which they tried to sell for $3,200. Issue is whether "loss" is measured by retail value ($6,326.40). Court of appeals holds that retail value counts, relying need for uniformity. (Dissenting opinion on issue of loss argues that victims were wholesalers and therefore their loss is only the wholesale value.) Court relies on case law on valuation under 18 U.S.C. § 641, rejecting argument that definition of value under 18 U.S.C. § 2311 should be used. Court notes also that defendants failed to produce evidence of wholesale value (offered evidence only as to black market price).

Statute of conviction: 18 U.S.C. § 659 (possession of property stolen from interstate shipment). MOC: plea. Guideline: §2B1.2. OL, CH, range not specified. Sentences = 14, 20, 36, or 48 mos., depending on defendant.

26. United States v. Rivers, 917 F.2d 369 (8th Cir. 1990): Burglary of house from which various personal items were taken (e.g., jewelry, appliances). At sentencing government produced hearsay testimony about owner's estimate of value of stolen property. Although appellate court agrees that in general the owner of the property may testify to its value, it holds that evidence in this case was insufficient to support the offense level increase because the owner was not present at the sentencing hearing and the basis for the owner's estimate was not specified. Court notes that replacement cost could easily have been verified by consulting a reliable dealer. (Note that many items included in the loss amount were gifts and were said to involve sentimental value.)

Statute of conviction: 18 U.S.C. § 1153 (burglary in Indian country). MOC: plea. Guideline: §2B2.1. OL = 16; CH not specified. Range = 24 - 30 mos.; sentence = 27 mos.

27. United States v. West, 942 F.2d 528 (8th Cir. 1991): Defendant sold adulterated meat. Issue is whether "loss" includes value of meat not paid for, and whether it includes value of unadulterated as well as adulterated meat. Court of appeals holds that "loss" is the contract price for the meat (approximately $285,000), whether it was paid for or not, and that good meat cannot be excepted from "loss" because it was mixed with the bad. Court relies on Application Note 7 to §2F1.1, that "loss" includes "probable or intended loss." Further states that "[t]he amount of the loss is a factual question to be reviewed under the clearly erroneous standard."

Statutes of conviction: 21 U.S.C. §§ 601(m)(8), 610 (b), 676 (selling adulterated meat food product with intent to defraud). MOC: plea. Guideline: §2F1.1. OL, CH, range not specified. Sentence = 21 mos.

Ninth Circuit

28. United States v. Wills, 881 F.2d 823 (9th Cir. 1989): Credit card fraud case in which a total of $52,000 in cash advances were withdrawn for defendant's benefit, about half of which was recovered. Issue is whether "loss" includes amount recovered or only actual loss to the victim. Court of appeals, relying on the phrase "estimated, probable, or intended loss," holds that "loss" includes all amounts defendant attempted to obtain, whether recovered or not, because the defendant's "attempt intended to cause a loss of $52,000."

Statute of conviction: 18 U.S.C. § 1029 (credit card fraud). MOC: plea. Guideline: §2F1.1. Sentence = 41 mos., consecutive to sentence defendant was then serving. Offense level, range, CH not specified; however, court indicates that OL increase relating to loss was 5.

29. United States v. Burns, 894 F.2d 334 (9th Cir. 1990): Defendant fraudulently obtained credit card numbers and used them to order computer equipment. Issue is whether sales tax and shipping charges for merchandise charged by improper use of fraudulently obtained credit card numbers are included in "loss." (Including tax and interest increased OL by 6 rather than 5.) Court of appeals holds that "loss" includes tax and shipping charges.

The court relies upon phrase "value of property taken, damaged, or destroyed," which is "[o]rdinarily . . . the fair market value of the particular property at issue." Defendant argued that "fair market value" means the amount a willing buyer would pay a willing seller," which should exclude tax and shipping since those amounts do not go to the seller. The court, however, concludes that "in ordinary retail trade the amount that a willing buyer is prepared to pay includes the tax and shipping costs, regardless of who ultimately receives that fraction of the purchase price." The court points out that Application Note 4 to §2B1.1 provides that "[t]he loss includes any unauthorized charges made with stolen credit cards" and that Application Note 3 states that loss need not be determined with precision. The court also states that interpretation of "loss" is a question of law. (Note that the case involves a superseded version of guidelines, and the decision is probably dictum, in that the defendant, according to court of appeals, waived the argument by failing to produce relevant calculations for trial court.)

Statute of conviction: 18 U.S.C. § 1029 (credit card fraud). MOC: plea. Guideline: §2F1.1. OL = 12; CH = VI. Range = 30 - 37 mos.; sentence = 30 mos.

30. United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990): Mail fraud case in which employee tried to sell his company's research and development to a competitor. Issue is whether "loss" is the amount of money employee tried to obtain from competitor ($200,000) or the company's cost of developing the information ($8 million), or some other amount.

Trial court started with $8 million, discounted it by half because half the information was protected by patent, and then further reduced the remaining $4 million by 75%, apparently to "[g]iv[e the defendant] the benefit of every doubt arising from the 'ball park estimate' of value" provided by the company. Final "loss," then was $1 million. Court of appeals engages in extended analysis of valuation of stolen property, relying on case law under substantive statutes (e.g., 18 U.S.C. § 641 felony/misdemeanor distinction), and refuses to adopt "price paid on the black market" as the standard because that relates only to defendant's gain and not to the victim's loss. Holds that trial court's conclusion that

market value was difficult to ascertain because of uniqueness of product was not clearly erroneous, and that decision to base loss on development costs and its computation of them were not clearly erroneous.

Statutes of conviction: 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1342 (use of false name in mail fraud scheme). MOC: plea. Guideline: §2F1.1. Range = 15 - 21 mos.; sentence = 15 mos.

31. United States v. Pemberton, 904 F.2d 515 (9th Cir. 1990): Defendant received stolen property, i.e., partially completed technical drawings of landscape and irrigation designs for a commercial development, produced by employer of thief pursuant to contract. Issue is what value to place on drawings, which were incomplete, had no market value, and were worthless to the defendant (according to the defendant). Trial court took contract price and reduced by 20% since drawings were only 80% completed, for a "loss" of $118,000. Court of appeals upholds this calculation on theory that market value was difficult to ascertain, and so contract price was reasonable substitute (relying on Application Notes 2 and 3 to §2B1.1, which give the court "considerable discretion in measuring the value of stolen property"). Disregards defendant's claim that, at 80% complete, the drawings were worthless to anyone. (Note that it is unclear from opinion why thief took the drawings or why defendant had them, and that court of appeals declines to decide whether drawings in fact were worthless to the defendant.)

Statute of conviction: 18 U.S.C. § 662 (receiving stolen property in special maritime and territorial jurisdiction). MOC: trial. Guideline: §2B1.1. OL = 12; CH = III. Range = 15 - 21 mos.; sentence = 21 mos.

32. United States v. Davis, 922 F.2d 1385 (9th Cir. 1991): Wire fraud involving attempt to obtain jewels by false representations. "Loss" was held to be the fair market value of jewels ($150,000), even though defendant did not actually obtain the jewels. Court relies upon §2X1.1, and Application Note 7 to §2F1.1, that "probable or intended loss" may be used instead of actual loss. Court further points out Application Note 8 to §2F1.1 that "loss" need not be determined with precision. Court states that standard of review is de novo to the extent application of guidelines involves mixed question of fact and law.

Statute of conviction: 18 U.S.C. § 1343 (wire fraud). MOC: plea. Guidelines: §2F1.1; §2X1.1. OL, range not specified. CH score = 12. Sentence = 34 mos.

33. United States v. Cambra, 933 F.2d 752 (9th Cir. 1991): Sale of counterfeit steroids, sentenced under Part 2F rather than Part 2N, on theory that government agency was defrauded. Issue is whether "loss" is the value of the drugs ($500,000). Court of appeals holds that the value of the drugs is the "loss" because it represents gain to the defendant,

even though government's loss was not monetary. Court relies on commentary to §2B1.1, that "loss" was intended to reflect gain to the defendant and harm to the victim.

Statute of conviction: 21 U.S.C. § 333(a)(2) (Food and Drug Act violation). MOC: plea. Guideline: §2F1.1. OL, CH, range not specified. Sentence = 24 mos.

34. United States v. Koenig, 952 F.2d 267 (9th Cir. 1991): Defendants organized scheme to gain access to account and personal identification numbers (PINs) for 7,470 automated teller machine cards (through defendant Koenig, who worked as a computer consultant) and use the information to withdraw funds from Bank of America accounts. Defendants planned to withdraw the funds over President's day weekend, but two weeks prior to that a search warrant at Koenig's home was executed, which disclosed that Koenig had encoded 1,480 counterfeit cards with the account numbers and PINS, placed magnetic tape on 4,100 more cards (but not yet encoded them), and manufactured 800 more cards (to which magnetic tape had not yet been affixed and which had not yet been encoded). Trial court, relying upon intended loss, determined that "loss" exceeded $2 million.

Court of appeals upholds trial court's determination of "loss," treating application of the guidelines as subject to de novo review. Court of appeals, relying on phrase "probable or intended loss" in Application Note 7 to §2F1.1, concludes that basing determination of "loss" on intended loss is justified "because there was evidence that the conspirators considered and discussed how much money the scheme would produce. For example, in response to a comment by [one conspirator], Mark Koenig indicated that 1,000 cards could produce $500,000." Court also determined that finding that intended loss exceeded $2 million was not clearly erroneous, relying on the following facts:

> Since it appears that the conspirators were attempting to make about 7,470 cards, the intended loss would be approximately 3.74 million dollars. Even if we assume that one-third of the cards were not used, the intended loss would still be greater than two million.

While court notes that "one statement or calculation may not always conclusively establish that the conspirators intended a loss of over two million dollars," it concludes that the evidence in this case "taken as a whole" supports the holding that there was no clear error in the determination of "loss." Court further concludes that trial court is not required to find that defendants' intentions were realistic, noting that, given the "highly planned, well-organized, and sophisticated" nature of this conspiracy, it was not clear error for the trial court to take the "conspirators' plans and loss assessment seriously in calculating the intended loss to be over two million dollars."

Court of appeals rejects defendants' claim of entitlement to a three-level reduction under §2X1.1(b), stating that: §2X1.1 does not apply when §2F1.1 applies to an offense; even if §2X1.1 applied, only §2X1.1(a) would apply, not §2X1.1(b); and the November 1991

amendment to the commentary to the contrary is a substantive change that cannot be given retroactive effect. Finally, court refuses to review trial court's denial of a downward departure based on the disparity between the actual loss and the probable or intended loss.

Statutes of conviction: 18 U.S.C. § 1029 (conspiracy to produce and use counterfeit access devices); other crimes not specified. MOC: plea. Guideline: §2F1.1. OL, CH, range not specified. Sentence = 18, 21, 30, or 41 mos., depending on defendant.

35. United States v. Hernandez, 952 F.2d 1110 (9th Cir. 1991): Defendants convicted of counterfeiting audio cassettes. Trial court held that "probable or intended loss" was $10,454,000, calculated by using an estimated market value of $4 per tape times 2,613,600 (the number of individual package wrappings found at defendants' warehouse minus 1% predicted defective or broken package wrappings). Cheapest tapes found in warehouse had estimated market value of between $2.00 and $4.99. Court of appeals holds that trial court's reliance on $4 as estimated market value of each tape was not clear error, and that it is appropriate to use market value rather than lost profit (or defendants' gain) because lost profit is too complicated to determine. Court, noting that the issue whether profit or market value should be used to measure "loss" is a question of law to be determined de novo, relies upon Application Note 8 to §2B1.1, that loss need not be determined with precision.

Statutes of conviction: 17 U.S.C. § 506 (copyright infringement); 18 U.S.C. § 371 (conspiracy to traffic in counterfeit labels and goods, in violation of 18 U.S.C. §§ 2318 - 2320. MOC: trial. Guideline: §2F1.1. OL, CH, range not specified. Sentence = 71 mos.

36. United States v. Hughes, 775 F. Supp. 348 (E.D. Cal. 1991): Defendant falsified bank loan applications to obtain loans totalling $591,610, some of which he repaid and others of which were secured by collateral the value of which exceeded the loan balance. Rejecting government's argument that the face value of the loans is the "loss," trial court concludes there was no property taken, damaged, or destroyed, and thus "loss" cannot be measured according to Application Note 2 of §2B1.1. Court finds there was no "intended loss" and no actual or even probable loss. Court notes that "defendant here may have exposed the banks to an increased risk, but the Government has made no effort to quantify that risk."

Statute of conviction; 18 U.S.C. § 371 (conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1014 and § 1344). MOC: not specified. Guideline: §2F1.1. OL = 6. CH, range, sentence not specified.

37. United States v. Westmoreland, 911 F.2d 398 (10th Cir. 1990): Defendant (a truck driver) hijacked his employer's tractor-trailer filled with electronic equipment, stole the equipment, and abandoned the truck. Issue is whether "loss" includes value of tractor-trailer or only the value of the merchandise stolen ($691,311 vs. $10,768).

Court of appeals holds that "loss" is the entire value of the truck and its contents, despite clear indication that defendant did not intend to keep the truck (he abandoned it and reported it stolen) and despite its recovery by the FBI. Court relies upon Application Note 2 to §2B1.1, that "'[l]oss' means the value of the property taken, damaged, or destroyed," ordinarily measured by fair market value, but including the full amount of a check or money order a defendant was attempting to cash and the full value of a vehicle the defendant is attempting to steal, even if the vehicle is immediately recovered. Finding the present case "clearly analogous" to the examples in the Application Note, the court concludes that the amount taken was the total value of the vehicle and its contents, and that "good police work" does not diminish the defendant's culpability. Court also "reject[s] defendant's argument that the three level decrease applicable to incomplete attempts, solicitations, or conspiracies applies in the instant case."

Statute of conviction: 18 U.S.C. § 659 (theft of interstate shipment). MOC: plea. Guideline: §2B1.1. OL, CH, range, sentence not specified.

38. United States v. Whitehead, 912 F.2d 448 (10th Cir. 1990): Defendant used a false social security number to enter into lease of house with option to buy. Issue is whether "loss" includes the market value of the house ($168,000), on the theory that the defendant attempted to steal the house. Court of appeals holds that "loss" is the value of the option ($2,000), not the full value of the home. Court reasons that the purchase of the option did not constitute an attempt to steal the home because the defendant could elect whether or not to exercise the option, and "it was far from certain that he ever would have been successful in doing so or that the full value of the home would have been lost." Court does not explain, however, how it concluded that loss occurred by virtue of the option. Court states that whether "loss" includes value of home is a legal question subject to de novo review.

Statutes of conviction: 42 U.S.C. § 408(g) (using false social security number); 18 U.S.C. § 1028(a)(3) (possessing five or more false identification documents). MOC: plea. Guidelines: §2F1.1; §2X1.1 (in effect prior to the Nov. 1989 amendments). OL = 13; CH = VI. Range = 41 - 51 mos.; sentence = 72 mos. (departure due to inadequacy of criminal history and lack of contrition).

39. United States v. Johnson, 941 F.2d 1102 (10th Cir. 1991): Defendant purchased HUD-insured rental property knowing he could not afford to make the payments. Defendant converted rent and never made mortgage payments; government foreclosed. Issue is whether "loss" includes full value of real estate (at least $400,000) or only the rent the defendant converted (approximately $16,000). Court of appeals holds that "loss" includes real estate's fair market value despite foreclosure because real estate was "taken" by the defendant, relying on Application Note 2 to §2B1.1. Court reverses because of inadequate proof of fair market value of house.

Statutes of conviction: 18 U.S.C. § 1341 (mail fraud); 12 U.S.C. § 1709-2 (equity skimming). MOC: trial. Guideline: §2F1.1. OL = 16; CH = II (issue on appeal as to correctness of this determination). Range = 24 - 30 mos.; sentence = 30 mos.

40. United States v. Smith, 951 F.2d 1164 (10th Cir. 1991): Defendant, who constructed and sold new homes, aided and abetted submission of false statements to bank by falsely representing that downpayments had been made or amounts of downpayments on property he sold, thereby allowing customers to obtain bank loans. Loans totaled $440,896, but no customer had defaulted on a loan as of the time of sentencing. Issue is whether "loss" is the face value of the loan, as trial court had held.

Court of appeals holds that "loss" in this context is not the face value of the loans when the bank suffered no actual loss and there is no evidence that the defendant intended to inflict a monetary loss. Instead, net loss figure should be used (as to which, court concluded, there was no proof it exceeded $2,000). Court distinguishes between "naked fraudulent takings, and exchanges of property where the wrongdoer merely misrepresents the value of the consideration advanced," and relies upon the common law of damages in civil fraud cases. Court distinguishes Johnson, 941 F.2d 1102 (10th Cir. 1991) (supra), as case in which the defendant "lied about his intention to repay the loans on the houses," and that "involved a naked taking in which the seller received nothing in return because the only consideration offered by the defendant was a worthless promise to assume the loans."

Statutes of conviction: 18 U.S.C. §§ 2, 1014 (aiding and abetting the submission of false statements to a bank). MOC: apparently plea. MOC: plea. Guideline: §2F1.1. OL = 19; CH = I. Range = 30 - 37 mos.; sentence = 24 mos. (due to two-year statutory maximum; sentence reversed on appeal).

41. United States v. Lara, 956 F.2d 994 (10th Cir. 1992): Defendants altered subcontracting bids to inflate their amounts, then submitted them to government. Trial court measured "loss" as the difference between the true amount and the altered amount of the bids ($20,969.85). Court of appeals upholds determination of "loss," rejecting defendants' claim that the "loss" was nothing because the "actual value of the construction services provided to the government was equal to or greater than the bid quotations

submitted" by defendant. Court treats "question of what factors the guidelines direct the court to consider in computing the amount of a loss" as a question of law subject to de novo review.

Court states that "'loss' is not simply intended to be a measure of the net monetary damage to the victim. Its purpose is to gauge the severity of a particular offense." Analogizing to the examples in Application Note 2 to §1B1.1 and relying on the phrase "value of the property taken, damaged, or destroyed," court concludes that obtaining $20,969.85 more than was defendant was entitled to constituted a "taking" and therefore a "loss." Court further notes that defendant intended to take that amount.

Statutes of conviction: 18 U.S.C. § 1001 (false statement to government); 18 U.S.C. § 1510 (obstruction). MOC: trial. Guideline: §2F1.1. OL = 12. CH, range, sentence not specified.

Eleventh Circuit

42. United States v. Scroggins, 880 F.2d 1204 (11th Cir. 1989), cert. denied, 494 U.S. 1083 (1990): Defendant committed series of thefts from postal self-service machines by breaking into them. "Loss" held to include cost of repairing machines as well as amounts taken from them (for total of $11,000). Court of appeals relies on Application Note 2 to §2B1.1, as amended June 15, 1988, to the effect that "loss" when property is damaged is the cost of repairs not to exceed the value of the property. Although this amendment was not in effect at the time of the offense, the court stated that it could be considered because it only clarified the earlier version of the guidelines.

Statute of conviction: 18 U.S.C. § 641 (theft of government property). MOC: plea. Guideline: §2B1.1. OL = 11; CH = III. Range = 12 - 18 mos.; sentence = 12 mos.

43. United States v. Jenkins, 901 F.2d 1075 (11th Cir.), cert. denied, 111 S. Ct. 259 (1990): Bank larceny by bank security guard; issue is whether "loss" is the face amount of non-negotiable securities ($101,750) or the replacement cost of reissuing the stolen certificates ($1,017). Court of appeals, analogizing to a stolen car that is recovered, holds that "loss" is the face value, even though stocks, because non-negotiable, were worthless to the defendant. Court reasons that the fact that stolen stock certificates may be canceled and new certificates issued does not change their value for sentencing purposes any more than does recovery of a stolen car: "Jenkins took from his victims securities that were worth $101,741.64 to those victims in some way and at some time." Court also notes that it is applying the amendments to the Application Notes effective June 15, 1988 (value of property taken), rather than the previous language (replacement cost to victim or market value, whichever is greater) in effect at time of commission of crime.

Statute of conviction: 18 U.S.C. § 2113(b) (bank larceny). MOC: trial. Guideline: §2B1.1. Range = 21 - 27 mos.; sentence = 27 mos.

District of Columbia Circuit

No cases

SUMMARIES OF CASES
More Than Minimal Planning

First Circuit

1. United States v. Fox, 889 F.2d 357 (1st Cir. 1989): Defendant, who was a bank officer, created fictitious customers and bogus loan documents in order to divert loan funds to herself. Five loans totalling $21,650 were made. Court of appeals holds that "more than minimal planning" was involved, stating that it "cannot conceive of how obtaining even one fraudulent loan would not require more than minimal planning." Court notes that the offense was not a "spur of the moment" taking as a result of being tempted by a large amount of cash, and that the defendant had to provide "a chain of false information" in order to obtain the loans.

Statute of conviction: 18 U.S.C. § 656 (embezzlement by bank officer). MOC: plea. Guideline: §2B1.1. OL = 10. CH, range not specified. Sentence = three years' probation, conditioned upon service of 6 mos. in community corrections center.

2. United States v. Beauchamp, 986 F.2d 1 (1st Cir. 1993): Defendant convicted of uttering and publishing a forged federal tax refund check. When contacted by IRS agents about the forgery, defendant falsely told agents that the check had been given him by a man in partial payment for the sale of a car, and that the man was introduced to defendant by a friend, who, when contacted by agents, initially supported defendant's story. The friend later testified that defendant told the friend that defendant was in trouble about the check and wanted the friend to corroborate defendant's false story. Trial court gave two-level enhancement for "more than minimal planning" based on concealment, which defendant contested on appeal. Court of appeals, unwilling "to go so far as the Seventh Circuit [in Maciaga, infra,] in requiring direct evidence of pre-offense planning of the concealment, upholds the enhancement, because "the necessity to conceal was so integral to the entire scheme, and because "defendant's cover-up was far more elaborate and better planned than in Maciaga." Court explains:

> We recognize there may be situations where a defendant's subsequent cover-up activity is disassociated from the earlier crime as to make it unreasonable to find that the crime itself "involved" more than minimal planning. But we believe the determination is essentially one of fact for the district court. Crimes of fraud and deceit by their very nature may, and often do, compel, quite predictably, later efforts at a cover-up. Thus defendant here, having put his name and address on the check, knew that he would probably be later questioned by authorities,

> at which time he would necessarily have to offer some innocent explanation. It is not unreasonable to view the false story he eventually told, and the elaborate steps he took to support it, as integral to the original offense itself, so that the offense can properly be said to have "involved" this later cover-up activity.

Dissent on issue of "more than minimal planning," concluding that evidence of pre-offense planning of concealment is required.

Statutes of conviction: 18 U.S.C. §§ 2 (aiding and abetting), 510(a)(2) (forgery). MOC: trial. Guideline: §2F1.1. OL, CH, range not specified. Sentence = 11 mos.

Second Circuit

3. United States v. Brach, 942 F.2d 141 (2d Cir. 1991): Defendant entered into negotiations with Village of Randolph to move a knitting mill there, during which he requested a loan as a financial incentive. Randolph made the loan after defendant falsely represented that he was the primary owner of the mill and falsely represented his net worth. Randolph then learned that defendant was a deadbeat and requested return of the loan, which defendant reimbursed with a bad check. Randolph then filed criminal complaint and defendant repaid the loan.

Court of appeals affirms enhancement for "more than minimal planning," citing the following facts:

> Concocting a scheme to move a business that one does not own is not a simple thing to do, particularly when it involves securing a quarter-of-a-million dollar advance from the subject of the fraud. The money that [defendant] received from Randolph was preceded by extensive negotiations and travel by both Randolph representatives and [defendant] that extended over many months. It was based upon a false financial statement that was anything but a simple planning device. Indeed, it is safe to say that fraudulent loans in any substantial amount seldom result from minimal planning.

Statute of conviction: 18 U.S.C. § 1343 (wire fraud). MOC: plea. Guideline: §2F1.1. OL = 16; CH not specified. Range = 21 - 27 mos.; sentence = 27 mos.

4. United States v. Maciaga, 965 F.2d 404 (7th Cir. 1992): Defendant, a part-time security guard for a bank whose position required him to open the bank, deactivate the alarm, and open the night deposit safe, took a night deposit bag containing $5,350 one morning and put it into the trunk of his car. After work, defendant took the money and

destroyed the bag and the accompanying deposit ticket. Defendant contacted investigating police officers and told them that he had had problems removing the deposit bags from the chute and that recently one bag had become stuck in the chute and torn open when defendant attempted to remove it. The police were unable to solve the crime and the case was closed. About two and one-half months later, defendant accidentally set off the alarm at work, to which the police responded. When the police left the scene, defendant took two deposit bags containing $12,000 and placed them in the trunk of his car. After failing two polygraph tests, defendant was prosecuted, and pleaded guilty to two counts of bank larceny.

Trial court gave two-level enhancement for "more than minimal planning" on the theory that, although the second theft was "opportune," the first involved "more than minimal planning" because the defendant concealed his offense. Court of appeals reversed the enhancement for "more than minimal planning." Appellate court concludes that the planning for this offense did not rise to the level of more than was necessary to commit the offense. Court notes that defendant did not "take any unusual steps" or "engaged[] in any atypical planning to get the money." Court further concludes that there were no "repeated acts" because there were only two thefts and one was "opportune." With respect to concealment, court states that there was no evidence that the concealment was planned, which, the court notes, was always a factor in cases in which "more than minimal planning" was based on concealment.

Statute of conviction: 18 U.S.C. §2113(b) (bank larceny). MOC: plea. Guideline: §2B1.1. OL, CH, range not specified. Sentence = 4 mos. (reversed and remanded for resentencing).

Third Circuit

5. United States v. Cianscewski, 894 F.2d 74 (3d Cir. 1990): Defendant and his wife possessed and sold stolen Treasury checks on four occasions to an undercover agent. Court of appeals affirms enhancement for "more than minimal planning," reciting the following facts:

> In this case, not even considering the checks sold by his wife, [defendant] received stolen checks from a government informant or from his wife and sold them to undercover agents on three separate occasions over a three-week period. On each occasion, [defendant] went to the same pre-arranged location, entered the vehicle of his buyer, and completed the illicit transaction. On at least one occasion, [defendant] himself (not his wife) arranged the rendezvous.

Statutes of conviction: 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 1708 (possession of stolen mail); 18 U.S.C. § 510 (possession of stolen treasury checks). MOC: trial. Guideline: §2F1.1. OL = 13; CH = VI. Range = 33 - 41 mos.; sentence = 41 mos.

6. United States v. Kopp, 951 F.2d 521 (3d Cir. 1991): Defendant submitted false documents to bank to get loans of $14 million for real estate partnership. Documents included forged leases, designed to misrepresent the amount of money earned on the property, which was pledged as collateral. After foreclosure, collateral sold for more than the amount of the loans. Court of appeals upholds enhancement for "more than minimal planning," because "twenty-eight [false, loan-related] documents were delivered on three occasions, demonstrating repeated fraud and not mere taking advantage of a sudden opportunity."

Statute of conviction: 18 U.S.C. § 1344 (bank fraud). MOC: plea. Guideline: §2F1.1. OL = 19; CH = I. Range = 30 - 37 mos.; sentence = 33 mos. (vacated due to improper calculation of loss).

Fourth Circuit

7. United States v. Foster, 898 F.2d 25 (4th Cir. 1990): Defendant convicted of making a gasoline bomb arising from his fabricating the bomb, concealing it in the car of his ex-girlfriend's new boyfriend, and rigging it to go off. Court of appeals affirms finding of "more than minimal planning," noting the following facts: "[Defendant] took the gas can, went to buy gasoline and wire, came back to the victim's car and assembled the bomb, placed the bomb in the rear seat of Brown's car, and then concealed the bomb with Brown's clothes. This does not describe an offense committed on the spur of the moment." Court rejects defendant's argument that enhancing for both "more than minimal planning" and "aggravated assault" constitutes double punishment, alluding to the distinction between murder and manslaughter (presumably a referent to "heat of passion") as an example of increasing punishment for "the more deliberate commission of the crime."

Statute of conviction: 26 U.S.C. § 5861(f) (making a bomb). MOC: plea. Guideline: §2A2.2. OL = 18; CH = I. Range = 27 - 33 mos.; sentence = 27 mos.

8. United States v. Curtis, 934 F.2d 553 (4th Cir. 1991): Defendant, by impersonating INS agent and representing that government would pay, convinced store owner to deliver merchandise to him without advance payment. In April 1988 defendant obtained an INS identification card while working with Marielitos and falsely reported that he had lost it. In summer 1988 defendant set up corporation and began falsely representing himself as regional director of INS. In December 1988 defendant made several trips to furniture store representing that he was government employee and that government would pay for items he purchased. Defendant had cohort call store and confirm that defendant worked for INS and that government would pay for merchandise. When store requested a written guarantee, defendant had another cohort tell the store a purchase order would be sent, and produced a blank purchase order on the letterhead of defendant's corporation, which he falsely represented to be the financial arm of the Justice Department.

Trial court gave enhancement for "more than minimal planning" and for defendant's role in the offense. As to "more than minimal planning," trial court adopted presentence report statement: "The offense involved more than minimal planning in that it was carried out over time, involved deliberate deception, and occurred after several contacts between the defendant, victim, and others, both in person and by telephone." Defendant did not challenge the enhancement for "more than minimal planning," but argued that applying both enhancements "amounts to impermissible double counting because the same facts were used in making both adjustments." Court of appeals concludes that both enhancements may be used, stating:

> [Defendant's] use of [his cohorts] was just one of the elements relied on by the court in finding more than minimal planning. On his own, [defendant] set up the corporation used in committing the crime, he obtained and did not return the identification badge, and he visited the store on more than one occasion. These actions alone, without the involvement of [his cohorts], would have amounted to more than minimal planning. Therefore, it was permissible to award a two-level increase for more than minimal planning as well as a two-level increase for being an organizer or manager.

Statute of conviction: 18 U.S.C. § 912 (personation). MOC: trial. Guideline: §2B1.1. OL = 11; CH = VI. Range = 27 - 33 mos.; sentence = 33 mos.

9. United States v. Palinkas, 938 F.2d 456 (4th Cir. 1991): Elaborate scheme to fraudulently obtain loans pursuant to line of credit based on fake accounts receivable. Trial court departs upward for one defendant based on amount of loss (net loss of $32 million), duration of the scheme, and sophistication of the crime. Court of appeals approves both reasons for and extent of departure, rejecting defendant's claim that enhancements for role in the offense and/or more than minimal planning already take into account the factors upon which the trial court relied in departing. Court of appeals states that in adopting "more than minimal planning"

> [t]he Commission considered planning . . .; it did not consider the constant fraudulent activity executed by a defendant [citing Burns, infra]. . . . The "on-going nature" cited by the district court does not refer to the planning necessary, but instead . . . to the fraudulent activity that occurred on a daily basis. We thus conclude that section 2F1.1(b)(2)(A) does not adequately encompass the "on-going nature" of the scheme.

Court further notes that degree of sophistication of this offense (citing commentary to §2F1.1) was exceptional because it involved such acts as the creation of dummy supplier and buyer corporations, the development of a complex computer program to "document" the fake accounts receivable, and the counterfeiting of checks and check stubs to "document" payment of invoices.

Statutes of conviction: 18 U.S.C. § 371 (conspiracy to commit wire fraud and to transport fraudulently obtained money); 18 U.S.C. § 2314 (transporting fraudulently obtained money). MOC: plea. Guidelines: §2F1.1. OL = 17 or 21, depending on defendant; CH not specified. Range = 24 - 30 mos., or 37 - 46 mos., depending on defendant; sentence = 24 mos. or 60 mos., depending on defendant.

10. United States v. Rothberg, 954 F.2d 217 (4th Cir. 1992): Defendant falsified loan documents to obtain $480,000 loan to refinance a condo jointly owned with his wife, who did not want to obtain the loan. Defendant accomplished this by falsely representing that his wife was seriously ill, getting the bank to relax its requirement that the bank officer be present during execution of the loan documents, then having imposter go with him to notary public and forge his wife's signature. Trial court refused to enhance for "more than minimal planning," despite probation officer's suggestion that it was appropriate. Government did not appeal this aspect of the sentence.

Statutes of conviction: 18 U.S.C. 1344(2) (bank fraud); 18 U.S.C. § 1014 (false statement to bank). MOC: not specified. Guideline: §2F1.1. OL = 6 (vacated due to failure to enhance for "loss"); CH = I. Range = 24 - 30 mos. ; sentence = 6 mos.' probation (vacated and remanded for resentencing).

Fifth Circuit

11. United States v. Beard, 913 F.2d 193 (5th Cir. 1990): Defendant, a practicing attorney who had filed for bankruptcy, convicted of perjury for lying under oath in bankruptcy proceeding concerning the existence of an asset, a $175,000 check (received after he filed for bankruptcy) as payment for his services as criminal defense attorney. Defendant converted the payment into a certificate of deposit and cashier's checks payable to his relatives, and a cashier's check payable to him, which he negotiated and deposited in part and secreted in part. Trial court "found that there was a complex scheme involving multiple participants used by [defendant] to conceal the existence of the $175,000." Court of appeals affirms enhancement for "more than minimal planning," stating that "there was sufficient evidence to show that [defendant's] actions went beyond merely opening an account to hold the money, but involved a systematic scheme involving multiple banks and many different parties." The finding of "more than minimal planning" was justified, the court concluded, "[b]ecause the evidence sufficiently establishes [defendant's] role in orchestrating dispersal of the funds."

Statute of conviction: 18 U.S.C. § 152 (perjury in bankruptcy proceeding). MOC: plea. Guideline: §2F1.1 (date of sentencing = Oct. 1989). OL = 16. CH, range not specified. Sentence = 27 mos.

12. United States v. Barndt, 913 F.2d 201 (5th Cir. 1990): Defendant stole wire from Army missile range, then sold it to scrap metal dealer. Defendant accomplished crime by receiving information from telephone workers that cables from which he took wires were not in service. Defendant then "formed the intent to take the wires, collected cutting tools, cut the wires, loaded the wires into his vehicle, sought a buyer, transported the wires to the buyer, and made the sale." Court of appeals, relying on Application Note 1(f) to §1B1.1, finds the district court's conclusion that the crime involved "more than minimal planning" not clearly erroneous, reciting the following facts: "[Defendant] formed an intent to commit the crime in advance. He took several discrete steps in furtherance of his plan before he actually sold the wire."

Statute of conviction: 18 U.S.C. § 641 (theft of government property). MOC: plea. Guideline: §2B1.1. OL, CH, range not specified. Sentence = 5 years' probation.

Sixth Circuit

13. United States v. Sloman, 909 F.2d 176 (6th Cir. 1990): Defendant was insurance claims adjuster who falsely reported to insurance company that a boat was a total loss as a result of a fire, falsely representing both the extent of the damage and the estimated costs of repair. Insurance company paid claim for full value of boat, and told defendant to solicit salvage bids. Defendant submitted two fictitious salvage bids with forged signature, then secretly bought boat at the salvage sale through a friend who put up none of the sale price but in whose name the boat was kept titled. Defendant then repaired the boat, for a total cash investment of $43,000, compared with $140,000 value of boat.

Court of appeals upholds enhancement for "more than minimal planning," rejecting defendant's argument that "after the initial appraisal, his actions that led to his ownership of the boat involved only his special skill as an insurance adjuster and no planning was required." Court concludes that enhancement for both "abuse of trust" and "more than minimal planning" was warranted, stating that trial court "found that the entire scheme involved more than minimal planning as well as the utilization of [defendant's] special skill as an adjuster. These were separate components of the scheme, both of which contributed to its success."

Statutes of conviction: 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 371 (conspiracy to commit mail fraud); 18 U.S.C. § 1343 (wire fraud). MOC: trial. Guideline: §2F1.1. OL = 16; CH = I. Range = 21 - 27; sentence = 27 mos.

14. United States v. Jones, 933 F.2d 353 (6th Cir. 1991): Defendant obtained credit cards by making false representations, then charged items at eight stores, for which she did not pay. Court of appeals upholds enhancement for "more than minimal planning," stating that

defendant "not only used elaborate falsehoods in obtaining the credit cards, she used the cards to make numerous purchases at a variety of stores."

Statute of conviction: 18 U.S.C. § 1029(a)(2) (credit card fraud). MOC: apparently plea. Guideline: §2F1.1. OL = 9. CH, range not specified. Sentence = 3 years' probation, with 6 mos. served in community treatment center.

15. United States v. Kappes, 936 F.2d 227 (6th Cir. 1991): Defendant in April and August 1989 filed forms with Department of Labor regarding temporary total disability payments he had been receiving in which he falsely represented that he had not been employed during the previous fifteen months. Court of appeals affirms enhancement for "more than minimal planning" because of the following facts, which the court said "indicate . . . that [defendant] took extensive measures to conceal the offense":

> [Defendant's] period of unreported employment spanned several years. During this time, he failed to report his employment activities to his attending physician during 1987 and 1988, or to his employment vocational specialist. [Defendant] also failed to report the outside income on his tax forms during the years in question.

Statute of conviction: 18 U.S.C. § 1001 (false statements to government). MOC: trial. Guideline: §2F1.1. OL = 14; CH not specified. Range = 15 - 21 mos.; sentence = 21 mos.

16. United States v. Romano, 970 F.2d 164 (6th Cir. 1992): Defendant operated three medical clinics through which he defrauded Medicaid, obtained kickbacks from laboratories for referrals, and illegally dispensed drugs. On appeal, defendant claimed that receiving both an enhancement for "more than minimal planning" and for aggravating role in the offense constituted double counting. Court of appeals agrees with defendant, holding that if conduct is used to enhance sentence under one provision, it cannot be used to establish another enhancement, whether or not the guidelines expressly prohibit taking the same conduct into account under two separate provisions. (Dissent on the issue of double counting.)

Statutes of conviction: Not specified, but crimes described as conspiracy, Medicaid fraud, Medicaid kickbacks, mail fraud, and unlawful distribution of controlled substances. MOC: trial. Guidelines: §2F1.1, §3B1.1. OL, CH, range not specified. Sentence = 15 years.

17. United States v. White, 903 F.2d 457 (7th Cir. 1990): After escaping from state prison, defendant went on a three-state crime spree that included assault with a knife, kidnapping, rape, and theft. Defendant forced one rape victim to drive him to bank to withdraw money from her mother's account, but victim escaped. Defendant took the car and drove to Washington University, where mother of victim worked. At university, defendant requested help in jump-starting his car and kidnapped the person who agreed to help him, forcing her to drive him out-of-state. When she escaped, he stole her car. Thereafter defendant kidnapped another person, stole his car, and forced him to drive defendant to another city. Defendant used this car to attempt to evade arrest, resulting in a high-speed chase and car crash. Federal charges of kidnapping and interstate transportation of a stolen vehicle were brought against defendant.

Court of appeals upholds enhancement for "more than minimal planning," rejecting defendant's claim that theft of car was not part of a plan but occurred "when the opportunity arose after his deceptive requests to the victim to merely give him a ride." Court, labeling defendant's argument "ridiculous," notes the following facts:

> [T]he theft of the [first] motor vehicle was not merely a whimsical crime, but was a crime committed as part of a planned attempt to flee the St. Louis area. Furthermore, the selection of Washington University as the locale for the theft obviously involved planning on [defendant's] part as he was apprehended with the keys to the car of another Washington University employee (the mother of the girls he had terrorized). In addition, [defendant's] elaborate scheme to avoid apprehension, including the changing from prison garb to a jogging suit, the concealing of a knife until he was ready to use it, having others drive the car so he could hide below window level when necessary, and his requests for rides to different locations in the St. Louis area demonstrate something more than minimal planning on his part.

Court concludes "that this combination of a kidnaping and theft to facilitate an escape and a rather elaborate theft scheme combined to require the conclusion" that "more than minimal planning" was involved.

Statutes of conviction: 18 U.S.C. § 2312 (interstate transportation of a stolen vehicle); 18 U.S.C. § 1201(a)(1) (kidnapping). MOC: plea. Guideline: §2F1.1 (as to § 2312). OL, CH, range, sentence not specified.

18. United States v. Ojo, 916 F.2d 388 (7th Cir. 1990): Defendant tried to open checking account, presenting several false pieces of identification, but was refused because of dissatisfaction with the identification. Defendant then obtained another piece of false identification by providing false social security number and other identifying information.

By presenting false identification and giving false social security number, defendant was thereafter able to open a checking account at a different bank. After arrest for using false social security number with intent to deceive, defendant provided false information to pre-trial services, upon which low bond was set. Trial court enhanced for "more than minimal planning," which at that time required court to add two levels or, if the resulting level was less than ten, to increase the offense level to ten.

Court of appeals affirms finding of "more than minimal planning," rejecting defendant's claim that because she did not select particular banks or employees to mislead and provided random numbers, she engaged in only minimal planning. Court notes that defendant obtained a false identification more than six months prior to using it at the bank at which she opened an account, after her first effort to open an account had failed due to inadequate identification. Court further notes that defendant obtained and used multiple forms of false identification. Court then concludes that the finding of "more than minimal planning" was not clearly erroneous "[b]ecause of the forethought and planning required in obtaining false identification as early as [six months before the crime], the planning and effort required to obtain two false college identification cards, and the effort to obtain another type of false identification . . . after a failed attempt at opening one bank account." Court later in opinion states that defendant's "calculated and programmed scheme of obtaining and using multiple forms of false identification under the same fictitious name, clearly demonstrates 'more than minimal planning.'" Note that defendant had prior conviction for similar offense.

Statute of conviction: 42 U.S.C. § 408(g) (using false social security number with intent to deceive). MOC: plea. Guideline: §2F1.1. OL = 10; CH, range not specified. Sentence = 5 mos.' imprisonment and 5 mos. in community treatment center.

19. United States v. Lennick, 917 F.2d 974 (7th Cir. 1990): Defendant convicted of making false statement to federal agent after local police arrested his business partner, a convicted felon who was involved in the purchase of an assault rifle and suspected of drug trafficking. Partner was charged with felon in possession offense, and rifle was held by police as evidence pending partner's trial. In response to agent's question, defendant falsely reported that defendant was the owner of the gun (when, in fact, defendant's business partner was the true owner). Defendant had earlier obtained a receipt falsely representing that defendant had purchased the gun, and hired attorney who wrote to the police requesting that gun be released to defendant because it belonged to defendant.

Court of appeals upholds enhancement for "more than minimal planning," after extended comparison of case with examples in Application Note 1(f) to §1B1.1 and with decided cases. Although court acknowledges that a number of cases in which the enhancement was applied involved "repeated or complex criminal activity," it cites a number of cases in which the enhancement was also applied even though the facts disclosed "considerably less planning than the previously cited cases." Court concludes that

enhancement was warranted because "[s]imple perjury would not involve the establishment of a 'paper trail' like the one [defendant] created."

Statute of conviction: 18 U.S.C. § 1001 (false statement to the government). MOC: trial. Guideline: §2F1.1. OL, CH, range, sentence not specified.

20. United States v. Phillips, 962 F.2d 739 (7th Cir. 1992): Defendants devised scheme to obtain HUD-insured loans on properties they wanted to renovate and sell as condominiums. Scheme involved using cooperative straw buyers who would then resell the properties to defendants at an increased cost, the repurchase being financed with the HUD-insured loans. Loan documents included false representations of income, indebtedness, and extent of payment of earnest money to the "sellers," the last being documented with bogus cashier's checks and forged promissory notes. A total of $662,920.50 in loans was obtained. Properties were sold by defendants to a third person, who defaulted on the loans, forcing HUD to repurchase the properties for $814,266.68. Properties were then sold at foreclosure sale for $156,000, leaving out-of-pocket loss for HUD of $658,268.68. Trial court imposed enhancement for "more than minimal planning," which was not challenged on appeal.

Statute of conviction: 18 U.S.C. § 1010 (false statements to HUD); 18 U.S.C. § 371 (conspiracy to make false statements). MOC: plea (as to two defendants who challenged their sentences). Guideline: §2F1.1. OL = 18 (includes two-level downward departure based on loss overstating seriousness of offense). CH, range not specified. Sentence = 21 mos. or 24 mos., depending on defendant.

Eighth Circuit

21. United States v. Sutherland, 890 F.2d 1042 (8th Cir. 1989): Defendant and accomplice broke into automatic teller machine, apparently by unlawfully obtaining the combination. Court of appeals affirms finding of "more than minimal planning," concluding it was not an abuse of discretion to determine that these facts demonstrated "more than minimal planning":

> [S]everal months before the offense [defendant] spoke with another employee of the bank who had access to combinations of the automatic teller about robbing the machines, and . . . the day before the offense he called her and obtained the combination to the automatic teller. There was also evidence that [defendant] arranged for a friend to go to the automatic teller and break it open while he waited outside, which would prevent his picture from being taken by the camera in the machine. After the burglary, the money was concealed in a briefcase at another friend's house.

Statute of conviction: 18 U.S.C. § 2113(b) (bank larceny). MOC: plea. Guideline: §2B1.1. OL, CH, range not specified. Sentence = 8 mos.

22. United States v. Hearrin, 892 F.2d 756 (8th Cir. 1990): Defendant, who was regional sales manager for Coca-Cola, and co-defendant, his wife, created fictitious company to receive payments from Coca-Cola over an eight-month period based on bogus requests for payment for promotions, unsalable products, etc. Court of appeals affirms finding of "more than minimal planning," based on creation of fictitious companies, creation of bogus payment requests, establishment of bank account in fictitious name, renting of post office box in fictitious name to receive payments, and the receipt of a large sum of money ($129,404) by means of multiple acts over a period of time (approximately 70 requests for payment) that were not purely opportune. Court rejects defendants' argument that mail fraud inherently involves "more than minimal planning," because activities described above involved more planning than is typical for commission of mail fraud conspiracy (which requires only a single overt act) in a simple form. Court also rejects defendants' argument that "more than minimal planning" is ambiguous and should, under the doctrine of lenity, be construed in favor of the defendant.

Statute of conviction: 18 U.S.C. § 371 (conspiracy to commit mail fraud). MOC: plea. Guideline: §2F1.1. OL, CH, range not specified. Sentence = 4 mos. or 21 mos., depending on defendant.

23. United States v. Werlinger, 894 F.2d 1015 (8th Cir. 1990): Defendant, who was bank teller, was convicted of embezzling $600,000 during the ten years of his employment. Defendant attempted to conceal embezzlement from auditors doing surprise cash audit by asking co-workers to falsify documents. Trial court gave two-point enhancement for "more than minimal planning" and for obstruction. Court of appeals reverses, holding that because concealment is inherent in embezzlement and in "more than minimal planning" enhancement, obstruction enhancement cannot be based upon pre-investigation concealment. (Note that court, without exploring the possible double-counting issue, states: "It is difficult to imagine an embezzler who does not take some affirmative steps to conceal his wrongdoing. Concealment is crucial to the very success of the crime.")

Statute of conviction: 18 U.S.C. § 656 (bank embezzlement). MOC: plea. Guideline: §2B1.1. OL = 12; CH, range not specified. Sentence = 27 mos.

24. United States v. Reyes, 908 F.2d 281 (8th Cir. 1990), cert. denied, 111 S. Ct. 1111 (1991): Defendant convicted of multiple counts of making false statements to the government, being an alien unlawfully present in the United States, and felon-in-possession offense. Defendant had been deported in 1987, illegally re-entered the country, and then, on several occasions, made false representations to the Social Security Administration in an

effort to get a social security card under a false name and made false representations in a passport application. When arrested, defendant was found in possession of false identification cards. Defendant thereafter made false statements to the pretrial services officer and to the magistrate in connection with the bail hearing, and to the INS. A search of a locker rented by defendant yielded a gun, knife, and several pieces of false identification.

Court of appeals upholds enhancement for "more than minimal planning," reciting the following facts:

> [Defendant] did not merely illegally enter this country and attempt to conceal his identity by acquiring one piece of identification. His activities went far beyond what was necessary to commit his offense in its simple form. He acquired at least twelve pieces of false identification from various parts of the country and attempted to obtain two social security numbers under the name of a handicapped person. In the locker at the bus station, agents found special materials useful in acquiring and creating additional false documents. He wrote checks for which there were insufficient funds and abused automatic teller machines, thereby depriving persons of money and property. He was also apparently involved in the selling of controlled substances. He also attempted to conceal some of his offenses by giving false names to law enforcement authorities in order to conceal the fact that he was in the United States illegally.

The court then concluded that it "need not determine the precise minimum threshold for establishing more than minimal planning because whatever it is [defendant] far exceeded it."

Statutes of conviction: Thirteen counts of making false statements, in violation of 18 U.S.C. § 911, § 1001, § 1002, § 1028, § 1542, and 42 U.S.C. § 408(g)(2); 8 U.S.C. § 1326 (alien unlawfully present in U.S.); 18 U.S.C. § 922(g) (felon in possession of firearm); 18 U.S.C. § 1028(a)(3) (possession of false identification). MOC: trial. Guideline: §2F1.1. OL, CH, range not specified. Sentence = 33 mos.

25. United States v. West, 942 F.2d 528 (8th Cir. 1991): Defendant sold adulterated meat with intent to defraud. Court of appeals affirms enhancement for "more than minimal planning," rejecting defendant's claim that the enhancement did not apply because he did not order the unauthorized ingredients, formulate the products, or enter into the contracts to sell the meat. Court states that "[a]lmost any crime that consists of a pattern of activity over a long period of time would qualify" for the enhancement, citing Application Note 1(f) to §1B1.1, and therefore defendant qualified for the enhancement because he was a knowing participant in the fraud for almost two years.

Statutes of conviction: 21 U.S.C. §§ 601(m)(8), 610 (b), 676 (selling adulterated meat food product with intent to defraud). MOC: plea. Guideline: §2F1.1. OL, CH, range not specified. Sentence = 21 mos.

26. United States v. Wilson, 955 F.2d 547 (8th Cir. 1992): Defendants convicted of conspiracy to transport and receive stolen property for engaging in large-scale stolen property ring involving shoplifting and resale of stolen property across several states. Although plea agreement did not take into account enhancement for "more than minimal planning," court imposed the enhancement. One issue on appeal is whether enhancement for "more than minimal planning" constitutes "improper double counting because the both the charge of conspiracy and the nine-level increase based upon the value of the stolen property fully reflect the repetitive nature of their crimes."

Court of appeals holds that enhancement is permissible because "the more-than-minimal-planning adjustment increases the punishment for repeated criminal acts, regardless of the amount stolen." Court rejects the "contention that it may not be imposed unless the defendant engaged in extensive planning, complex criminal activity, or concealment." Court also rejects defendants' argument that enhancement is improper because they were not the planners, stating that the defendants each engaged in "repeated, knowing criminal acts" in carrying out their roles in the conspiracy, and therefore they should receive the enhancement.

Statute of conviction: 18 U.S.C. § 371 (conspiracy to transport and receive stolen property in violation of 18 U.S.C. §§ 2314 and 2315). MOC: plea. Guideline: §2B1.1. OL = 11, 13, or 15, depending on defendant. CH, range not specified. Sentences ranged from 8 to 41 mos., depending on defendant.

Ninth Circuit

27. United States v. Deeb, 944 F.2d 545 (9th Cir. 1991), cert. denied, 112 S. Ct. 1597 (1992): Co-defendant, a bank employee, miscoded and misrouted check for $309,586. Defendant (not clear whether he is also a bank employee) reopened previously inactive bank account into which check was deposited. Another accomplice opened an account under false name in same bank with a check for $309,586, drawn on previously inactive account opened by defendant. Most of funds were withdrawn from accomplice's newly opened account shortly thereafter. Court of appeals concludes that enhancement for "more than minimal planning" was proper because the offense "involved more than 'a single taking accomplished by false book entry," noting that: the co-defendant had miscoded the check; defendant reopened the previously inactive account; another accomplice opened a bank account in a fictitious name and deposited defendant's check; and most of the funds were then withdrawn. The court further found "more than minimal planning" because

[s]ignificant affirmative steps were taken to conceal the offense. The miscoded check was transferred into two separate bank accounts to avoid detection. The second bank account was opened under a fictitious name. The conspirators rehearsed plausible alibis to use if questioned.

Statutes of conviction: 18 U.S.C. § 371 (conspiracy to embezzle bank funds); 18 U.S.C. § 656 (embezzlement by bank employee); 18 U.S.C. § 1344 (bank fraud). MOC: trial. Guideline: §2F1.1. OL, CH, range, sentence not specified.

28. United States v. Ruelas-Armenta, 684 F. Supp. 1048 (C.D. Cal. 1988): Defendant pleaded guilty to one count of possessing Treasury check stolen from the mail. Pursuant to plea agreement, other charges involving possession of other stolen checks were dismissed, but all charges stemmed from search of defendant's car during which a number of stolen checks and false pieces of identification were found. Court states that the "names of the payees on the checks appeared at least once as a name on the identification documents." Court finds "more than minimal planning" because of "[t]he presence of other checks and false identification" found at the time of the arrest.

Statute of conviction: 18 U.S.C. § 1708 (possession of stolen mail). MOC: plea. Guideline: §2B1.1. OL = 10; CH not specified. Range = 6 - 12 mos.; sentence not specified.

29. United States v. Hughes, 775 F. Supp. 348 (E.D. Cal. 1991): Defendant conspired with another to cause three persons to present falsified bank loan applications to a bank in order to obtain four loans, totalling $591,610, for the purchase of homes. Defendant repaid some of the loans and others were secured by collateral the value of which exceeded the loan balance. Rejecting government's argument that the face value of the loans is the "loss," trial court does not increase OL based on "loss," since there was no "intended loss" and no actual or even probable loss and government made no effort to quantify increased risk to bank. Court states "[i]t is . . . agreed that the offense level should be increased by two levels for more than minimal planning."

Statute of conviction: 18 U.S.C. § 371 (conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1014 and § 1344). MOC: not specified. Guideline: §2F1.1. OL = 6. CH, range, sentence not specified.

Tenth Circuit

30. United States v. Westmoreland, 911 F.2d 398 (10th Cir. 1990): Defendant (a truck driver) hijacked his employer's tractor-trailer filled with electronic equipment, stole the

equipment, and abandoned truck and reported it stolen. Trial court enhanced for "more than minimal planning," and court of appeals, in affirming the sentence, notes that the enhancement was not challenged on appeal.

Statute of conviction: 18 U.S.C. § 659 (theft of interstate shipment). MOC: plea. Guideline: §2B1.1. OL, CH, range, sentence not specified.

31. United States v. Johnson, 911 F.2d 403 (10th Cir. 1990), cert. denied, 111 S. Ct. 1004 (1991): Defendant, who was employee of freightway terminal, broke into terminal by cutting off lock (replacing it with different lock) and stole electronic equipment from two tractor-trailers, located at door 18 and door 49. Two days before the theft defendant had handled some of the equipment, thus giving him knowledge of its location. On day of theft, defendant looked for bolt cutters at a flea market, and borrowed a friend's truck, in which the bolt cutters used to cut the lock were found after the theft.

Court of appeals affirms enhancement for "more than minimal planning," reciting the following facts: "(1) advance knowledge was obtained in order to know which two of the fifty trailers had the goods the defendant desired to steal; (2) bolt cutters had to be procured in advance; (3) an alarm system had to be avoided." The court concludes that "more than minimal planning" was established by the following activity:

> [A] plan was formulated and implemented. The plan involved identifying the goods and their location, the necessity for and the obtaining of the necessary tools to gain entry -- not only into the freight terminal but into the trailers, and the eluding of an alarm system which was designed to deter such thefts.

(Note that no other description of the alarm system appears in the opinion.)

Statute of conviction: 18 U.S.C. § 659 (theft of interstate shipment). MOC: trial. Guideline: §2B1.1. OL = 17; CH = III. Range not specified; sentence = 37 mos.

32. United States v. Sanchez, 914 F.2d 206 (10th Cir. 1990): Defendant convicted of credit card fraud for scheme in which defendant's brother and brother's girlfriend, both employees of Postal Service, stole credit cards from the mail and gave them to family and friends, including defendant. Defendant used one card fifteen times in one month, forging the true owner's signature each time, at fifteen different stores. Relying on "repeated acts over time" portion of Application Note 1(f) to §1B1.1, court of appeals affirms enhancement for "more than minimal planning," reciting the following facts: "[Defendant] personally used the stolen card on fifteen separate occasions at as many locations over a period of approximately one month. Each purchase involved several calculated falsehoods including a forged signature."

Statute of conviction: 18 U.S.C. § 1029 (credit card fraud). MOC: plea. Guideline: §2F1.1. OL, CH, range, sentence not specified.

33. United States v. Smith, 951 F.2d 1164 (10th Cir. 1991): Defendant, who constructed and sold new homes, aided and abetted submission of false statements to bank by falsely representing on six occasions that down payments had been made or amounts of down payments on property he sold, thereby allowing customers to obtain bank loans. Loans totaled $440,896, but no customer had defaulted on a loan as of the time of sentencing. Trial court enhanced for "more than minimal planning," which was not challenged on appeal.

Statutes of conviction: 18 U.S.C. §§ 2, 1014 (aiding and abetting the submission of false statements to a bank). MOC: apparently plea. MOC: plea. Guideline: §2F1.1. OL = 19; CH = I. Range = 30 - 37 mos.; sentence = 24 mos. (due to two-year statutory maximum; sentence reversed on appeal due to incorrect determination of loss).

Eleventh Circuit

34. United States v. Scroggins, 880 F.2d 1204 (11th Cir. 1989), cert. denied, 494 U.S. 1083 (1990): Defendant committed series of thefts from self-service vending machines. Court of appeals, citing Application Note 1(f) to §1B1.1, upholds finding that "more than minimal planning" was involved based on multiple acts (nineteen thefts).

Statute of conviction: 18 U.S.C. § 641 (theft of government property). MOC: plea. Guideline: §2B1.1. OL = 11; CH = III. Range = 12 - 18 mos.; sentence = 12 mos.

District of Columbia Circuit

35. United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990), rev'd on other grounds, 111 S. Ct. 2182 (1991): Defendant pleaded guilty to theft of government funds, making false claims, and income tax evasion arising out of scheme to use position as manager to authorize payments, purportedly for travel by a third party, and to cause them to be improperly diverted to him. Trial court departed upward based on duration of crime, significant disruption of government functions, and fact that tax evasion concealed his theft of government funds. Court of appeals affirms sentence, approving both the factors relied upon by the trial court and the extent of the departure.

Court of appeals rejects defendant's argument that "duration of crime" and concealment are already counted in "more than minimal planning," noting that "duration" relates to execution of, not planning for, the offense (as does "more than minimal planning"). Despite defendant's citation of the "repeated acts over time" portion of Application Note

1(f) to §1B1.1, court states that trial court's decision "was based not simply on planning but upon the prolonged and repetitive nature of [defendant's] crime." Citing the "more planning than is typical for commission of the offense in simple form" portion of the Application Note, the court concludes that the trial court

> properly observed that in incorporating a "more than minimal planning" adjustment into the Guidelines, the Commission did not consider "the number of years and the amount of fraudulent transactions executed" by a defendant. [Defendant's] crime involved 53 separate acts of theft over a six-year period. The trial judge could reasonably have concluded that the duration of execution, then, warranted enhancement. . . . [T]he trial court's finding . . . was not dependent upon the amount of planning involved in the crime, and thus was not unreasonable.

As to concealment, court of appeals states that the departure was based upon the tax evasion, not on

> the fact that he used other elaborate methods to conceal his crimes. Therefore, while the Guidelines discuss an adjustment for "more than minimal planning" for theft of government funds and false claims, this applies only to the planning of those offenses. [Defendant's] evasion of taxes to conceal his embezzlement scheme constituted a separate basis for an upward departure, distinct from the fact that his activities were well planned.

Statutes of conviction: 18 U.S.C. § 641 (theft of government funds); 18 U.S.C. § 287 (making false claims against government); 26 U.S.C. § 7201 (tax evasion). MOC: plea. Guidelines: Not fully specified, but presumably §2B1.1; §2F1.1; §2T1.1; §5K2.0; §5K2.7; §5K2.9. OL = 19; CH = I. Range = 30 - 37 mos.; sentence = 60 mos.

SUMMARY OF CASES BY CIRCUIT RELATING TO ABUSE OF TRUST ADJUSTMENT

First Circuit

1. United States v. Tardiff, 969 F.2d 1283 (1st Cir. 1992): The defendant acted as an investment counselor and mismanaged funds entrusted to him. Ruling that any sort of money manager or financial advisor is, by definition, a person in a position of private trust, the First Circuit affirmed the adjustment for abuse of a position of trust. The First Circuit agreed with the Ninth Circuit's holding that "the primary trait that distinguishes a person in a position of trust from one who is not is the extent to which the position provides the freedom to commit a difficult-to-detect wrong." See United States v. Hill, 915 F.2d 502, 506 (9th Cir. 1990).

2. United States v. Rehal, 940 F.2d 1 (1st Cir. 1990): A police officer, convicted of cocaine distribution charges, received the adjustment for abuse of a position of trust. At sentencing, the district court found that the defendant "was charged with enforcement of law [but] used his intelligence, and knowledge as a police officer . . . to conceal his own illegal activities . . . and to suborn other officers into violation of their duties." Id., at 5. On appeal, the court held that the enhancement was proper because the defendant used his familiarity with narcotics investigations to further his own criminal activity.

Second Circuit

3. United States v. Castagnet, 936 F.2d 57 (2d Cir. 1991): A former airline agent, who used a computer access code to issue tickets to himself when the counters were not staffed, received an enhancement for abuse of a position of trust. The court of appeals, in affirming the sentence, held that the relationship between the defendant and the airline provided the ability to commit the crime and the circumstances of the criminal activity (i.e., when the ticket counter was closed) allowed the defendant to commit the acts without observation and to leave the area before the crime was discovered.

4. United States v. Young, 932 F.2d 1035 (2d Cir. 1991): The defendant, while working as an informant for the DEA and United States Customs Service, purchased counterfeit government identification cards as part of an investigation. The defendant kept some of the cards, used them for his own criminal activity, and was then charged with impersonating a federal officer. The §3B1.3 enhancement was upheld on appeal because the government

placed trust in the defendant to work as an informant and the defendant used his position to further the commission of the offense.

5. United States v. McElroy, 910 F.2d 1016 (2d Cir. 1990): The defendants, one the CEO of a bank and the other the president of another bank, engaged in a reciprocal loan arrangement whereby the defendants floated loans to each other without going through the proper filing requirements. The Second Circuit rejected the defendants' argument that because 18 U.S.C. § 656 applies only to persons connected with a bank, it already accounts for an abuse of trust. The court agreed that this statute applies only to those involved with a bank, but reasoned that because every bank employee does not hold a position of trust, abuse of trust is not an element of the offense. The court also held that, based on the facts of the case, it was clear that the defendants used their positions in their respective banks to further their criminal activities.

6. United States v. Parker, 903 F.2d 91 (2d Cir.), cert. denied, 111 S. Ct. 196 (1990): A security guard facilitated the robbery of payroll trucks by using his knowledge of the routes and delivery times of the trucks. The defendant appealed the increase for abuse of a position of trust, claiming that any employee could have been aware of this information. The court of appeals held that the district court did not err when it found that the defendant's employment as a security guard facilitated the offense.

Third Circuit

7. United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992): Defendant, a bank vice-president, was responsible for balancing the bank's suspense account. The defendant embezzled approximately $94,000 from the account over a four-year period. The district court refused to apply §3B1.3 because it found that bank embezzlement by definition suggests breach of trust. The Third Circuit reversed, concluding that the requisite nexus between the position of trust the defendant held and the commission and concealment of the embezzlement was proved. The defendant alone was responsible for balancing the suspense account and the defendant was able to carry out the crime over a four-year period.

8. United States v. Georgiadis, 933 F.2d 1219 (3d Cir. 1991): A bank's assistant vice president for its mortgage department diverted more than $280,000 in closing costs over a period of four years by depositing these monies into his own accounts at the bank and altering the settlement sheets to avoid detection. The Third Circuit rejected the defendant's argument that an abuse of trust was factored into the offense level of embezzlement, and held that, although the crime of embezzlement requires a breach of a trust, "an abuse of trust under the Guidelines requires something more." Id. at 1225. The court stated that in

order to find an abuse of trust, a court must determine whether "the breach of trust, if any, substantially facilitated the commission or concealment of the crime." Id. at 1226.

9. United States v. McMillen, 917 F.2d 773 (3d Cir. 1990): A branch manager of a federal savings and loan completed fraudulent loan applications, approved them, and deposited the proceeds into an account for his own benefit. In a government appeal of the district court's refusal to order the §3B1.3 enhancement, the Third Circuit reversed the decision of the district court and held that the abuse of trust enhancement should have been given. This defendant was the branch manager, acted in a supervisory capacity, and had the authority to perform most acts without consultation with others. Furthermore, the fact that the defendant's position enabled him to commit these crimes without detection was not disputed by either party.

10. United States v. Hogan, CR No. 92-128 (E.D. Pa. July 27, 1992): A revenue officer of the Internal Revenue Service collected cash payments from taxpayers and embezzled a total of $59,845, by failing to use receipts provided by the IRS to account for cash payments. The district court ordered the abuse of trust enhancement, noting that "[a]n abuse of a position of trust involves conduct that is more culpable than taking advantage of an opportunity." Id. This defendant created the opportunity for his criminal activity when he requested payments only in cash, and made detection more difficult by issuing fraudulent receipts.

11. United States v. Craddock, CR No. 91-00424-10 (E.D. Pa. Mar. 24, 1992): Western Union tellers committed credit card and wire transfer fraud by forgoing the necessary identification requirements for the other members of the conspiracy who attempted to collect a wire transfer of money. Defendants received the adjustment for abuse of a position of trust. Unlike "ordinary bank tellers" who are required to balance accounts at the end of the day, making skimming quite apparent, these criminal activities were impossible to detect because they accounted for the money received and paid.

Fourth Circuit

12. United States v. Helton, 953 F.2d 867 (4th Cir. 1992): The government appealed the district court's finding that the defendant, who was responsible for issuing travelers' checks and cash to other employees and embezzled over $20,000 in travelers' checks in one year, held a position analogous to a bank teller and therefore, §3B1.3 did not apply. The court of appeals affirmed, concluding that the facts that the defendant signed her own name and continued the criminal activity for such a long time illustrate that she did not go to any

lengths to conceal her crimes, which would have been detected but for the ineptness of her supervisors.

Fifth Circuit

13. United States v. Siciliano, 953 F.2d 939 (5th Cir. 1992): Defendant, a sheriff's deputy serving as a prison guard, sold to an undercover agent an ounce of marijuana that he had previously smuggled into the prison. At the same time, the defendant smuggled into the prison marijuana given him by the agent. The Fifth Circuit affirmed application of §3B1.3 to defendant for abusing his position of trust in his capacity of a deputy sheriff, and affirmed an upward departure for placing the security of the prison at risk.

14. United States v. Brown, 941 F.2d 1300 (5th Cir. 1991), cert. denied, 112 S. Ct. 648 (1991): A corrections officer became involved in a drug distribution scheme in the prison where he was employed. The court of appeals held that a corrections officer is in a position of trust because the public places a great deal of trust in corrections officers and expects that they will not participate in criminal schemes with the inmates.

15. United States v. Ehrlich, 902 F.2d 327 (5th Cir. 1990), cert. denied, 111 S. Ct. 788 (1991): A bank loan clerk, who was responsible for loan balancing, diverted more than $3,500 from the general ledger accounts to her personal checking account. The Fifth Circuit affirmed the enhancement and rejected the defendant's assertion that she was an ordinary bank teller. The court held that the defendant's position gave her specialized knowledge and information about the accounting system, unlike other employees. Additionally, the court held that the enhancement was appropriate because she alone was responsible for a large account, a task assigned only to the most responsible and trustworthy employees.

Sixth Circuit

16. United States v. Muxlow, 759 F. Supp. 1258 (E.D. Mich. 1991): A uniformed police officer who staged a seizure of drugs, which she then sold, was found to have abused a position of trust in committing the drug offense.

Seventh Circuit

17. United States v. Kosth, 943 F.2d 798 (7th Cir. 1991): A holder of a merchant credit account at a bank, who submitted false customer invoices for nonexistent purchases with stolen credit card numbers, was held not to be in a position of trust with the bank. The defendant's arrangement with bank was a standard commercial relationship; no special private trust existed.

18. United States v. Odoms, No. 87 CR 915 (N.D. Ill. Aug. 12, 1992): The district court held that §3B1.3 applies to a mail clerk convicted of stealing food stamps. The court also held that the Commission's suggestion that an "ordinary bank teller" does not abuse a position of trust is contrary to §3B1.3 and ought to be disregarded. The district court stated that the distinguishing characteristic of a defendant who qualifies for an "abuse of trust" enhancement is access to or authority over valuable things. Therefore, defendants, like Odoms, who use such access or authority to commit crimes are properly subject to the enhancement.

19. United States v. Crossey, No. 91 CR 650 (N.D. Ill. Jan. 17, 1992): A bank vice president embezzled more than $329,000 in unauthorized loans and lines of credit. The district court gave the enhancement under §3B1.3, rejecting the defendant's argument that she was like the ordinary bank teller. The court stated that "unlike the ordinary bank teller, this defendant was able to obtain bank statements and interest statements that would have been sent to bank customers and doctor those statements so that they would not reveal her theft." The court also rejected the defendant's argument that the enhancement is factored into the statute of conviction (18 U.S.C. § 656) because the statute only applies to bank employees with authority. The court, relying on Ehrlich, supra, stated that abuse of trust is not an element of embezzlement, and further noted that §2B1.1 focuses on the amount taken and not the status of the individual doing the taking.

20. United States v. Arrington, 765 F. Supp. 945 (N.D. Ill. May 29, 1991): The defendant, a casual mail handler whose employment duties included sorting, processing, and stamping mail, was held not to be in a position of trust. The defendant had no level of special responsibility and no more access to mail than any other employee.

21. United States v. Berkowitz, 712 F. Supp. 707 (N.D. Ill. 1989), rev'd and remanded on other grounds, 927 F.2d 1376 (7th Cir. 1991): A defendant, who stole documents from United States Attorney's office provided as discovery for his pending tax and mail fraud case, "took advantage of an opportunity" but did not abuse position of private trust.

22. United States v. Brinson, No. 90 Cr 253-1, 2 (N.D. Ill. Oct. 30, 1991): The defendants, a director and an officer of a closely held corporation, were convicted of conspiracy to defraud the United States by means of filing false corporate tax returns. The defendants personally received payments in the form of cashier's checks for corporate accounts. The district court did not enhance under §3B1.3 because it held that their positions as officers of a closely held corporation provided no greater opportunity than that available to officers of any other corporation. Further, the fact that they were officers did not facilitate the commission of the offense.

23. United States v. Nettles, No. 91 CR 546 (N.D. Ill. Feb. 20, 1991): A postal truck driver embezzled registered mail. The district court, relying on Arrington, rejected the government's argument that the defendant was in a position of public trust, and refused to enhance the defendant's sentence for abuse of a position of trust. The court asserted that the defendant's job as a postal truck driver was not different from a casual mailhandler.

Eighth Circuit

24. United States v. Lange, 918 F.2d 707 (8th Cir. 1990): A postal employee who had direct access to express and certified mail as a substitute handler one day a week was held to be in a position of trust. The court asserted that "[p]ostal employees in general did not have the same opportunity as Lange to steal from this type of mail and conceal the crime, and the kinds of mail involved are especially sensitive and probably more likely to contain things of value than mail in general." Id. at 710.

Ninth Circuit

25. United States v. Ajiboye, 961 F.2d 892 (9th Cir. 1992): The defendant, a former mail carrier convicted of theft and possession of stolen mail, argued on appeal that the enhancement under §3B1.3 was improper. The court of appeals upheld the enhancement because the public trusts the Postal Service to safely deliver mail and the Postal Service places corresponding faith in those it hires. Further, the mail carrier, unlike the bank teller, performs his duties without surveillance or a daily accounting of the delivery of mail. "[A] Postal Service employee who delivers ordinary mail is in a quintessential position of trust."

26. United States v. Christiansen, 958 F.2d 285 (9th Cir. 1992): Defendant, a credit union manager, embezzled more than $96,000 from the credit union he managed. The Ninth Circuit affirmed the abuse of trust enhancement because defendant's position allowed access to large amounts of cash and made it possible for the defendant to conceal the theft for an extended period of time.

27. United States v. Pascucci, 943 F.2d 1032 (9th Cir. 1991): A United States Marshal used his affiliation with the Marshals Service to obtain personal information about someone, whom he then extorted by using that information. The court held that the defendant would not have found out this information but for his connection with the Marshals Service and, because of that, the enhancement was proper.

28. United States v. Foreman, 926 F.2d 792 (9th Cir. 1990): The defendant, a police officer, was stopped in Los Angeles International Airport after the airport officers observed what they considered suspicious behavior. When asked for identification, the defendant displayed her badge and police identification. A search of the defendant revealed that she possessed cocaine. At sentencing, the district court adjusted for an abuse of a position of trust, stating that the defendant had used her position as a police officer to prevent the investigation from continuing. The court of appeals affirmed the sentence and held that the defendant used her employment as a police officer, a position of public trust, to attempt to conceal criminal activity.

29. United States v. Dailey, 920 F.2d 937 (9th Cir. 1990): The defendant, a major shareholder and bank director who ordered subordinate loan officers to make fraudulent loans on the basis of his representations, was held to have abused a position of trust. The Ninth Circuit asserted that "but for his position in the bank, the loan officers would not have made the loans at his direction." Id. at 939.

30. United States v. Hill, 915 F.2d 502 (9th Cir. 1990): The defendant, a truck driver who transported household goods for families that were relocating outside of the country, was convicted of conspiracy to steal goods entrusted to him and received the adjustment under §3B1.3. The court of appeals upheld the enhancement, concluding that a relationship of trust existed because the defendant held exclusive control over the goods for a long period of time and worked without supervision, and because detection of the criminal acts of the defendant could not be made until the families inspected the goods, usually after some time had passed.

31. United States v. Drabeck, 905 F.2d 1304 (9th Cir. 1990): The defendant, a bank janitor who had keys to the bank, was able to enter the bank when no other employees were present and had access to areas not open to the public. The court enhanced the sentence under §3B1.3, finding that the defendant occupied a position of trust, based on the lack of supervision of the defendant and the other circumstances of the job. Both the district court and the court of appeals rejected the defendant's argument that the adjustment was inapplicable because a janitor had even less of a fiduciary duty than a bank teller.

Tenth Circuit

32. United States v. Chimal, 976 F.2d 608 (10th Cir. 1992): Defendant, a comptroller at an inn, was convicted of embezzlement. As comptroller, defendant was responsible for receiving vendors' checks, billing and receiving payments from groups staying at the inn, overseeing others employed in the accounting office, and occasionally cashing checks for the guests. The Tenth Circuit Court of Appeals affirmed application of §3B1.3 because

defendant essentially had complete control over the accounting department, rarely had to report her activities to a superior, and had complete access to the vendor checks. Further, defendant's position enabled her to alter deposit slips without arousing suspicion.

33. United States v. Williams, 966 F.2d 555 (10th Cir. 1992): A military pay account technician was convicted of embezzling public money by manipulating an automated pay system and issuing checks to his friend. The Tenth Circuit affirmed application of §3B1.3 because defendant had greater authority and greater access to the master pay military accounts than line technicians, which allowed him to circumvent the system of checks and balances.

34. United States v. Zamarripa, 905 F.2d 337 (10th Cir. 1990): A baby sitter convicted of numerous counts of abusive sexual contact was not given an enhancement for abuse of trust. The court of appeals concluded that §3B1.3 should have been applied in this situation because "[a] babysitter is in a position of trust, and this position certainly enables him to commit a sexual crime more easily than the man on the street." Id., at 340.

Eleventh Circuit

35. United States v. Milligan, 958 F.2d 345 (11th Cir. 1992): Defendant, employed as a post office clerk, misappropriated postal funds by issuing receipts that did not appear on the accounting form generated by the computer, and keeping the money involved in those transactions. The Eleventh Circuit affirmed the enhancement because, although defendant's "position was non-supervisory and involved a visible work station at a public counter, the degree of authority [defendant] had indicates a position of trust that enabled him to facilitate both the commission and concealment of the offense by abuse of his position." Id. at 352. The court distinguished the defendant's position from that of an ordinary bank teller on the grounds that the defendant's work was infrequently monitored and he had access to the computer system.

36. United States v. Yount, 960 F.2d 955 (11th Cir. 1992): Defendant, vice president and trust officer for a bank, who misappropriated for his own use approximately $445,000 from trust accounts held by elderly people, received the enhancement under §3B1.3.

District of Columbia Circuit

no cases

SUMMARIES OF CASES
Departures -- §2B1.1; §2F1.1

A. Synopsis of Relevant Case Law on Upward Departures, By Circuit

First Circuit

1. United States v. Scott, 915 F.2d 774 (1st Cir. 1990): Defendant convicted of making false statements in passport application, for which he applied in order to escape arrest for child molestation. Defendant at the time was on parole for sexual battery, and acquired various pieces of identification, such as a driver's license, in a false name (the name of a real person who had died many years earlier) in order to be able to obtain the passport. Trial court departed upward by 15 months because of the record of deception in carrying out the crime and because the dollar loss did not capture the seriousness of the offense. Court of appeals upholds both the reasons for and the extent of the departure, citing Application Note 9 to §2F1.1, that departure might be appropriate when the primary objective of the fraud was nonmonetary.

Statute of conviction: 18 U.S.C. § 1001 (false statement to government). MOC: plea. Guidelines: §2F1.1; §5K2.0. OL, CH not specified. Range = 15 - 21 mos.; sentence = 36 mos.

2. United States v. Harotunian, 920 F.2d 1040 (1st Cir. 1990): Comptroller of company embezzled $11 million by writing checks to himself. Trial court departed upward a net of two offense levels based on the amount of the loss. (At that time the loss table stopped at $5 million.) Court of appeals upholds both the reason for and the extent of the departure, characterizing the "massive extent of the embezzlement" as "unusual enough to create a 'meaningful atypicality,'" and thus "remov[e it]from the heartland."

Statute of conviction: 18 U.S.C. § 2314 (interstate transportation of stolen property). MOC: plea. Guidelines: §2B1.1; §5K2.0. OL = 19; CH = I. Range = 30 - 37 mos.; sentence = 46 mos. (represents a two-level reduction for substantial assistance and four-level increase for amount of "loss").

Second Circuit

3. United States v. Bryser, 954 F.2d 79 (2d Cir. 1992): Defendants bought armored car company in order to steal money with which their customers entrusted them. Approximately $3.7 million was taken in a staged heist of defendants' premises. Trial court departed

upward five offense levels due to defendants' refusal to return stolen money. Court of appeals affirms the decision to depart for that reason, but remands to allow defendants to introduce evidence that they no longer had the money. Court, relying on Valle, infra, concludes that "the Sentencing Commission did not give adequate consideration to the issue of encouraging defendants to return stolen money prior to their release from prison," and therefore departure was permissible. Court notes that there is "little incentive in the Guidelines for defendants to return" stolen property before their release, in that returning the money would not result in a reduction of offense level (although it might influence the position of the sentence within the range).

Statutes of conviction: 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 659 (theft from interstate shipment); 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud). MOC: trial. Guidelines: not fully specified; §5K2.0. OL, CH, range not specified. Sentence = 78, 97, or 120 mos., depending on defendant (represents upward departure of five levels).

Third Circuit

4. United States v. Chiarelli, 898 F.2d 373 (3d Cir. 1990): Defendants convicted of conspiring to receive stolen property for scheme involving theft of insured property (valuable antique guns) from bank and effort to "sell" it back to the insurer, culminating in high-speed chase and capture of defendants. Trial court departed upward because of danger caused by chase, magnitude of theft, and defendants' association with thieves. Court of appeals holds that neither amount of loss ($1 million) nor association with thieves was a basis for departure because amount already accounted for in guideline range and receiving stolen property inherently involves association with thieves. Court approves reliance on high-speed chase, provided there was adequate proof of each defendant's responsibility for the chase. (On latter point, court affirms as to two defendants and reverses as to a third.) Court of appeals also rejects one defendant's argument that recovery of property is a basis for downward departure.

Statutes of conviction: Not specified by number but described as conspiracy to receive stolen property and conspiracy to transport stolen property in interstate commerce, and receiving stolen property (probably 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 2314 (transportation of stolen property); 18 U.S.C. § 2315 (receipt of stolen goods)). MOC: trial. Guidelines: §2B1.2; §5K2.14. OL = 14, 16, or 18, depending on defendant; CH = I. Range = 15-21 mos., 21-27 mos., or 27-33 mos., depending on defendant; sentence = 60 mos. (reversed and remanded due to reliance on improper factors).

5. United States v. Astorri, 923 F.2d 1052 (3d Cir.), cert. denied, 112 S. Ct. 444 (1991): Defendant convicted of wire fraud and income tax evasion for Ponzi scheme involving investments, whereby victims lost life savings to support defendant's extravagant lifestyle.

Trial court departed upward by two offense levels because of psychological harm to victims, who were elderly and who lost retirement or education funds or were forced to sell their home. Court of appeals upholds both reason for and extent of departure. Dissent on issue of departure concluding that finding of "extreme psychological injury" was "clearly erroneous" in that there was no reliable evidence of such injury. Dissent believes that trial court confused vulnerability of the victims and amount of loss with psychological injury, and that impact of loss on victims is already taken into account in the guidelines in the adjustment for the amount of loss.

Statutes of conviction: 18 U.S.C. § 1343 (wire fraud); 26 U.S.C. § 7201 (tax evasion). MOC: plea. Guidelines: §2F1.1; §2T1.1; §5K2.3. OL = 23 (includes two-level upward departure); CH not specified. Range = 46 - 57 mos. (includes two-level upward departure); sentence = 54 mos.

6. United States v. Kopp, 951 F.2d 521 (3d Cir. 1992): Defendant convicted of making false statements in loan applications in order to qualify for loan. Trial court rejected government's request, premised on Application Note 10 to §2F1.1, to grant upward departure based on amount of loss ($13.75 million, which represents full amount of loan, not actual loss to bank). Loss table for guideline then applicable stopped at $5 million. Court of appeals reverses determination of "loss," holding that only actual loss or intended loss (if greater) may be counted in determining the offense level. Court, however, remands "to determine whether the properly calculated 'loss' significantly over- or understates the gravity of the crime, and therefore whether departure from the normal sentencing range is appropriate."

Statute of conviction: 18 U.S.C. § 1344 (conspiracy to commit bank fraud; bank fraud). MOC: plea. Guideline: §2F1.1. OL = 21; CH = I. Range = 30 - 37 mos.; sentence = 33 mos. (reversed).

Fourth Circuit

7. United States v. Palinkas, 938 F.2d 456 (4th Cir. 1991): Elaborate scheme to fraudulently obtain loans pursuant to line of credit based on fake accounts receivable. Trial court departs upward by 14 months for one defendant based on amount of loss (net loss of $32 million), duration of the scheme (approximately one year), and sophistication of the crime. Court of appeals approves both reasons for and extent of departure, rejecting defendant's claim that enhancements for role in the offense and/or more than minimal planning already take into account the factors upon which the trial court relied in departing. Court of appeals states that "more than minimal planning" refers to planning for the crime, not the duration of the execution of the crime. Court further notes that degree of sophistication of this offense (citing commentary to §2F1.1) was exceptional because it

involved such acts as the creation of dummy supplier and buyer corporations, the development of a complex computer program to "document" the fake accounts receivable, and the counterfeiting of checks and check stubs to "document" payment of invoices.

Statutes of conviction: 18 U.S.C. § 371 (conspiracy to commit wire fraud and to transport fraudulently obtained money); 18 U.S.C. § 2314 (transporting fraudulently obtained money). MOC: plea. Guidelines: §2F1.1. OL = 17 or 21, depending on defendant; CH not specified. Range = 24 - 30 mos., or 37 - 46 mos., depending on defendant; sentence = 24 or 60 mos., depending on defendant.

Fifth Circuit

8. United States v. Roberson, 872 F.2d 597 (5th Cir.), cert. denied 493 U.S. 861 (1989): Defendant convicted of fraudulent use of credit card belonging to a roommate who several days prior to the use of the credit card died under circumstances causing defendant to fear prosecution for murdering the roommate. Defendant used credit card during period he was driving around with roommate's body in the trunk of his car; shortly thereafter, defendant disposed of body by dousing it with diesel fluid and igniting it. Defendant then fled, purchasing airline ticket with roommate's credit card. After apprehension, state authorities twice sought, unsuccessfully, murder charges against defendant for death of roommate. Ultimately, defendant charged in state court with abuse of a corpse (felony), and in federal court with credit card fraud. Court of appeals upholds upward departure of 83 months because abuse of corpse was "extreme conduct" that could be taken into account in sentencing for the credit card fraud, and because defendant's criminal history category did not adequately reflect his criminal record.

A fair amount of the argument dealt with whether the "extreme conduct" (burning of the corpse) had to be related to the offense of conviction (credit card fraud). The court of appeals concluded that the extreme conduct did not have to be so related and that, even if it did, defendant's conduct was so related because "[c]oncealing and burning the body, refusing to report the death, and using the credit card after [the roommate's] death are all acts and omissions occurring during Roberson's abuse of an access card." The court further noted that the conduct could be considered in determining the range and whether to depart even though it did not constitute elements of the offense of abuse of an access card, relying on the commentary to §1B1.3 (to the effect that the spectrum of information that may be considered at sentencing is broader than the spectrum that may be considered in determining the range). The court further concluded that §5K2.8 did not require a nexus between the victim of the "extreme conduct" and the offense of conviction.

Statute of conviction: Not specified, but probably 18 U.S.C. § 1029 (credit card fraud). MOC: trial. Guidelines: §2F1.1; §5K2.8. OL = 12; CH = VI. Range = 30 - 37 mos.; sentence = 120 mos.

9. United States v. Campbell, 878 F.2d 164 (5th Cir. 1989): Defendant convicted of mail fraud and conspiracy to commit mail fraud for selling sales kits to persons but never delivering the goods. Trial court departed upward by 39 months "due to the magnitude of this offense directed at numerous unsuspecting victims." Court of appeals holds departure unreasonable, reverses, and remands for resentencing.

Court notes that certain aspects of the magnitude of the offense (amount of loss, number of victims) were already accounted for in determining the offense level, and "[t]hat that factor was not present to a degree substantially in excess of that ordinarily involved in a mail fraud conviction." Court concludes, however, that it is "unsatisfied from the reasons advanced by the district court that Campbell's offense warranted such an extreme departure," and that it "cannot say that the extent of the district court's departure was reasonable." (Thus, it is not clear whether the reasons for the departure or the extent of the departure or both account for the reversal.)

Statutes of conviction: 18 U.S.C. § 371 (conspiracy to commit mail fraud); 18 U.S.C. § 1341 (mail fraud). MOC: plea. Guideline: §2F1.1. OL = 14; CH = I. Range = 15 - 21 mos.; sentence = 60 mos.

10. United States v. Garcia, 900 F.2d 45 (5th Cir. 1990): Defendant convicted of theft of mail by postal employee for stealing money from greeting cards and disposing of damaged mail rather than delivering it. Trial court departed upward from OL 6 to OL 10 because of the incalculability of the loss due to the volume of mail involved (approximately 950 pieces), and the unusual degree of disruption of a government function. Court of appeals upholds both reasons for and extent of departure.

Court rejects defendant's arguments that guidelines take into account volume of mail by requiring focus on monetary loss, and that government was responsible for incalculability of monetary loss because it failed to inventory the contents of the mail stolen. Court reasons that it would be "unreasonable and unduly burdensome" to require the government to conduct such an inventory. Court further concludes that unusual degree of disruption of government function was demonstrated by testimony that defendant's theft was the largest volume of mail the investigator had seen stolen by a postal employee in twenty years of service, and by fact that some mail was discarded.

Statute of conviction: 18 U.S.C. § 1709 (theft of mail by postal employee). MOC: plea. Guidelines: §2B1.1; §5K2.5; §5K2.7. OL = 6; CH = I. Range = 0 - 6 mos.; sentence = 8 mos.

Sixth Circuit

11. United States v. Benskin, 926 F.2d 562 (6th Cir. 1991): Defendant posed as securities broker and bilked 600 private citizens of $3.8 million in retirement and college funds. Trial court departed upward by 27 months based on psychological harm to victims and duration and number of acts. Court of appeals upholds both reasons for and extent of departure. Court states that "the psychological harm inflicted on these investors (including disabled and elderly individuals) is immeasurable." Court further notes that "more than minimal planning" does not take into account duration and number of acts because duration and number of acts relate to execution of the offense, not planning for the offense. (Note that it is not clear whether the defendant received an enhancement for either more than minimal planning or abuse of trust.)

Statutes of conviction: 18 U.S.C. § 13- (mail fraud); 15 U.S.C. § 77q (securities fraud). MOC: plea. Guidelines: §2F1.1; §5K_.0. OL = 18; CH = I. Range = 27 - 33 mos.; sentence = 60 mos. (Defendant also received consecutive sentence of five years' imprisonment on non-guidelines counts.)

Seventh Circuit

12. United States v. Berkowitz, 927 F.2d 1376 (7th Cir.), cert. denied, 112 S. Ct. 141 (1991): Defendant charged with tax counts asked government to review documents in discovery, then stole boxes of the evidence; he was then charged with obstruction and theft. Trial court departed upward from CH I to CH III because of inadequacy of criminal history score, given that defendant was facing trial on tax counts at time of his offense. Court of appeals upholds both reason for and extent of departure, relying on §4A1.3(d).

Statutes of conviction: 18 U.S.C. § 641 (theft of government property); 18 U.S.C. § 1503 (obstruction of justice). MOC: trial. Guidelines: §2B1.1; §4A1.3. OL, range, not specified. CH = I (court departed to CH III). Sentence = 63 mos.

13. United States v. Boula, 932 F.2d 651 (7th Cir. 1991): Ponzi scheme involving real estate investments, $7 million in loss, and 3,000 victims. Trial court departed upward by ten offense levels based on extent of planning, amount of loss, and number of victims. Court of appeals holds that neither amount of loss nor number of victims is valid basis for upward departure because this crime was "not of a scale unknown to the Commission when setting up the Guidelines," and because number of victims is accounted for in the loss table, which the Commission determined would control instead of the number of victims. Court holds that departure based on extent of planning was proper based on Application Note 1 to §2F1.1 (prior to November 1989 revisions), that departure was allowed if there was more

than minimal planning and more than one victim. Court further holds that extent of departure was unreasonable because based in part on improper factors.

Statute of conviction: 18 U.S.C. § 1341 (mail fraud). MOC: plea. Guidelines: §2F1.1; §5K2.0 (pre-November 1989 revisions). OL = 21; CH not specified. Range = 37 - 46 mos.; sentence = 108 mos.

Eighth Circuit

14. United States v. Fousek, 912 F.2d 979 (8th Cir. 1990): Defendant was a bankruptcy trustee who embezzled funds from estates of bankrupts. Trial court, after enhancing for more than minimal planning and abuse of trust, departed upward by 18 months because of defendant's position, relying on Application Note 9 to §2F1.1, that loss does not always capture seriousness of the offense and that departure may be warranted when offense caused loss of confidence in an important institution. Court of appeals upholds both the reason for and the extent of the departure, reasoning that the guidelines do not take into consideration embezzlement by a trustee and that "embezzlement by a bankruptcy trustee is atypical of the embezzlement contemplated by the Sentencing Commission." Court of appeals specifically notes that defendant did not challenge the increase for abuse of trust, and implies that defendant's "double-counting" argument might be valid if he had challenged the enhancement for abuse of trust.

Statute of conviction: 18 U.S.C. § 153 (embezzlement by bankruptcy trustee). MOC: plea. Guidelines: §2B1.1; §5K2.0. OL = 13; CH not specified. Range = 12 - 18 mos.; sentence = 36 mos.

15. United States v. Perkins, 929 F.2d 436 (8th Cir. 1991): Defendant convicted of wire and credit card fraud involving use of false identities to open accounts and use of bad checks (in the name of John E. Baker) to make some payments on these accounts. Defendant had fifteen-year history of theft and forgery, involving propensity to appropriate other people's identities, including that of John E. Baker, whose credit rating and academic history were destroyed by defendant's fraudulent acts. A number of defendant's crimes involving use of Baker's name were committed while on probation for earlier offenses involving the use of Baker's name or shortly after release from prison for such crimes. Trial court departed upward by 47 months "based on the Guideline's objective of deterring crime and the exceptional financial and emotional hardship" to Baker. Trial court relied upon §5K2.3 (extreme psychological injury), §5K2.5 (property damage and other damage not taken into account), and §5K2.8 (unusually cruel, brutal, or degrading conduct).

Court of appeals upholds sentence. Court characterized defendant's treatment of Baker "reprehensible," and held it "not an abuse of discretion . . . to consider the impact of

[defendant's] crimes on his victim." Court further agrees that aggravating circumstances not taken into consideration in the guidelines were present in that defendant "has not once completed a term of supervised release or probation without returning to his pattern of criminal activity and committing the same types of offenses against the same person without any regard for the consequences to himself or to Mr. Baker." Court concludes that "some peace of mind may return to Mr. Baker if [defendant] is unable to further sabotage Mr. Baker's character."

Dissent on the issue of departure, concluding that defendant's "demonstrated inability successfully to complete a term of noncustodial supervision . . . is adequately accounted for in his criminal history score," and that there was no evidence of extreme psychological injury. Dissent agrees that defendant's "extreme conduct toward Baker and the property damage or loss Baker incurred are appropriate grounds for an upward departure," but disagrees with the extent of the departure.

Statutes of conviction: 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 1029 (credit card fraud). MOC: plea. Guidelines: §2F1.1; §5K2.3; §5K2.5; §5K2.8. OL = 12; CH = VI. Range = 30 - 37 mos.; sentence = 84 mos.

Ninth Circuit

No cases

Tenth Circuit

16. United States v. Whitehead, 912 F.2d 448 (10th Cir. 1990): Defendant used a false social security number to enter into lease of house with option to buy. Defendant had seventeen prior convictions for similar conduct, well over the number of convictions to qualify for the highest criminal history category (VI). Trial court departed upward by 21 months based on inadequacy of criminal history and defendant's lack of contrition. Although court of appeals holds that "loss" was calculated incorrectly, it upholds inadequacy of criminal history as a reason for departure and approves extent of departure, remanding with instructions to make appropriate adjustments to the sentence in light of the anticipated reduction in offense level due to recalculation of the amount of loss. Court, however, notes that lack of contrition "should not normally be a factor justifying departure," although propensity to commit future crimes is a valid consideration and lack of contrition may bear on that factor.

Statutes of conviction: 42 U.S.C. § 408(g) (using false social security number); 18 U.S.C. § 1028(a)(3) (possessing five or more false identification documents). MOC: plea.

Guidelines: §2F1.1; §2X1.1 (in effect prior to the Nov. 1989 amendments). OL = 13; CH = VI. Range = 41 - 51 mos.; sentence = 72 mos.

17. United States v. Roth, 934 F.2d 248 (10th Cir. 1991): Defendant, a member of the Air Force assigned to security police squadron at air base, stole military supplies and sold them. Loss set at $10 million, $9.9 million of which was attributable to planned (but only partially executed) sale of airplane engines to undercover agents. Loss table at that time stopped at $5 million. Trial court departed upward by 83 months based upon amount of theft and effect of the crime on military morale and national security (thereby disrupting government function). Court of appeals approves reasons for departure, but reverses because of trial court's failure to explain the degree of departure.

Statute of conviction: 18 U.S.C. § 641 (theft of government property). MOC: plea. Guidelines: §2B1.1; §5K2.0; §5K2.7; §5K2.14. OL not specified; CH = 0. Range = 30 - 37 mos.; sentence = 120 mos.

Eleventh Circuit

18. United States v. Valle, 929 F.2d 629 (11th Cir.), cert. denied, 112 S. Ct. 401 (1991): Defendants (one of whom was a guard for Wells Fargo) stole armored car and $1.7 million inside. Trial court departs upward to 15 years because of defendants' refusal to turn over the proceeds of the crime. (Only $50,000 of money taken was recovered, and loss was ultimately borne by so described "modest-sized corporation," although it is not clear whether referent is Wells Fargo or company whose money was being picked up at time of crime.)

Court of appeals upholds both reason for and extent of departure, holding that defendants' "willful, continuing scheme to profit from their illegal activity is a factor not taken into consideration by the Sentencing commission in drafting the Guidelines." Court concludes: "To permit the appellants to keep the monetarily lucrative proceeds of their crime and yet serve no more prison time than if the money had been surrendered or otherwise recovered, would make a mockery of our system of justice." Court notes there was adequate evidence that defendants "knew where the money was and were in control of it." Court finally indicates as rule of thumb that departure should be considered whenever a "sentence called for under the Guidelines is so disproportionate to the offense and the defendant's conduct as to blatantly depreciate respect for the law."

Statutes of conviction: 18 U.S.C. § 371 (conspiracy to commit bank larceny); 18 U.S.C. § 2113(b) (bank larceny). MOC: plea. Guideline: §2B1.1. OL, CH not specified. Range = 30 - 37 mos. or 37 - 46 mos., depending on defendant; sentence = 15 years.

District of Columbia Circuit

19. United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990), rev'd on other grounds, 111 S. Ct. 2182 (1991): Defendant pleaded guilty to theft of government funds, making false claims, and income tax evasion arising out of scheme to use position as manager to authorize payments, purportedly for travel by a third party, and to cause them to be improperly diverted to him. Trial court departed upward by 23 months based on duration of crime, significant disruption of government functions, and fact that tax evasion concealed his theft of government funds. Court of appeals affirms sentence, approving both the factors relied upon by the trial court and the extent of the departure. Court of appeals rejects defendant's argument that "duration of crime" and concealment are already counted in "more than minimal planning," noting that "duration" relates to execution of, not planning for, the offense (as does "more than minimal planning"), and concealment refers only to tax evasion, not other methods of concealing the fraud and theft. As to disruption, court of appeals notes that defendant's actions caused other employees to divert their labor to processing false claims for travel and caused employees of another agency (Treasury Department) to divert their labor to paying these claims.

[Supreme Court reversed for failure to give notice specifying ground for departure when it was not set forth in the presentence report or the government's prehearing submission.]

Statutes of conviction: 18 U.S.C. § 641 (theft of government funds); 18 U.S.C. § 287 (making false claims against government); 26 U.S.C. § 7201 (tax evasion). MOC: plea. Guidelines: Not fully specified, but presumably §2B1.1; §2F1.1; §2T1.1; §5K2.0; §5K2.7; §5K2.9. OL = 19; CH = I. Range = 30 - 37 mos.; sentence = 60 mos.

B. Synopsis of Relevant Cases on Downward Departures

1. United States v. Russell, 870 F.2d 18 (1st Cir. 1989): Defendant, driver of Wells Fargo armored car, was mistakenly given additional $80,000 in pick-up, which he initially kept but then turned over to the authorities. Trial court rejected defendant's request for downward departure premised on argument that this offense represented a single, aberrant act. Only issue before the court of appeals is whether the trial court understood that it had the power to depart downward; court of appeals remands for trial court to clarify its ruling. (Trial court subsequently reported that it did understand it had the power to depart.) Court of appeals notes that aberrant behavior may form the basis for departure, citing paragraph 4(b) from the Introduction to the Guidelines Manual.

Statute of conviction: Described as bank larceny (presumably 18 U.S.C. § 2113). MOC: plea. Guideline: §2B1.1. OL, CH not specified. Range = 4 - 10 mos.; sentence = 4 mos. in community treatment facility.

2. United States v. Carey, 895 F.2d 318 (7th Cir. 1990): Defendant involved in kiting checks over fifteen-month period. Trial court departed downward without articulating reason. After appeal filed, trial court entered nunc pro tunc order stating that reasons for departure were age and health of the defendant, the fact that loss overstated the seriousness of the offense because the defendant had made $200,000 in restitution, and the fact that a single act of aberrant behavior was involved. Court of appeals reversed the departure, concluding that: (1) generally restitution is adequately considered by the guidelines and trial court did not make findings to support conclusion that this case is atypical; (2) trial court failed to make factual findings to support downward departure based on health or age of the defendant under §5H1.4; and (3) conclusion that single act of aberrant behavior was involved was clearly erroneous given fifteen-month duration of scheme.

Court remands for resentencing, stating that it "share[s] in the district court's concern over any harshness the Guidelines create in [this] case," given that "up until the commission of the offense the defendant had lived a meritorious life and had been a model citizen, that "[h]is crime did not involve personal gain but was done to help his company through tough times," and that the trial court believed "the defendant 'had suffered enough.'"

Statute of conviction: 18 U.S.C. § 1344 (bank fraud). MOC: plea. Guideline: §2F1.1. OL = 13; CH = I. Range = 12 - 18 mos.; sentence = 1 mo. (reversed).

3. United States v. Phillips, 962 F.2d 739 (7th Cir. 1992): Defendants devised scheme to obtain HUD-insured loans on properties they wanted to renovate and sell as condominiums. Scheme involved using cooperative straw buyers who would then resell the properties to defendants at an increased cost, the repurchase being financed with the HUD-insured loans. Loan documents included false representations of income, indebtedness, and extent of payment of earnest money to the "sellers," the last being documented with bogus cashier's checks and forged promissory notes. A total of $662,920.50 in loans was obtained. Properties were sold by defendants to a third person, who defaulted on the loans, forcing HUD to repurchase the properties for $814,266.68. Properties were then sold at foreclosure sale for $156,000, leaving out-of-pocket loss for HUD of $658,268.68. Trial court used out-of-pocket loss to determine OL, but departed downward two levels because some of HUD's losses were not attributable to defendants.

Issue on appeal is whether the OL should have been increased at all for any of HUD's losses. Defendants argued that the losses were unintended, unforeseeable, and directly caused by the new owner and by HUD (which, defendants argued, sold the property too cheaply, given appraised value of $780,000). Court of appeals upholds district court's

determination that OL should be enhanced for "loss," stating that the failure of the victim to mitigate loss or the negligence of intervening actors does not affect the determination of "loss." Court adds, however, that the fact that some losses are attributable to the victim or third parties may result in "loss" overstating the seriousness of the offense, and thus warrant a downward departure. Because the government did not appeal the departure, the court of appeals did not determine the correctness of the departure.

Statutes of conviction: 18 U.S.C. § 1010 (false statements to HUD); 18 U.S.C. § 371 (conspiracy to make false statements). MOC: plea (as to two defendants who challenged their sentences). Guideline: §2F1.1. OL = 18 (includes two-level downward departure based on loss overstating seriousness of offense). CH, range not specified. Sentence = 21 mos. or 24 mos., depending on defendant.

4. United States v. Johnson, 908 F.2d 396 (8th Cir. 1990): Defendant used false identification documents to obtain loans, with which she purchased two sport cars. Defendant had prior history of loan defaults and judgments. Trial court refused to depart downward on basis of defendant's being a single parent of an infant. Court of appeals holds refusal to depart is unreviewable.

Statute of conviction: 18 U.S.C. § 1014 (false statement in bank loan application). MOC: plea. Guideline: §2F1.1. OL, CH, range not specified. Sentence = 15 mos.

5. United States v. Koenig, 952 F.2d 267 (9th Cir. 1991): Defendants organized scheme to gain access to account and personal identification numbers (PINs) for 7,470 automated teller machine cards (through defendant Koenig, who worked as a computer consultant) and use the information to withdraw funds from Bank of America accounts. Defendants planned to withdraw the funds over President's day weekend, but two weeks prior to that a search warrant for Koenig's home was executed, which disclosed that Koenig had encoded 1,480 counterfeit cards with the account numbers and PINS, placed magnetic tape on 4,100 more cards (but not yet encoded them), and manufactured 800 more cards (to which magnetic tape had not yet been affixed and which had not yet been encoded). Trial court, relying upon intended loss, determined that "loss" exceeded $2 million.

Court of appeals upholds trial court's determination of "loss," concluding that basing determination of "loss" on intended loss is justified "because there was evidence that the conspirators considered and discussed how much money the scheme would produce. For example, in response to a comment by [one conspirator], Mark Koenig indicated that 1,000 cards could produce $500,000." Court also determined that finding that intended loss exceeded $2 million was not clearly erroneous, relying on the following facts:

> Since it appears that the conspirators were attempting to make about 7,470 cards, the intended loss would be approximately 3.74 million dollars. Even if

we assume that one-third of the cards were not used, the intended loss would still be greater than two million.

Court of appeals upholds determination of "loss," noting that guidelines do not require determination that defendants' intentions regarding loss be realistic. Court refuses to review trial court's denial of a downward departure based on the disparity between the actual loss and the probable or intended loss.

Statutes of conviction: 18 U.S.C. § 1029 (conspiracy to produce and use counterfeit access devices); other crimes not specified. MOC: plea. Guideline: §2F1.1. OL, CH, range not specified. Sentence = 18, 21, 30, or 41 mos., depending on defendant.

[See also:

1. United States v. Takai, 941 F.2d 738 (9th Cir. 1991): Defendant convicted of bribing INS official in order to obtain green card for a friend. Trial court departed downward because: crime did not involve pecuniary gain; crime was motivated by a desire to help someone; the seriousness of the offense was mitigated by the conduct of a government agent; the defendant had assisted victims of an earthquake; and the crime involved single, aberrant act. Court of appeals upholds departure on basis of single, aberrant act, and holds extent of departure reasonable.

Statute of conviction: 18 U.S.C. § 201 (bribery). MOC: plea. Guideline: §2C1.1. OL = 11; CH score = 0. Range = 8 - 14 mos.; sentence = 4 mos.' home detention.

2. United States v. Dickey, 924 F.2d 836 (9th Cir.), cert. denied, 112 S. Ct. 383 (1991): Defendant convicted of counterfeiting offenses requested downward departure on the basis that his offenses constituted "aberrant behavior." Court of appeals remands case for clarification whether trial court understood it had the power to depart downward for that reason.

Statutes of conviction: 18 U.S.C. § 471 (printing counterfeit bills); 18 U.S.C. § 472 (possession of counterfeit bills); 18 U.S.C. § 477 (possession of engraving plate). MOC: plea. Guideline: §5K1.1 only one mentioned. OL, CH, range not specified (but CH apparently I). Sentence = 12 mos. (downward departure due to cooperation).]

ANALYSIS OF CASE LAW
Tax Guidelines: Tax Loss and Application Issues

A. Summary

The first notable thing about the case law relating to the tax guidelines is that it is sparse. Given the paucity of cases, it is difficult to generalize or to extrapolate the extent to which they are typical.

Several of these cases raise the issue, analogous to an issue in the fraud and theft area, of the extent to which the amount of "loss" is determined by the actual deprivation of tax revenue. For example, Schmidt, defining "understated gross income" under §2T1.9, held that the gravity of the offense is measured by the actual loss of tax revenue, not by the full extent of participation in a tax evasion scheme. Krause held that the defendant's crime was not to facilitate evasion, and thus no enhancements for "tax loss" could be given, when he submitted tax forms containing obviously inflated amounts of income and claims for refunds that the IRS never took seriously. In Telemaque, another case involving the submission of obviously inflated claims, the court apparently did not enhance for the amount involved (more than a billion dollars), but did depart upward two levels due to the extent of the intended monetary loss and disruption to the government.

Brimberry, taking a different view, held that the full amount of taxes owed were to be considered as "tax loss" in an evasion case in which the defendant hid assets from the IRS, even if that amount was so high it would never be paid and it far exceeded the value of the assets hidden. Finally, Barski, on the theory that the Commission did not intend to make the actual loss of revenue determinative, upheld the constitutionality of §2T1.3 against a claim that it created an irrebuttable presumption that the "tax loss" was 28 percent of underreported income.

B. Synopsis of Cases

Second Circuit

1. United States v. Krause, 786 F. Supp. 1151 (E.D.N.Y. 1992): Defendant, a tax protestor well known to the IRS, filed a false income tax return claiming earnings of $32,595,126, withheld taxes of $32,599,088, and a refund of $23,472,858, amounts that were patently false and known by the IRS to be false. Defendant received no refund, and the IRS never seriously considered paying the claim for refund. Defendant was not charged with evasion, as there was no tax loss, but rather was charged with perjury (26 U.S.C. §

7206(1)) and endeavoring to obstruct the IRS (26 U.S.C. § 7212(a)). Issue is which guideline should be used, §2T1.3(a)(1) or §2T1.3(a)(2). Government argued that §2T1.3(a)(1) applied because there was a "tax loss," in the form of a false credit, of $32,599,088, the amount falsely reported as withheld. Defendant argued that his conduct was not to facilitate evasion of taxes, and therefore §2T1.3(a)(2), with a base offense level of 6, should apply.

District court holds that §2T1.3(a)(2) applies. Relying on United States v. Schmidt, infra, and United States v. Telemaque, infra, and analogizing to cases involving the fraud and theft guidelines, court concludes that defendant actually caused no "tax loss" and did not intend to cause one. Therefore, case involves false statements and not evasion.

Statutes of conviction: 26 U.S.C. § 7206(1) (perjury); 26 U.S.C. § 7212(a) (endeavor to obstruct IRS). MOC: trial. Guideline: §2T1.3(a)(2). OL = 6; CH = I. Range = 0 - 6 mos.; sentence not specified in this opinion.

Third Circuit

2. United States v. Astorri, 923 F.2d 1052 (3d Cir.), cert. denied, 112 S. Ct. 444 (1991): Defendant convicted of wire fraud and income tax evasion for Ponzi scheme involving investments, the earnings from which defendant failed to report as income. Trial court enhanced offense level for fraud because of the tax evasion count, giving as alternate theories that the two counts could be grouped under §3D1.2 and the special offense characteristic of tax evasion would cause a two-level increase, or that the two counts could not be grouped (due to different victims) but the enhancement was proper under §3D1.4(a).

Court of appeals holds that two counts could not be grouped under §3D1.2(a) because the victims were different. Court further holds that the counts could not be grouped under §3D1.2(c) because the special offense characteristic of §2T1.1 relating to illegally derived income was not embodied in the fraud count. Court relies on commentary to §2T1.1 relating to deterrence and states that the Sentencing Commission's supplemental illustration (Example C6) was not binding on the court or necessary to the analysis. Court notes that "[t]o include this specific offense characteristic as 'conduct' in the fraud count negates its separate inclusion within the tax evasion count." Court therefore upholds the alternate theory about enhancing the sentence because of the effect of the second group.

Statutes of conviction: 18 U.S.C. § 1343 (wire fraud); 26 U.S.C. § 7201 (tax evasion). MOC: plea. Guidelines: §2F1.1; §2T1.1; §5K2.3. OL = 23 (includes two-level upward departure); CH not specified. Range = 46 - 57 mos. (includes two-level upward departure); sentence = 54 mos.

2. United States v. Hirschfeld, 964 F.2d 318 (4th Cir. 1992): Defendant convicted of aiding the preparation of a false return by reporting in 1984 that he paid a $2.1 million judgment and therefore was entitled to a deduction in that amount. In fact, the "judgment" was the product of a fraudulent settlement of a sham lawsuit. In 1984, defendant had no gross income against which to apply the deduction; however, government contended that he intended to carry forward the loss created by the deduction to reduce taxable income in future years. District court determined "tax loss" under §2T1.3 as 28 percent of the $2.1 million reported on the 1984 return. Defendant contended on appeal that his sentence should not be enhanced for "tax loss" because there was no actual loss of revenue by the government.

Court of appeals holds that future tax losses may be considered under §2T1.3, relying on background commentary to §2T1.3 regarding underreporting income that may not yet have resulted in a tax loss. Court distinguishes Schmidt, infra, on ground that Schmidt involved reporting of income that did not and would not have resulted in a loss of tax revenue, whereas defendant's "fraudulent deduction would have directly reduced the amount of tax ultimately due."

Statutes of conviction: 18 U.S.C. § 371 (conspiracy to defraud IRS and SEC); 26 U.S.C. § 7206(2) (aiding preparation of false returns). MOC: trial. Guideline: §2T1.3. OL, CH, range not specified. Sentence = 36 mos. on tax counts, consecutive to sentence of 36 mos. on conspiracy counts.

3. United States v. Schmidt, 935 F.2d 1440 (4th Cir. 1991): Defendants sold to "investors" phony tax shelters in the form of trusts, and instructed "investors" to file income tax returns that omitted substantial income and federal fiduciary returns that included it as income of the trust and claimed personal expenses as business deductions for the trust. Defendants also encouraged "investors" to make "income distributions" to an off-shore bank to further reduce taxable income and avoid IRS investigation.

After conviction for conspiracy to defraud the IRS and aiding in the submission of false returns, defendants argued that their base offense level under §2T1.9 should be 10, and not enhanced for the amount of "tax loss" under §2T1.3. Trial court concluded that "tax loss" under §2T1.3 was 28 percent of the total amount of income not reported on the personal income tax returns but reported on the fiduciary returns as income of the trust, on the theory that "gross income . . . was understated" by that amount.

Court of appeals reverses, rejecting government's argument that the gross income of the investors was understated by the total amounts reported as trust income on the fiduciary return because "investors" were not entitled to report any of their personal income on fiduciary returns. Court states that under §2T1.3 "gravity is represented by the actual loss

of tax revenue to the IRS," and not by "the full extent of participation in the tax evasion scheme regardless of the tax consequences to the government." Court notes that the "government simply is not suffering a 'tax loss' merely because the taxpayer reports his income on a trust return rather than an individual return. Court concludes that in this case "understated gross income" consists only of nonlegitimate deductions and any income nominally distributed to the off-shore bank.

Dissent on the issue of "gross income," arguing that the "majority permits the appellants to profit from their own wrongdoing by offsetting unreported individual income with income fraudulently and illegally reported on trust returns." Dissent notes that choice of words "tax loss" on the part of the Commission may have been "unfortunate," but Commission understood that "tax loss" is only an approximation of actual tax consequences, and did not intend it to replicate the actual loss of revenue. Dissent states that majority's ruling "creates problems of proof the guidelines meant to avoid."

Statutes of conviction: 18 U.S.C. § 371 (conspiracy to impair IRS; conspiracy to commit witness tampering in violation of 18 U.S.C. § 1512); 26 U.S.C. § 7206(2) (aiding submission of false returns); 26 U.S.C. § 7203 (failure to file). MOC: trial. Guideline: §2T1.9. OL, CH, range not specified. Sentences = 57, 84, or 108 mos., depending on defendant (reversed and remanded for resentencing).

Seventh Circuit

4. United States v. Becker, 965 F.2d 383 (7th Cir. 1992): Defendant convicted of evasion and failure to file. In order to hide his income, defendant used a "warehouse bank" in which his account was identifiable only by an assigned number and not by his name or social security number. District court increased the offense level by two because defendant used "sophisticated means" to conceal his crimes. Court of appeals upholds trial court's finding as not "clearly erroneous," noting that defendant

> used a so-called "warehouse bank" to hide his assets under an account identified not by [defendant's] name or social security number but only by an arbitrary number. In addition, he eliminated all bank accounts in his name and deposited his earnings in his son's account. [T]hese steps were taken to make it "difficult, if not impossible, to discover his income and to inquire into his finances . . . .

Statutes of conviction: 26 U.S.C. § 7201 (evasion); 26 U.S.C. § 7203 (failure to file). MOC: trial. Guideline: §2T1.2. OL, CH, range not specified. Sentence = 72 mos.

5. United States v. Brimberry, 961 F.2d 1286 (7th Cir. 1992): Defendant had $7 million tax deficiency ($19 million including interest and penalties)assessed against her (relating to failure to declare income earned through embezzlement), and declared to the IRS that she had no property that could be used to satisfy the deficiency. Thereafter, IRS found her in possession of assets totalling $77,000, which she had at the time of the declaration. Trial court determined that "tax loss" was the amount of taxes defendant owed and was trying to evade ($7 million), not the value of the assets she hid from the IRS.

Court of appeals upholds trial court's determination, rejecting defendant's argument that, since she would never be able to pay the deficiency, realistically the tax loss to the government was $77,000. Court acknowledges that "in cases, like this one, involving hidden assets, defining 'tax loss' as the amount of tax deficiency could lead to some strange results," but relies on a "plain reading" of the guidelines. Court finds the definitions in §2T1.1 and §2T1.3 "unambiguous."

Statutes of conviction: 26 U.S.C. § 7206(1) (perjury); 26 U.S.C. § 7201 (attempted evasion). MOC: trial. Guidelines: §2T1.1; §2T1.3. OL, CH, range not specified. Sentence = 33 mos.

6. United States v. Motley, 940 F.2d 1079 (7th Cir. 1991): Defendant prepared tax returns for others on a contingency fee basis, claiming false deductions to increase refund and thereby increase his fee. Because he actually signed no returns, he was charged with aiding and abetting the submission of false claims to the United States, in violation of 18 U.S.C. §§ 2, 287, rather than with violations of the tax statutes. Defendant challenged his conviction on appeal. Court of appeals holds that defendant, although improperly convicted under § 287 because of failure of government to offer proof on an element of the offense, was properly convicted of lesser included offense under 26 U.S.C. § 7206(2). Court remands case for resentencing, noting that trial court did not explain how it arrived at its sentence.

Statute of conviction: 18 U.S.C. § 287 (false claims). MOC: trial. Guideline: §2F1.1. OL, CH, range not specified. Sentence = 24 mos. (reversed and remanded for resentencing).

Eighth Circuit

7. United States v. Telemaque, 934 F.2d 169 (8th Cir. 1991): Defendant, a tax protestor, convicted of conspiracy to defraud the United States in connection with scheme to encourage participants to file fraudulent 1099 forms with the IRS reporting the payment of income to persons who had allegedly committed wrongs against the participants, and then to file tax returns fraudulently claiming a refund for the amount reported on the 1099s. Through this scheme, participants filed 1099 forms reporting over a billion dollars in payments and returns claiming over a billion dollars in refunds. Various of the 1099 forms

were sent to Congressmen, judges, and IRS personnel. Trial court sentenced under §2T1.9, with a base offense level of 10. Defendant contended on appeal that sentence should have been imposed under §2T1.3, not §2T1.9, and that no upward adjustment should have been made for "official victim."

Court of appeals finds these claims without merit, noting that government officials who received the 1099 forms were "victims" of the conspiracy. (Note that a two-level upward departure was given by the trial court due to the "extent of the intended monetary loss and disruption to the government." This departure was not challenged on appeal and court generally held that "district court's application of the guidelines was not clearly erroneous.")

Statute of conviction: 18 U.S.C. § 371 (conspiracy to defraud United States). MOC: trial. Guidelines: §2T1.9; §5K2.0. OL, CH, range not specified (but OL appears to be 20). Sentence = 36 mos. (represents two-level upward departure).

Ninth Circuit

8. United States v. Barski, 968 F.2d 936 (9th Cir. 1992): Defendant convicted of tax evasion. Defendant's tax rate was less than 28 percent and the amount of taxes he owed was at most $35,884.25; under §2T1.3, however, defendant's "tax loss" was approximately $59,000. Defendant argued that §2T1.3 creates an irrebuttable presumption that "tax loss" is 28 percent of unreported taxable income, and therefore violates due process. Court of appeals upholds constitutionality of §2T1.3 noting that the "legally operative fact" under §2T1.3 is the amount of unreported income, not the actual tax loss to the government. (Court also notes that as this was the only constitutional argument made by the defendant, the holding is "limited to the conclusion that it does not create an irrebuttable presumption in violation of due process.")

Statute of conviction: 26 U.S.C. § 7201 (evasion). MOC: not specified. Guideline: §2T1.3. OL, CH, range, sentence not specified.

Appendix D:
Hotline Call Summaries and Amendment History

Appendix D. SYNOPSIS OF TAS HOTLINE CALLS RECEIVED ABOUT §2B1.1

From September 1990 to August 1991, 92 calls regarding §2B1.1 were received on the TAS Hotline. The calls have been separated into twelve categories, which are listed below in descending order of the number of calls received. Note: An additional 50 calls were received between 1987 and September 1990. These calls have been archived and are not reflected in the synopsis below.

A. Definition of Loss

Sixty-one calls were received regarding the definition of loss. Sixteen of these calls specifically relate to the use of intended or actual loss in determining the offense level. Eleven of these calls are inquiries about the inclusion of penalties, interest and fees in the determination of loss. Eleven calls concern the application of §1B1.3 (Relevant Conduct) in the determination of loss. Five of these calls are inquiries about the determination of loss in cases involving stolen credit cards or automatic teller machine cards. Interestingly, three of these calls concern the definition of loss in cases where the offense involved the theft of archeological relics or damage to archeological sites. Loss is difficult to ascertain in these cases since the relics are usually priceless, and the impact of disturbance of a particular site cannot be identified.

B. Specific Offense Characteristics

Nine calls were received regarding the specific offense characteristics contained in §2B1.1, including the definitions of terms. Five of the calls relate to the definition and application of the two-level enhancement for "more than minimal planning." The remaining calls in this category relate to definition of terms contained in the other specific offense characteristics.

C. Abuse of a Position of Trust

Six calls were received concerning the Chapter Three Adjustment for abuse of a position of trust (§3B1.3). Half of those questions specifically relate to the use of this adjustment in embezzlement cases.

D. Applicable Guidelines

Five calls were received regarding the application of the proper offense guideline (e.g., theft vs. fraud).

E. Statutory Penalties

Five calls were received concerning the interaction between the statutory penalties and the guideline range. Two of these calls specifically relate to the statutory prohibition against a sentence of probation for individuals convicted of embezzlement of 18 U.S.C. § 656.

F. Miscellaneous Issues

The six remaining calls concern various issues, including amendments, ex post facto, Chapter Three adjustments, and the grouping rules.

SYNOPSIS OF TAS HOTLINE CALLS RECEIVED ABOUT §2F1.1

From September 1990 to August 1991, 115 calls regarding §2F1.1 were received on the TAS Hotline. The calls have been separated into seven categories, which are listed below in descending order by the number of calls received. Note: An additional 52 calls were received between 1987 and September 1990. These calls have been archived and are not reflected in the synopsis below.

A. Definition of Loss

Fifty-seven calls were received regarding the definition of loss. Eighteen of these calls are general inquiries into the calculation of loss. Fifteen calls were received regarding the interaction of the determination of loss and collateral, property or funds that were recovered or paid prior to sentencing. Many of these calls specifically deal with Application Note 7(b). Ten calls specifically relate to the use of intended or actual loss in determining the offense level. Four calls were received regarding the determination of loss in cases involving stolen credit cards. Inquiries regarding the determination of loss in cases involving food stamps were received three times. The Hotline received only two calls about the inclusion of penalties, interest and fees in the determination of loss. Nonpecuniary loss was an cited as an issue in only five calls.

B. Specific Offense Characteristics

Nineteen calls were received regarding the correct application of the specific offense characteristics contained in §2F1.1, as well as the definitions and terms used in these specific offense characteristics. Sixteen calls were received regarding specific offense characteristic (b)(3), with the majority of the calls inquiring whether or not the enhancement for misrepresentation of a charitable organization applied (§2F1.1(b)(3)(A)). Eleven calls were inquiries relating to the use of specific offense characteristic (b)(2), with eight of the calls specifically relating to the definition and application of the 2-level enhancement for "more than minimal planning" (§2F1.1(b)(2)(A)).

C. Application Notes and Commentary

Fifteen calls were received regarding the application of the Commentary at §2F1.1. Application Note 13, which gives direction in cases where the offense behavior is more appropriately considered under a guideline other than §2F1.1, was the subject of fourteen calls received on the hotline. Most of these calls were inquiries about the application of this note. Several calls were specific questions about the appropriateness of other guidelines. The remaining two calls referenced the operation of Application Note 11 which gives instruction in cases that involve fraudulent access devices. Both of these callers questioned whether the instruction contained in this application note requires a departure.

D. Multiple Count Rules

Five calls were received concerning the application of the multiple count rules. The majority of the calls were questions regarding the grouping of fraud and either tax, money-laundering or drugs.

E. Miscellaneous

Nineteen calls were received regarding miscellaneous issues not necessarily specific to the operation of §2F1.1. These calls include: ex post facto issues; departures; statutory penalties; pre-guideline cases; and general guideline application.

SYNOPSIS OF ATTORNEY HOTLINE CALLS ABOUT §2B1.1 OR §2F1.1

The Attorney Hotline data show eleven calls referencing either §2B1.1 or §2F1.1. Eight of these calls were questions regarding the determination of loss. The remaining calls address the operation of Application Note 13 and ex post facto issues. Note: The procedure for recording calls on the Attorney Hotline is substantially different than that on the TAS Hotline. Because every call is not recorded on the Attorney Hotline, the number of calls recorded may not be reflective of the actual number of calls received.

HOTLINE CALLS REGARDING TAX GUIDELINES

In studying the tax guidelines, the Working Group examined TAS Hotline calls regarding Part T from November 1987 to September 1991. Each Hotline call was categorized according to the type of question or questions asked. An overview of the calls, by category is first presented, then an analysis of those calls, and finally a detailed description of the calls by guideline.

With respect to the detailed description in section III, below, the number of questions listed for each guideline represents the number of significant questions addressed primarily to application of Part T. It does not correspond to the number of calls received, because several questions may have been asked in a single call, a logged call may have been a follow-up to an earlier call, or the call may have been logged as a Part T question since that was the guideline for the offense of conviction but the question actually dealt with another section of guidelines. When the question was not clearly answered by the guideline or commentary, the answer TAS gave is also set forth.

I. Overview

A. Calculation of Tax Loss

Review of the Hotline calls indicates that the most prevalent question for Part T guidelines involved calculation of tax loss.[1] Of the 155 Hotline calls, calculation of tax loss was the primary question in 111 (72 percent).[2] The questions regarding tax loss include whether tax loss prior to November 1, 1987, can be included, whether tax loss for a defendant in a conspiracy includes not only that for the defendant but also for others in the conspiracy; whether under §2T1.2 the actual amount of tax loss should the used if known rather than the alternative measures under §2T1.3; whether tax losses from individuals and corporations may be added together; and how under §2T3.1 "tax loss" should be calculated if there is no actual tax loss.

B. Grouping

The next most frequent type of question concerns grouping of tax offenses (13 percent). Questions about grouping included: how to group tax counts with counts stemming from the underlying conduct that led to the tax violations; how to group multiple

---

[1]The Hotline received at least one call relating to offenses covered by each of these seven guidelines: §2T1.1; §2T1.2; §2T1.3 ; §2T1.9; §2T2.1; §2T3.1; and §2T3.2.

[2]Of these calls, 57 percent concerned calculation of tax loss; 18 percent concerned relevant conduct in calculating tax loss; and 25 percent involved the role of old and new law in calculating tax loss.

counts of different tax violations; grouping of counts for tax violations with counts for other nontax offenses based on an aggregate.

C. Miscellaneous

The remaining 15 percent of the calls involved miscellaneous questions about guideline application, such as the definition of "sophisticated planning" under §2T1.3 and the appropriate choice of guideline when drug smuggling was involved.

II. Summary and Observations

The primary concerns regarding Part T have to do with relevant conduct, definitions of tax loss, and grouping of multiple counts.

While several of the Part T guidelines have application notes that address relevant conduct for tax offenses, some do not. Generally the direction given is that relevant conduct is quite broad for tax offenses. The guidance does not address conduct beyond the statute of limitations, which seems often to be a consideration for these types of offenses. The directives as to the breadth of relevant conduct (e.g., Application Note 3 of §2T1.1) may be narrower than what otherwise be considered relevant conduct (e.g., §2T1.1(a)(A) in defining "tax loss" as tax that "the taxpayer" evaded).

Aside from the relevant conduct issues related to "tax loss", there are additional concerns about the general definitions and calculations of tax loss, particularly when "alternative" measures are involved (e.g., §2T1.1, §2T1.2, §2T1.3).

While the guidelines generally seem to direct that relevant conduct be viewed broadly, the Part T guidelines use limited definitions of tax loss, which seems to cause confusion not only in the case of single counts or multiple counts under the same Part T guideline, but also when there are multiple counts under more than one of the Part T guidelines.

The additional questions regarding multiple counts generally relate to the grouping of counts using Part T guidelines with counts based on an aggregate or involving illegally derived income.

III. Complete Description of Calls Received by Guideline

A. §2T1.1. Evasion (approximately 52 questions)

The majority of questions concerned the determination of relevant conduct in calculating "tax loss." Specifically, callers asked whether it was correct to include tax loss

resulting from conduct prior to November 1, 1987, from acts beyond the statute of limitations, or from conduct for which the defendant was acquitted. Callers also asked how to sentence when both guideline and pre-guideline counts are involved in a single case.

The next most asked questions involved the grouping of tax counts with counts stemming from the underlying illegal conduct generating the income that is the subject of the tax violations (e.g., drug sales, fraud, embezzlement).

Questions were also asked about how to group multiple counts of different tax violations (e.g., counts of evasion and counts of failure to file, both of which are based on an aggregate but use different guidelines).

Questions regarding "tax loss" primarily involved whether the actual amount of tax evaded should be used when it is known or 28 percent of the understatements of gross income and taxable income in those instances. Before the 1991 clarifying amendment, a couple of questions asked how to calculate the understatements of gross and taxable income,

Only one or two questions asked about criminal livelihood (§4B1.3), the definition of "sophisticated means," and how to calculate interest. Again, most of the questions were subsequently addressed by amendments or already had been addressed but the caller had not read the application notes.

While asked only once each, there were a few interesting calls that may be noteworthy. One involved a defendant who had taken money from the business for which he worked. He was convicted of not paying taxes on the monies taken. The question was whether under relevant conduct and in keeping with Application Note 3 the tax loss related to the corporate taxes that were not paid should be included in the tax loss total. (The TAS answer was that it should be.)

A similar question asked if calculation of tax loss for a defendant in a conspiracy includes not only that from the defendant's taxes but that for others in the conspiracy as well. (The TAS answer was that it should.)

Finally, a caller asked what the guidelines provide when a tax evader is a member of a tax protest group. (The TAS answer was that there is no special direction for these situations.)

B. §2T1.2 Failure to File (approximately 21 questions)

The majority of questions involved determining what to include as relevant conduct when calculating tax loss, specifically whether tax violations prior to November 1, 1987, or those not covered under §2T1.2 may be included.

There were several questions regarding the definition of tax loss. There was confusion about whether to use the actual tax loss for a year in which the defendant failed to file or not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded $20,000. (The TAS answer was that the actual amount is to be used when known. Because the summaries of the responses are not detailed, it is difficult to determine the basis for this answer. The guideline language seems to say that tax loss is the taxes owed when that amount is known, except that a floor amount of 10 percent of the amount by which the taxpayer's gross income for that year exceeded $20,000 is imposed. If that reading of the guideline is not accurate, the background commentary of §2T1.2 regarding "alternative measure of the tax loss" seems to be inconsistent with Application Note 4 of §2T1.1.)

A couple of questions asked whether one looks to gross income or net profit in determining whether the income from criminal activity exceeded $10,000 in any year. (The TAS answer was gross income.)

C. §2T1.3, Perjury (approximately 48 questions)

The majority of questions concerned the definition of tax loss. Most callers wanted to know whether the actual amount of tax loss is to be used if known or whether the calculations of §2T1.3 (28 percent (or 34 percent if a corporation) of the greater of understated gross and taxable income) must be considered. One somewhat similar question asked whether, in the case of a defendant filing as a corporation, the 34 percent multiplier or the corporate rate at the time of the offense should be used. (The TAS answer was 34 percent.)

There was also a question about the calculation of gross income; specifically, whether gross receipts would be used when business receipts are involved, or some lesser amount, such as salary, to determine gross income. Some questions were asked about the provision regarding false credits against tax, but those questions were predominantly before the clarifying amendment in November 1991.

There were several questions regarding the determination of gross income in cases under 26 U.S.C. 7206(I) involving gambling activity and the submission of an IRS form 730, which uses the term "gross wagers."

The issue of what constitutes relevant conduct for the purpose of determining tax loss yielded the second greatest number of questions. Specifically, callers asked whether tax violations prior to November 1, 1987, or conduct beyond the statute of limitations may be considered in calculating loss.

There were also questions whether to group counts for tax violations and counts for the underlying illegal conduct that generated the income that was the subject of the tax violations.

There were a couple of questions about the meaning of the specific offense characteristic relating to the use of "sophisticated means" to impede discovery of the offense. There was also a question about application of criminal livelihood (§4A1.3) in a case under §2T1.3.

One call concerned a case in which the defendant was convicted of violating 26 U.S.C. § 7212(a) for attempting to evade taxes by making a false statement. The statutory index for this offense only refers to the assault guidelines at §2A2.2 and §2A2.3.

D. §2T1.9. Conspiracy to Evade Taxes (approximately 8 questions)

Again, there were questions about what constitutes relevant conduct for the purpose of this guideline, specifically whether tax violations for additional years may be included. A related question was whether an individual's tax losses may be added to corporate tax losses.

A couple of the questions in the Hotline listing for this guideline are more appropriately addressed in other parts of the guideline manual and therefore are not listed here. Others seem to have come from individuals who overlooked the plain language of the guideline and commentary (e.g., whether §2T1.9(b)(2) should be applied if the defendant used other people knowingly and unknowingly to conceal and shelter assets to reduce tax payments; whether it should be applied if only codefendants were encouraged to violate tax laws; whether §2T1.9 should be used when a husband and wife filed a joint return).

E. §2T2.1. Non-payment of Alcohol and Tobacco Taxes (one question)

The sole question involving this guideline asked about relevant conduct. The case concerned an individual who reported business income on his personal returns. The caller asked whether the business taxes and social security withholdings not paid to the government also be included as relevant conduct. (The TAS answer was yes; that as of August 6, 1992, social security withholdings can be included as tax loss because it is a federal tax collected by the IRS and failure to pay is a violation of federal law.) (It should be noted that while guidelines such as §2T1.1 say that relevant conduct is very broad in terms of tax violations, the Application Note 1 of this guideline seems to restrict tax loss to the amount due on alcohol or tobacco. It seems somewhat inconsistent that this directive is in the application note while for most of Part T such directives seem to be in the actual guideline language (e.g., §2T3.1)).

F. §2T3.1. Evading Import Duties (approximately 15 questions)

The questions primarily involved how to determine tax loss and the selection of the applicable guideline. Several questions asked what should be done when there was no tax loss, although only one of these questions came after the 1991 amendment providing multiple base offense levels (including one for tax loss not exceeding $100).

Regarding the applicable guideline, several callers asked which guideline should be used when the smuggling involved otherwise illegal items, such as drugs or obscenity, or when the offense conduct seemed to constitute some other violation perhaps more serious than smuggling.

Another caller asked why the statutory index lists the smuggling guideline at §2T3.1 for violations of 18 U.S.C. § 549 when that offense involves breaking into a United States Customs warehouse.

A question was asked about grouping counts for tax violations with counts for other nontax offenses based on an aggregate (and therefore listed in §3D1.2(d)).

G. §2T3.2. Trafficking in Smuggled Property (approximately 7 questions)

Several questions asked what to do if there was no tax loss, but these questions for the most part came before the 1991 amendment giving multiple base offense levels (including one for tax loss not exceeding $100).

There were also questions about what to do when the smuggled property was steroids but, again, these questions were before the amendment to the drug guideline adding steroids.

Other questions involved whether another guideline should be used instead of §2T3.2 when drugs were being smuggled.

AMENDMENTS TO SELECTED GUIDELINES IN CHAPTER TWO, PART B - OFFENSES INVOLVING PROPERTY

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

This guideline was amended on five occasions: **June 15, 1988; November 1, 1989; November 1, 1990; and November 1, 1991.**

June 15, 1988: This amendment changed the loss table (specific offense characteristic (b)(1)) to state that it measured "loss" rather than the "value of property taken." Application Note 2 was amended by introducing a new definition of loss: "the value of the property taken, damaged or destroyed." Previously, loss was to be based upon "the replacement cost to the victim or market value of the property, whichever is greater." The purpose of this amendment was to clarify the determination of loss. See U.S.S.G., Appendix C, amendment 7.

November 1, 1989: This amendment changed the structure of the loss table to: conform it to the tax evasion table; remove an unintended inconsistency between these tables when loss is greater than $40,000; increase the offense levels for larger losses to provide additional deterrence and better reflect the seriousness of the conduct; and eliminate minor gaps in the table. See U.S.S.G., Appendix C, amendment 99.

The specific offense characteristic that provided a minimum offense level of 14 for offenses involving "organized criminal activity" (§2B1.1(b)(6)) was changed to clarify its coverage. This amendment replaced "organized criminal activity" with "an organized scheme to steal vehicles or vehicle parts." Application Note 8 was changed to correspond to the new language in the guideline. The background commentary was amended to explain that an alternative minimum measure of loss is needed in these cases since stolen property is rapidly resold or otherwise disposed of in the course of the offense, making it difficult to ascertain the value of the property (or loss). Some editorial changes were also made. See U.S.S.G., Appendix C, amendments 100-101.

November 1, 1990: This amendment reordered the specific offense characteristics at §2B1.1 that address offenses involving the United States mail. Because of the pre-amendment order of these specific offense characteristics, §2B1.1 produced an offense level that was less than produced by §2B5.2 in cases involving stolen or destroyed mail, more than minimal planning, and a loss of $1,000 or less. Reordering the specific offense characteristics corrected this anomaly by conforming the offense levels in these guidelines. See U.S.S.G., Appendix C, amendment 312.

In addition, this amendment added a new specific offense characteristic (§2B1.1(b)(7)) that provides a four-level enhancement, with a floor of 24, if the offense substantially jeopardized the safety and soundness of a financial institution. Application

Note 10 was added to define the terms used in the new specific offense characteristic. The background commentary was amended to note that this change was a result of a statutory directive to the Commission See U.S.S.G., Appendix C, amendment 317.

The definition of "destructive device" was removed from the commentary to §2K1.4 (Arson: Property Damage by Use of Explosives) and added to the commentary in §1B1.1. In a conforming amendment, Application Note 1 to §2B1.1 was changed to include the correct reference. Prior to the change, §2B1.1 referenced the definition of "destructive device" at the commentary to §2K1.4. See U.S.S.G., Appendix C, amendment 361.

November 1, 1991: In response to the Crime Control Act of 1990 this amendment to the specific offense characteristic regarding financial institutions. (§2B1.1((b)(7)) provided an alternative enhancement of four levels, with a floor of 24, if the offense affected a financial institution and the defendant derived more than $1 million in gross receipts from the offense.

Application Note 10 was revised with respect to the definition of "substantially jeopardized the safety and soundness of a financial institution," so that it includes cases in which the offense created a substantial risk of any of the harms described, in addition to cases in which such harm actually occurred. Application Notes 11, 12, and 13 were added to give guidance in applying the new specific offense characteristic (b)(7)(B) (financial kingpin). The background commentary was amended to note the reason for this new subsection. See U.S.S.G., Appendix C, amendment 364.

Application Note 2 was amended to provide clarifying examples of the determination of potential loss and to provide more specific instruction about how to calculate loss in cases of partially completed conduct. See U.S.S.G., Appendix C amendment 393.

§2B1.2 Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

This guideline was amended on three occasions: **January 1, 1988; June 15, 1988; and November 1, 1990.**

January 1, 1988: This amendment transposed the specific offense characteristics for theft of **a firearm** (§2B1.2(b)(2)) and theft of United States mail (§2B1.2(b)(3)). Corresponding changes were made in the commentary. See U.S.S.G., Appendix C, amendment 8).

June 15, 1988: In order to correct a clerical error, specific offense characteristic (b)(1) was amended by replacing "taken" with "stolen." See U.S.S.G., Appendix C, amendment 9.

November 1, 1989: This amendment changed the title from "Receiving Stolen Property" to "Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property." The commentary was amended in Application Note 1 to note this change. The specific offense characteristic at §2B1.2(b)(3)(A) was amended to clarify that it applies to persons engaged in the business of receiving and selling stolen property. See U.S.S.G., Appendix C, amendment 102.

A new specific offense characteristic was added that provided a floor of 6 if the property included undelivered United States mail. Additional commentary was added to define "undelivered United States mail." The purpose of this change was to conform this guideline to §2B1.1. See U.S.S.G., Appendix C, amendment 103.

The specific offense characteristic providing a minimal offense level of 14 for offenses involving "organized criminal activity" (§2B1.2(b)(5)) was changed to clarify its coverage. This amendment replaced "organized criminal activity" with "an organized scheme to steal vehicles or vehicle parts". Application Note 4 was changed to correspond to the new language in the guideline. The background commentary was amended to explain that an alternative measure of loss is needed in these cases since stolen property is rapidly resold or otherwise disposed of in the course of the offense, making the value of the property (or loss) difficult to ascertain. Some editorial changes were also made. See U.S.S.G., Appendix C, amendment 104.

This amendment also reordered the specific offense characteristics at §2B1.2 that address offenses involving United States mail. Because of the order of these specific offense characteristics, §2B1.2 produced an offense level that was less than that produced by §2B5.2 in cases involving stolen or destroyed mail, more than minimal planning, and a loss of $1,000 or less. In these cases, reordering the specific offense characteristics corrected this anomaly by conforming the offense levels in these guidelines. See U.S.S.G., Appendix C, amendment 312.

The definition of "destructive device" was removed from the commentary to §2K1.4 (Arson: Property Damage by Use of Explosives) and added to the commentary in §1B1.1. In a conforming amendment, Application Note 1 at §2B1.2 was changed to include the correct reference. Prior to the change, §2B1.2 referenced the definition of "destructive device" at the commentary to §2K1.4. See U.S.S.G., Appendix C, amendment 361).

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

This guideline was amended on two occasions: **November 1, 1990 and November 1 1991.**

November 1, 1990: This amendment added a new specific offense characteristic (§2B4.1(b)(2)) that provided a four-level enhancement, with a floor of 24, if the offense

substantially jeopardized the safety and soundness of a financial institution. Application Notes 3 and 4 were added to define the terms used in the new specific offense characteristic. The background commentary was amended to note that this change was the result of a statutory directive to the Commission. See U.S.S.G., Appendix C, amendment 317.

November 1, 1991: This amendment to the specific offense characteristic relating to financial institutions (§2B4.1((b)(2)) was made in response to the Crime Control Act of 1990. Subsection (B) provided an alternative four-level enhancement, with a floor of 24, if the offense affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense.

Application Note 4 was revised with respect to the definition of "substantially jeopardized the safety and soundness of a financial institution" so that it includes cases in which the offense created a substantial risk of any of the harms described, in addition to cases in which such harm actually occurred. Application Notes 5 and 6 were added to give guidance in applying the new specific offense characteristic (b)(2)(B) (financial kingpin). The background commentary was amended to note the reason for this new subsection. See U.S.S.G., Appendix C, amendment 364.

A special instruction for organizations was added to the guideline to correspond with the addition of Chapter Eight-Sentencing of Organizations. See U.S.S.G., Appendix C, amendment 422.

§2B5.1 Counterfeiting, Forgery, and Infringement of Copyright or Trademark

This guideline was amended on two occasions: **January 15, 1988 and November 1, 1989.**

January 15, 1988: This amendment corrected clerical errors in the statutory provisions section of the commentary. See U.S.S.G., Appendix C, amendment 16.

November 1, 1989: This amendment revised the title of §2B5.1 to clarify the coverage of this guideline. Application Note 2 was added, which adopted the statutory definition of "counterfeit" in 18 U.S.C. § 513. The commentary was changed to make clear that altered obligations are covered by §2B5.2. See U.S.S.G., Appendix C, amendment 115.

§2B5.2 Forgery: Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the U.S.

This guideline was amended on two occasions: **January 15, 1988 and November 1, 1989.**

January 15, 1988: This amendment corrected a clerical error in the statutory provisions section of the commentary. See U.S.S.G., Appendix C, amendment 17.

November 1, 1989: This amendment added "Altered" and "Counterfeit Bearer" to the title to clarify the coverage of this guideline. See U.S.S.G., Appendix C, amendment 116.

§2B5.3 Criminal Infringement of Copyright
§2B5.4 Criminal Infringement of Trademark

No amendments have been made to these guidelines.

AMENDMENTS TO CHAPTER TWO, PART F - OFFENSES INVOLVING FRAUD OR DECEIT

§2F1.1 Fraud and Deceit

This guideline was amended on four occasions: **June 15, 1988; November 1, 1989; November 1, 1990; and November 1, 1991.**

June 15, 1988: This amendment deleted the phrase "estimated, probable or intended" in the specific offense characteristic for loss at (b)(1). A reference to the definition of loss in §2B1.1 was added to Application Note 7, and a change was made to the statutory provision list. See U.S.S.G., Appendix C, amendment 30.

November 1, 1989: The loss table was deleted in its entirety and replaced with a new loss table. See U.S.S.G., Appendix C, amendment 154.

To ensure that this guideline would be interpreted consistently with §1B1.2 (Applicable Guidelines), Application Note 15 was deleted and Note 14 was changed to reflect the language about using another guideline when the count of conviction is more aptly covered by another guideline (e.g., §§2S1.1, 2T1.1, 2L2.1). A grammatical error was also corrected. See U.S.S.G., Appendix C, amendment 155.

The enhancements for "more than minimal planning" and "more than one victim" were separated from "misrepresentation that the defendant was acting on behalf of charitable institution" and "violation of an order" and the floor of 10 was removed from specific offense characteristic (b)(2). Accompanying commentary was amended and a statutory provision was added. See U.S.S.G., Appendix C, amendment 156.

In response to an instruction to the Commission in the Major Fraud Act of 1988, a new specific offense characteristic (§2F1.1(b)(4)) was added to provide a two-level enhancement for "conscious or reckless risk of serious bodily injury" with a floor of 13. See U.S.S.G., Appendix C, amendment 156.

November 1, 1990: This amendment added a new specific offense characteristic (§2F1.1(b)(6)) to provide for a four-level enhancement, with a floor of 24, for offenses that substantially jeopardize the safety and soundness of a financial institution. Application Notes 14 and 15 were added to define the terms used in this specific offense characteristic. The background commentary was amended to note that this change was the result of a statutory directive to the Commission. See U.S.S.G., Appendix C, amendment 317.

November 1, 1991: In response to the Crime Control Act of 1990, this amendment to the specific offense characteristic relating to financial institutions (§2F1.1(b)(6)) provided an alternative four-level enhancement, with a floor of level 24, if the offense affected a

financial institution and the defendant derived more than $1 million in gross receipts from the offense. Application Note 15 revised the definition of "substantially jeopardized the safety and soundness of a financial institution" so that it includes cases in which the offense created a substantial risk of any of the harms described in addition to cases in which such harm actually occurred. Application Notes 16, 17, and 18 were added to give guidance in applying the new specific offense characteristic. The background commentary was amended to note the reason for this new subsection. See U.S.S.G., Appendix C, amendment 364.

Additionally, Application Note 7 was amended to clarify that if the offense consisted of selling or attempting to sell fraudulently overvalued stock, the loss is the amount by which the stock was overvalued, and to provide more specific instruction about how to calculate loss in cases of partially completed conduct. Further, Application Note 7 was amended to provide instruction about how to calculate loss in the following specific types of cases: fraud involving the misrepresentation of the value of an item or product substitution; fraudulent loan application and contract procurement cases; consequential damages in procurement fraud and product substitution cases; diversion of government program benefits; and Davis-Bacon Act cases.

Editorial changes were made to clarify the determination of loss when it cannot be determined with precision. Application Note 9 was added to provide a more precise reference to the discussion in §2X1.1 involving a partially completed offense. See U.S.S.G., Appendix C, amendment 393.

§2F1.2 Insider Trading

No amendments have been made to this guideline.

AMENDMENTS TO CHAPTER TWO, PART R - ANTITRUST VIOLATIONS

§2R1.2 Bid rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

This guideline has been amended on two occasions: **November 1, 1989 and November 1, 1991.**

November 1, 1989: The volume of commerce table was amended to eliminate minor gaps in the table. Editorial changes were also made. See U.S.S.G., Appendix C, amendments 211 and 303.

November 1, 1991: This amendment increased the base offense level from 9 to 10 and changed the volume of commerce table for antitrust violations to make them more comparable to the offense levels for fraud involving comparable amounts of loss. Application Note 1 was changed to reflect the interaction between §2R1.1 and §§3B1.1 - 3B1.2 (Role in the Offense). See U.S.S.G., Appendix C, amendments 377 and 422.

AMENDMENT HISTORY OF PART T, CHAPTER TWO

Various guidelines in Part T of Chapter Two were amended effective November 1, 1989, 1990, and 1991.

I. Description of Amendments

A. 1989 Amendments

Generally, the most significant amendment in 1989 was a revision of the Tax Table at **§2T4.1**, to which most Part T guidelines (except for **§2T1.5**, **§2T1.8**, and **§2T2.2**) refer for purposes of setting the base offense level. Previously the highest offense level from the table was 18, corresponding to tax losses of "more than $5,000,000." The amendment increased the highest offense level to 24, corresponding to dollar amounts of "more than $80,000,000." Beginning at $70,000, the monetary ranges were narrowed, which resulted in many instances in an increase of one or two offense levels above that called for by the previous table. See U.S.S.G, Appendix C, amendment 237.

Other significant amendments in 1989 were to **§2T1.1** (evasion) and **§2T1.6** (failure to collect, account for, or pay over taxes), which removed interest from the determination of "tax loss." See U.S.S.G., Appendix C, amendments 220 and 232.

Section 2T1.2 (failure to file) was amended by adding a cross-reference to §2S1.3 (failure to report monetary transactions) when the defendant is convicted of violating 26 U.S.C. § 6050I. See U.S.S.G., Appendix C, amendment 225.

Deleted from the specific offense characteristics in **§2T1.1**, **§2T1.2**, and **§2T1.3** (fraud and false statement) was language about whether the offense concealed or furthered criminal activity. As amended, the specific offense characteristic requires the more objective determination whether the defendant failed to report or correctly identify the source of income exceeding $10,000 in "any year" derived from criminal activity. The phrase "any year" was also a change from the previous language, "per year." See U.S.S.G., Appendix C, amendments 221, 224, and 228.

The application notes to **§2T1.1**, **§2T1.2**, **§2T1.3**, and **§2T1.4** (aiding, procuring, advising tax fraud) were amended to give guidance in applying the specific offense characteristic calling for a two-level increase when sophisticated means were used to impede discovery of the nature or the extent of the offense. See U.S.S.G., Appendix C, amendments 222, 226, 229, and 231.

The application notes to **§2T1.1**, **§2T1.2**, and **§2T1.3** were amended to clarify that relevant conduct (**§1B1.3**) in applying these guidelines includes all conduct violating the tax

laws as part of the same course of conduct or common scheme or plan unless it is clearly unrelated. See U.S.S.G., Appendix C, amendments 219, 227, and 230.

An application note to §2T3.1 (smuggling) was clarified and the same application note was added to §2T3.2 (receiving or trafficking in smuggled property) to give guidance as well as a possible structure for a departure when the amount of the duties evaded does not adequately reflect the harm. See U.S.S.G., Appendix C, amendments 235 and 236.

Other amendments to Part T made during 1989 were insignificant and were made for clarification or to correct clerical errors. See U.S.S.G., Appendix C, amendments 233, 234 (both amending §2T1.9 (conspiracy to defeat tax)), and 303 (amending §2T1.4).

B. 1990 Amendments

In 1990 there were only a couple of significant amendments to Part T. One, affecting §2T1.1, §2T1.2, and §2T1.3, broadened the definition of "criminal activity" used in the specific offense characteristics of each of these guidelines. As amended, the specific offense characteristic requires only that the conduct be in violation of federal, state, or local law, rather than that it meet the definition of racketeering activity in 18 U.S.C. § 1961. See U.S.S.G., Appendix C, amendment 343.

The other significant amendment removed from the application notes to §2T1.4 a directive that the criminal livelihood guideline at §4B1.3 should not be applied. Without this prohibition on applying §4B1.3, the guideline producing the greater offense level must be applied, pursuant to §1B1.1, Application Note 5. Under §4B1.3, the offense level will be no less than 13, or no less than 11 if the two-level reduction for acceptance of responsibility is given. (It was possible before the amendment to have a final offense level as low as 8, or 6 if the reduction for acceptance of responsibility was given.) See U.S.S.G., Appendix C, amendment 343.

The final Part T amendment in 1990 deleted code sections of Title 26 (§ 5602, § 5607, § 5608, and § 5691) from the statutory provisions section of §2T2.2 (regulatory offenses). See U.S.S.G. Appendix C, amendment 359.

C. 1991 Amendments

One amendment added to §2T1.6 a cross-reference that directed the use of §2B1.1 (theft and embezzlement), if it produced a higher offense level, when the failure to account for and pay over taxes that had been collected constituted embezzlement. See U.S.S.G., Appendix C, amendment 409.

Sections 2T3.1 and 2T3.2 were amended by providing alternative base offense levels, rather than relying solely on the tax table in §2T4.1 (which has a minimum offense level of 6). Under the amendment the tax table is still used if the tax loss exceeded $1,000, but if the tax loss is more than $100 but not more than $1,000, the base offense level is 5; if the loss is $100 or less, the base offense level is 4. The amendment also added a specific offense characteristic (similar but not identical to those already in §2T1.1, §2T1.2, §2T1.3, and §2T1.4) that calls for an increase of two levels when sophisticated means were used to impede discovery of the nature or existence of the offense. See U.S.S.G., Appendix C, amendment 410.

An application note to §2T1.3 was amended to clarify the calculations necessary to determine "tax loss." (The "tax loss" under §2T1.3 is used as a method of determining the "tax loss" for the purposes of §2T1.1 and §2T1.4 as well.) See U.S.S.G., Appendix C, amendment 426.

The background commentary to §2T1.2 was amended to delete surplus passages regarding civil litigation, the likelihood of maximum sentences, and the burden of proof. Additionally, it clarified the definition of tax loss and the impact of that definition. See U.S.S.G., Appendix C, amendment 408.

II. Summary and Observations

Among the most significant amendments to Chapter Two, Part T, was the restructuring of the tax table (§2T4.1). With its higher offense levels for greater dollar amounts, it potentially increased offense levels for all but three of the guidelines in Part T. On the other hand, amendments to §2T3.1 and §2T3.5 that provided alternative base offense levels for lesser dollar amounts created lower offense levels for lower dollar amounts in those cases.

The removal of interest in the determination of tax loss for evasion and failure to collect or pay over taxes offenses simplified application and removed the prosecutor's ability to increase the base offense level by delaying prosecution, but also reduced offense levels for those offenses.

An apparently easily proved increase was removed from §2T1.1, §2T1.2, and §2T1.3 when the portion of the specific offense characteristics that allowed a two-level increase with a floor of 12 if the offense concealed or furthered criminal activity was deleted. On the other hand, reducing the requirement of showing the defendant failed to report income exceeding $10,000 per year from criminal activity to a requirement that $10,000 of such income be received in any year makes application not only easier but more likely. Additionally, redefining "criminal activity" not only eases application but again make application more likely.

The clarification of what constitutes a course of conduct or common scheme or plan for the purposes of determining relevant conduct under §2T1.1, §2T1.2, and §2T1.3 likely leads to inclusion of tax violations that may have been the subject of debate before the clarification.

The addition of cross references to §2T1.2 and §2T1.6 not only provides for a sentence more consistent with the conduct but, when applicable, will increase the offense levels for these offenses.

Appendix E:
Special Data Collection Effort

Appendix E. Special Data Collection

I. The Sample

In order to explore more fully the issues studied by the Working Group, a special coding effort was undertaken. Three substantive areas were chosen for the focus of this effort: the application of the enhancement for more than minimal planning, the definition of loss, and reliance on loss. The cases for this special coding task were selected from the Commission's 1991 monitoring database, according to the following criteria. First, the sampling frame (i.e., those cases from which the sample would be drawn) was limited to cases whose highest adjusted offense level resulted from either the application of §2B1.1 or §2F1.1. Second, in order to ensure adequate representation of high loss cases in the sample, a stratified random sampling scheme was devised. A simple random sample from the monitoring database would have, in all likelihood, netted only a few high loss cases (e.g., more than $1 million) because those cases are relatively few in number.

Based upon an examination of the distribution of guideline adjustments for loss, nine strata or groups were formed for §2B1.1 cases and eight strata for §2F1.1 cases. Where necessary, loss categories were combined so that the resulting distribution of cases was approximately equal across strata, with the exception of the lowest loss category ($100 or less for §2B1.1 and $2,000 or less for §2F1.1), where the percentage of cases was double that of any other stratum. Using 200 cases as a target for the total sample size, a target of 11 cases was set as the sample size for each stratum for each offense, with three exceptions. First, because of the large numbers of cases in the lowest loss category for both offense types, the target sample size for this stratum was set at 21 for the lowest loss categories in both §2B1.1 and §2F1.1. Second, since only the theft loss table identifies loss levels under $2,000, a stratum was formed for losses from $101 to $2,000 for §2B1.1 cases only. Third, since the highest stratum among §2B1.1 cases contained only seven cases, there were only seven cases in the sample for this stratum.

The sample was drawn by taking a separate random sample within each of the seventeen strata constructed for the two offense types. The final sample size was 203 cases. Twelve of these cases were unavailable in the Monitoring files, leaving a final sample of 191 cases. The distribution of sampled cases is described in the table below.

Sample Strata and Corresponding Sample Size

Loss Levels	§2B1.1	§2F1.1
$100 or less	17	-
More than $100	11	-
$2,000 or less	-	21
More than $5,000	12	10
More than $10,000	11	10
More than $20,000	9	11
More than $40,000	11	10
More than $120,000	10	11
More than $1,500,000	7	10

Note from the table that the twelve missing cases are distributed across the different strata and not concentrated in any one category of loss.

For each of these 191 cases, information was coded about issues concerning the planning and execution of the offense and the losses suffered by victims. More specifically, the information set forth below was coded from the Presentence Reports and Statements of Reasons for the sampled cases. (A copy of the complete coding instructions is contained in Appendix E-5.)

- Was the defendant convicted of a felony or a Class A misdemeanor violation?
- Was there a stipulation in the plea agreement to exclude a more than minimal planning enhancement from the guideline calculation?
- What rationale was used or accepted by the court in applying the more than minimal planning enhancement?
- What was the extent of the criminal activity?
- What was the approximate amount of time, in months, that the criminal offense persisted?
- What was the approximate number and type of victims of the offense?
- How many people were knowingly involved in the offense other than the defendant?

- Was an organization used by the defendant as an instrumentality of the offense (excluding instances in which the defendant's position within the organization merely afforded the defendant the opportunity to commit the offense, e.g., bank tellers, postal clerks)?

- Were act(s) of concealment completed during the offense conduct?

- Were act(s) of concealment completed after commission of the offense but prior to the investigation?

- Were act(s) of concealment completed after the commission of the offense but during the investigation of the offense?

- What level of planning was associated with the commission of the offense?

- Was there a stipulation in the plea agreement about the amount of pecuniary loss associated with the offense?

- What types and amounts of loss were associated with the offense (based upon the court's determination and an independent assessment by the coder)?

- What was the approximate value of the property recovered?

- What theory or theories of loss were used (by the coder and by the court) in determining loss?

- Was there a challenge to the probation officer's calculation of loss? What was the outcome of the loss challenge?

- If the amount of loss calculated by the probation officer was not accepted by the court, what amount was ultimately used by the court for sentencing the defendant?

II. Overview of the Sample

This section presents an overview of the data, which are discussed in greater detail in other sections of the Report. Prior to any presentation of these data, however, it is essential that the implications of the stratified sample be understood for the interpretation of the data presentations that follow. Because a random sample is taken from each stratum, it is necessary to "weight" the data prior to the calculation of frequencies and other descriptive statistics. The reasoning for this procedure is as follows: In a simple random sample, the entire population (or sampling frame) makes up a single stratum. Each unit or case in the sample therefore represents one unit or case in the population and represents

a fixed proportion of that population. In a stratified sample, a sampled case represents a case in only one stratum. Because the strata contain different numbers of cases, one case within one stratum may well represent a different proportion of cases from one case in another stratum. "Weighting" the data effectively equalizes these proportions across strata so that, in the weighted sample, each case represents an equal proportion of the stratum population. Frequencies and statistics from this weighted sample can then be compared to the overall population from which the sample was drawn.

Conversely, there are the implications of not weighting the sample data. For example, high-loss cases are overrepresented in this sample compared to the population of cases from which they were drawn (in order to ensure their presence in the sample). A mean loss calculated on the basis of the unweighted sample data will overestimate the average loss in the population. A mean calculated on the weighted data will not systematically under or overestimate the same value in the population.[1] In the Report, the weighted sample is used for information about the coded cases.

Appendices G and I present data about the coded sample. From these tables, some interesting information can be gleaned about the nature of the offenses. First, most of §2B1.1 and §2F1.1 cases have losses of $40,000 or less; approximately 40 percent of the §2B1.1 cases have losses under $2,000, compared to approximately 26 percent of the §2F1.1 cases. A little more than half of the §2B1.1 offenses involved multiple acts, compared to almost 75 percent of the §2F1.1 cases. Sixty-nine percent of the §2B1.1 offenses involved only one participant, compared to 52 percent of the §2F1.1 offenses. Almost 88 percent of the §2B1.1 cases involved a single victim, compared to 57 percent among the §2F1.1 cases. Finally, in 36 percent of the §2B1.1 cases there was one or more acts of concealment during the offense, whereas such concealment occurred in 49 percent of the §2F1.1 cases. For both guidelines, there were few cases in which acts of concealment occurred after the offense, whether prior to or during the investigation of the offense.

The tables also include some interesting information about plea agreements that is not available from the monitoring database. For example, 34 percent of the §2B1.1 cases in this sample received an upward adjustment for more than minimal planning, compared to approximately 67 percent of the §2F1.1 cases. While the application of more than minimal planning differs greatly by offense, there is little difference in the frequency of stipulations to exclude the more than minimal planning enhancement among cases in which the offender agreed to plead guilty. Approximately 5 percent of the relevant §2B1.1 cases and 6 percent of the relevant §2F1.1 cases included such a stipulation. Although stipulations to loss amounts are more common, there is similarly little difference between the two offense types. Approximately 39 percent of the relevant §2B1.1 cases and 36 percent of the relevant §2F1.1 cases included stipulations to loss amounts.

---

[1] See Sudman, S., Applied Sampling (1976).

Coding Instrument

General Instructions: For each of the following questions, use the factual information presented in the relevant court documents, i.e., presentence investigation report, plea agreement, statement of reasons, to answer the questions.

1 *Felony/Misdemeanor.* Was the defendant convicted of a felony or a Class A misdemeanor violation?

0 felony
1 misdemeanor
2 multiple counts, both classes
-9 missing data

***More than Minimal Planning* Component**

2 *Stipulation to Exclude More than Minimal Planning from the Guideline Calculation.* Was there a stipulation in the plea agreement to exclude *More than Minimal Planning* from the guideline calculation.

0 no
1 yes
-8 not applicable, (guilty by trial or guilty by plea but with no written agreement with prosecutors)
-9 missing data, no plea agreement available

3 *Theory of More than Minimal Planning.* Describe the rationale used or accepted by the court in applying the *More than Minimal Planning* enhancement.

0 *More than Minimal Planning* not applied
1 multiple criminal acts
2 sophisticated planning
3 acts of concealment
4 multiple indicia of *More than Minimal Planning*
-9 missing data

The Scope of the Offense

4 *Pattern of Activity--Offense.* Describe the extent of the criminal activity.

0 no act(s) completed but indications that a single criminal act was planned
1 no act(s) completed but indications that multiple criminal acts were envisioned

2 single act completed
3 single act completed but indications that multiple criminal acts were envisioned and would have been completed but for early detection of the offense
4 multiple acts completed
-9 missing data

5 *Duration of the Offense.* Describe the approximate amount of time, in months, that the criminal offense persisted. If the offense consisted of a single criminal act regardless of the preparation time, the duration of the offense is '0'; otherwise the duration of the offense is the interval of time from the first act of theft or fraud through the last act of theft or fraud as identified in the presentence investigation report. If the offense was interrupted due to detection by investigators, the date of detection is the date of the last criminal act.

0 single, criminal act
(actual time, in months)
-8 no act completed
-9 missing data

6 *Type of Victim.* Describe the victim(s) of the offense as identified in the presentence investigation report.

0 no victim
1 government
2 business
3 individual(s)
4 multiple types of victims
5 societal harm
-9 missing data

7 *Number of Victims.* Identify the approximate number of victims of the offense. If the presentence investigation report identifies a range of victims (e.g., 200 or more) code the bottom of the reported range. Report no more than 1,000 victims. *Note:* Each victim whether institutional or individual is counted as '1.'

0 no victim
(actual number)
1000 1,000 or more reported victims.
-9 missing data

The Complexity of the Offense

8 *Number of Persons Involved in the Offense.* Approximately how many people were knowingly involved in the offense *other* than the defendant? Include both codefendants and *known* but unindicted persons who were criminally responsible for the offense. But, exclude persons jointly-indicted in whose acts the defendant did not

participate and would not otherwise be held accountable. Report no more than 100 participants.

0 only the defendant
(actual number)
100 100 or more participants
-9 missing data

9 *Involvement of an Organization in the Offense.* Was an organization used by the defendant as an instrumentality of the offense? Exclude instances where the defendant's position within the organization merely afforded the defendant the opportunity to commit the offense, e.g., bank tellers, postal clerks.

0 no
1 yes
-9 missing data

The Preparation of the Offense

Affirmative Acts to Conceal the Offense. Each of the following questions should be considered independent of the others.

10 were act(s) of concealment completed during the offense conduct?

0 no
1 yes
-9 missing data

11 were act(s) of concealment completed after commission of the offense but prior to the investigation?

0 no
1 yes
-9 missing data

12 were act(s) of concealment completed after the commission of the offense but during the investigation of the offense?

0 no
1 yes
-9 missing data

13 *Extent of Planning.* Characterize the level of planning associated with the commission of the offense.

0 no planning involved, offense was purely opportunistic
1 planning involved, describe _____
-9 missing data

Definition of Loss Component

Note: The source of information for the following questions is specified at the beginning of each question. In calculating loss amounts, the coder should use the guideline manual that was applicable to the defendant during the period that he was sentenced or otherwise accountable.

14 *Stipulation to Loss.* **PLEA AGREEMENT** Was there a stipulation in the plea agreement to the amount of pecuniary loss associated with the offense?

0 no
1 yes
-7 no pecuniary loss
-8 not applicable, (guilty by trial or guilty by plea but with no written agreement with prosecutors)
-9 missing data, no plea agreement available

15 *Type of Loss.* **PSR--OFFENSE DESCRIPTION** Identify the type(s) of loss associated with the offense.

0 non-pecuniary loss
1 pecuniary loss
2 both
-9 missing data

Note: Non-pecuniary loss is harm for which a monetary value cannot be applied, e.g., harm to a company's reputation or the harm associated with illegal immigration.

16 *Value of Property Taken, Damaged, or Destroyed.* **PSR--OFFENSE DESCRIPTION/MAKE INDEPENDENT DETERMINATION** Using the information in the presentence investigation report, identify the approximate value of the property taken, damaged, or destroyed or the value of property *intended* to be taken, damaged, or destroyed by the defendant.

0 no pecuniary loss
(actual amount)
-9 missing data

17 *Value of Property Recovered.* **PSR--OFFENSE DESCRIPTION/MAKE INDEPENDENT DETERMINATION** Using information in the presentence investigation report, identify the approximate value of the property recovered. Value of property recovered includes monies not paid-out to the defendant but which the defendant sought to obtain. But the Value of property recovered does not include monies that were paid by the defendant as restitution for the offense.

0 property recovered had no value/no recovery
(actual amount)
-8 no pecuniary loss/no property actually taken
-9 missing data

18 *Theory of Loss Calculation--Coder.* Identify the theory(ies) that best explains the theory of loss used by the coder in calculating loss.

0 no pecuniary loss
1 actual amount taken
2 intended loss
3 fair market value
4 replacement/substitution cost
5 cost of repair
6 net loss
7 gain
8 value of misrepresentation
9 value of unpaid loans
10 other, describe _____
11 face value of loans made
12 multiple theories of loss, identify all relevant theories
-9 missing data, the theory of loss can not be inferred from the relevant documents

19 *Amount of Pecuniary Loss.* **PSR--GUIDELINE CALCULATION/WORKSHEETS** If the offense involved pecuniary loss, what was the aggregate loss amount that was used by the probation officer in the guideline calculation?

0 no pecuniary loss
(actual amount)
-9 missing data

20 *Challenged Loss.* **PSR--ADDENDUM** Was there a challenge to the probation officer's calculation of loss?

0 no
1 yes, by the prosecution
2 yes, by the defendant
-8 no pecuniary loss to challenge
-9 missing data

21 *Outcome of Challenge.* **SOR** What was the outcome of the loss challenge?

0 court accepts probation officer's recommendation
1 court accepts determination by challenger
2 court makes its own determination
-8 not applicable, no challenge to the loss calculation
-9 missing data

22 *Arbitrated Loss Amount.* **SOR** If the amount of loss calculated by the probation officer was *not* accepted by the court, what amount was ultimately used by the court for sentencing the defendant?

0 no loss amount used in the calculation
(actual value)
-8 probation officer's determination used
-9 missing data

23 *Theory of Loss Calculation--Court.* Identify the theory(ies) that best explains the theory of loss used by the court for sentencing the defendant. Note: The coder may refer to the theories articulated by either the probation officer or the court.

0 no pecuniary loss
1 actual amount taken
2 intended loss
3 fair market value
4 replacement/substitution cost
5 cost of repair
6 net loss
7 gain
8 value of misrepresentation
9 value of unpaid loans
10 other, describe _____
11 face value of loans made
12 multiple theories of loss, identify all relevant theories
-9 missing data, the theory of loss can not be inferred from the relevant documents

CODER: _____

USSC ID No.: _____

Circle/Highlight Correct Answer

0 1 2 -9 1 *Felony/Misdemeanor.*

***More than Minimal Planning* Component**

0 1 -8 -9 2 *Stipulation to Exclude More than Minimal Planning from the Guideline Calculation.*

0 1 2 3 4 -9 *3 Theory of More than Minimal Planning.*

The Scope of the Offense

0 1 2 3 4 -9 4 *Pattern of Activity--Offense.*

0 _____ -8 -9 *5 Duration of the Offense (in months).*

0 1 2 3 4 5 -9 *6 Type of Victim.*

0 _____ 1000 - *7 Number of Victims.*
9

The Complexity of the Offense

8 Number of Persons Involved in the Offense.

0 _____ 100 -
9

9 Involvement of an Organization in the Offense.

0 1 -9

The Preparation of the Offense

Affirmative Acts to Conceal the Offense.

10 were act(s) of concealment completed during the offense conduct?

0 1 -9

11 were act(s) of concealment completed after commission of the offense but prior to the investigation?

0 1 -9

U. S. Department of Justice

Washington, D.C. 20530

OCT 15 1992

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Under the Sentencing Reform Act of 1984, the Criminal Division is required to submit at least annually to the United States Sentencing Commission a report commenting on the operation of the sentencing guidelines, suggesting changes that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. § 994(o). In preparing this report, the Criminal Division has consulted with other components of the Department of Justice, and the views presented are those of the entire Department. It is our view that, on the whole, the guidelines are working well and the Commission has met its statutory responsibilities. We would like to bring to your attention some problems which have arisen and request that the Commission consider the following recommendations for changes. We have limited our comments to areas which the Sentencing Commission has identified as priority areas for the upcoming amendment cycle, with one exception relating to prior criminal history. We believe these recommendations will enhance the functioning of the guidelines and serve the purposes of sentencing set forth in the Sentencing Reform Act.

VIOLENT CRIME

Firearms and Gangs: Amendments in the area of violent crime, especially guidelines dealing with firearms and gangs, remain a high priority of the Department of Justice. The Criminal Division again urges the Commission to adopt the Attorney General's recommendations concerning enhanced sentences for firearms offenses and for felonies committed in furtherance of criminal street gang activities. These recommendations are set forth in detail in a letter dated January 31, 1992, from the Attorney General to the Sentencing Commission. We recommend that the Sentencing Commission recognize the urgency of the growing problem of violent crime by adopting amendments providing for enhanced sentences for firearms and gang offenses which pose a critical threat to public safety.

FRAUD

Enhancement for financial institution fraud: As in past years, we again recommend strongly an amendment to increase the sentences for financial institution fraud, in addition to other enhancements already in the guidelines. The amendment is needed to reflect the dramatic increases by Congress during the past several years in the maximum terms of imprisonment from 20 to 30 years for violations of 10 major title 18 bank fraud and embezzlement offenses. We believe Congress has sent a strong signal that individuals whose conduct jeopardizes the integrity of our nation's banking system should receive harsh sentences, including lengthy periods of incarceration.

We recommend that the following specific offense characteristic be added to guideline § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), § 2B4.1 (Bribery in Procurement of Bank Loans or Other Commercial Bribery), and § 2F1.1 (Fraud and Deceit):

> ( ) If the offense affected a financial institution, increase by 4 levels.

Concerns have been expressed that this enhancement could result in harsh punishments for employees of financial institutions such as bank tellers who commit offenses which amount to isolated incidents of theft involving low dollar amounts. For these types of cases it might be appropriate for the guidelines to state that the enhancement would not apply.

More than minimal planning: The Department strongly supports the current two-level upward adjustment for fraud offenses for "more than minimal planning." Because dollar loss is not associated with many fraud cases or often cannot be documented, we believe it would seriously undermine a large number of cases to conclude that "more than minimal planning" is present in all large fraud cases and attempt to take this into account in the loss tables.

As a matter of sound policy, we agree with the background to guideline § 2B1.1, which states that "[p]lanning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof." These factors often occur in public corruption cases, and warrant application of a specific offense characteristic apart from the dollar value of the money involved in the scheme. Simply stated, complex schemes to defraud often warrant harsher treatment than simple ones. The flexibility in application that may result from this additional characteristic is desirable in allowing the government and the court to distinguish between complex and simple schemes that often require different sentences even if similar amounts of loss

are involved. The extent of planning of a fraudulent scheme is an excellent measure of a defendant's culpability.

The Department prosecutes many fraud cases sentenced under guideline § 2F1.1 in which there is no dollar loss associated with the crime. These cases arise under 18 U.S.C. § 1028, for example, involving false identification documents. In other cases, such as fraud charging mislabeling or other types of misrepresentation, it is impossible to assign a figure for economic loss.

In many cases, losses are so difficult to document that they are unaccounted for at sentencing due to the defendants' successful efforts to hide the scope of illegal activity. Losses are frequently underestimated in odometer and food and drug fraud cases, for example, because of the effort required to quantify them. These characteristics are shared by many fraudulent schemes which involve poor records and an obscure paper trail but include many victims.

In addition, the Department often prosecutes individuals involved in financial or other fraud schemes and property crimes which simply do not result in large monetary losses but which, by virtue of the defendants' involvement in repeated transactions over an extended period to time, would fall within the definition of "more than minimal planning." Particularly if a defendant is caught early in a fraud scheme before substantial losses are amassed, it may be impossible to establish a significant loss from the fraud, but eminently feasible to show the extent of "planning".

In our experience, the "more than minimal planning" adjustment has not been difficult to apply in practice. If "more than minimal planning" is not always applied uniformly by the courts, we recommend clarifying commentary and more examples. In any event, we urge the Commission to distinguish problems of application from the sound policy reasons embodied in the "more than minimal planning" adjustment.

White collar crime policy issues: The Department supports the plans of the Commission's white collar crime working group to examine the fraud and theft guidelines to determine whether the relationship between the amount of loss and offense levels under the present loss tables is appropriate, particularly at the high ends of the tables. We also support the working group's plans to consider, in addition to reliance on loss in determining punishments, identification of other factors such as the sophistication of the scheme, potential loss, risk of injury, or type of victims in determining the offense level, where the loss does not fully measure the extent or severity of the fraud.

COMPUTER FRAUD AND ABUSE

The Department of Justice supports the adoption of a sentencing guideline to carry out the purposes of the Sentencing Reform Act in the context of the rapidly developing area of computer crime. A guideline is important in this unique area of federal law enforcement because computer offenses often harm intangibles, such as privacy rights or the unimpaired operation of networks, as well as the kinds of property values which the general fraud table measures.

The current sentencing guideline which applies to violations of The Computer Fraud and Abuse Act of 1988 (18 U.S.C. § 1030) is guideline § 2F1.1. In calculating the appropriate sentence, the most significant specific offense characteristic in § 2F1.1 is the amount of loss caused to the victim. With the exception of subsections (a)(4) and (a)(5)(A), section 1030 of title 18, United States Code, protects against harms that cannot be adequately quantified by examining dollar losses. For example, the Department of Justice has investigated numerous cases where hackers have accessed credit reporting agency computers to download (i.e., copy) credit reports of unsuspecting individuals. Although the market value of these credit reports is de minimis, such conduct represents a serious intrusion into the privacy rights of those individuals whose credit reports are compromised.

Other recent cases also highlight the inadequacies of applying § 2F1.1 to computer crimes:

1) Some hackers have allegedly manipulated telephone company computers to disrupt normal phone service. Although this may cause some economic harm to the phone company or a subscriber, the dollar harm fails to measure the true impact of the interference with normal phone service.

2) Another emerging trend involves disgruntled employees who intentionally damage their employer's computer systems. Their aim may be to harass rather than cause economic loss, and therefore relying entirely upon loss may be inappropriate.

3) Some hackers actively traffic in telephone access codes, such as the numbers used to charge telephone calls to a subscriber's home number, by publishing these codes on computer bulletin boards. Although the phone company can ascertain the amount of loss attributable to a given code, it is impossible to prove that the individual who posted that code is responsible for all of the losses. Some of these losses may have accrued before the defendant came into possession of the code and, in any event, the code may have been independently stolen and posted by other individuals around the country.

Finally, in determining the scope of loss under the current guideline, at least one court has held that the cost of tracking and identifying an intruder may not be considered by the court in determining loss. See U.S. v. Richard Wittman, No. 91-CR-327 (D. Colo. 1991).

Our proposed sentencing guideline, which is attached as Attachment C, considers this array of interests. This proposal uses the § 2F1.1 table where financial loss is an appropriate factor in determining the sentence, but offers other offense characteristics related to non-economic harms.

TAX OFFENSES

The Department has met with representative of the Commission's white collar crime working group and begun discussions of possible changes to the tax offense guidelines. In that meeting, we expressed our view that the Commission should consider three areas during this amendment cycle. Foremost, in our view, is the need to consider possible amendments to the offense levels in the Tax Loss Table (§ 2T4.1). As we have expressed to the Commission on numerous occasions, the Department believes that the amendments to the Sentencing Table slated to go into effect on November 1, 1992, will have a significant adverse impact on tax enforcement. Increasing offense levels throughout the Tax Loss Table might be necessary to offset this deleterious effect and to insure that the "heartland" tax case will result in adequate deterrence through some form of incarceration, be it imprisonment, intermittent confinement, community confinement, or home detention.

In addition, it is the Department's view that two matters considered, but not adopted, during the last amendment cycle deserve continued consideration. The varying definitions of "tax loss" in the tax guidelines have caused some application problems. Attention should be given to the desirability of enacting a single definition which is easier to apply and which will reduce the complexities of determining "tax loss." As part of this consideration, the benefits of consolidating and reducing the number of tax guidelines should also be addressed. Finally, the Department believes that the application in tax cases of the multiple count rules of Chapter Three, Part D deserves continued consideration. Too often, as a result of the grouping rules, a tax offense has no effect on the ultimate offense level when it is grouped with an offense having a much higher offense level.

The Department intends to work with the Commission's white collar crime working group on these and other matters. If it is determined that changes in these areas are appropriate, specific proposals will be submitted.

We appreciate your consideration of these important matters and will be available to assist the Commission in its efforts to address our concerns.

Sincerely,

Paul L. Maloney
Member (ex officio)
United States Sentencing Commission

Attachments

cc: Susan Winarski

U.S. Department of Justice

Tax Division

Office of the Assistant Attorney General

Washington, D.C. 20530

April 22, 1992

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, DC 20004

Re: Proposed Application Note to Amendment 29, Alternatives to Incarceration, and Proposed Conforming Application Notes to §5B1.1 and §5C1.1

Dear Judge Wilkins:

You have offered us an opportunity to attempt to draft language for an application note to Amendment 29, Alternatives to Incarceration, which would exempt tax offenses and antitrust offenses from the new Sentencing Table (Amendment 29, Option B). Attached is our suggested language for such an application note, together with proposed conforming application notes to §5B1.1 and §5C1.1.

The revision to the Sentencing Table of the Federal Sentencing Guidelines (Amendment 29, Option B) would expand Zone A at Criminal History Category I to include Levels 7 and 8, and set the sentencing range for those levels at 0-6 months. The new table would also expand Zone B by including Level 11 in the zone at Criminal History Category I and making a revised split sentence (requires at least one month in prison, remainder in community confinement or home detention) available for offense levels falling in Zone B, in addition to the possibility of only a probationary sentence with conditions of confinement.

If this change in the Sentencing Table is implemented, a substantial number of those convicted of violating the internal revenue laws will serve no time in jail at all. Thus, just as the impact of the Guidelines is beginning to be felt in criminal tax cases, this proposal will virtually eliminate any meaningful

deterrence in such cases. Similar effects will be felt in antitrust cases. 1/

The Commission's own statistics support this conclusion. Table 11 of the Preliminary Report to the Commission: Staff Working Group on Alternative, dated October 23, 1991, indicated that 59 tax cases had been sentenced under the Guidelines between October 1, 1989, and September 30, 1990. Using that figure, approximately 30% of the tax cases sentenced were eligible for straight probation (18 of 59). As a result of the expansion of Zone A to encompass offense levels 7 and 8, the percentage of those tax cases eligible for straight probation increases to approximately 52.5% (31 of 59).

The 13 additional cases which would be eligible for straight probation under the new Sentencing Table are not insignificant cases from an enforcement perspective. Tax cases at offense levels 7 and 8 in Criminal History Category I involve tax losses between $2,001 and $10,000, and unreported income of roughly $7,000 to $36,000.

The expansion of Zone B has similar adverse effects. Approximately 24% of the tax cases in Table 11 (14 of the 59) fall in the new Zone B and, thus, would be eligible for probation with conditions of confinement (i.e., possibility of no prison term) or the revised split sentence in which a mere one month of imprisonment could be ordered served as opposed to one-half of the minimum range which the defendant whose offense level falls in Zone B must now serve. 2/

By expanding Zone B to include offense level 11, tax losses ranging between $40,001 to $70,000, which derive from unreported incomes ranging between approximately $142,000 to $250,000, would now be included in this zone and could result in a prison sentence of only one month. Moreover, under the new table, 76% of the 59 cases sentenced between October 1, 1989, and September 30, 1990 (45 of the 59 cases) would be eligible for straight probation or a prison sentence no longer than one month.

1/ In a letter to you, dated April 10, 1992, and signed by James F. Rill, Assistant Attorney General, the Antitrust Division outlined the substantial adverse impact the new Sentencing Table would have on antitrust enforcement.

2/ These 14 cases of the 59 in Table 11 are made up of those cases which fall at offense levels 9, 10, and 11. Thirteen of the 59 cases fall at offense levels 7 and 8, and would be included in Zone A under the amended Sentencing Table. Three cases from level 11 would join the 11 cases at offense levels 9 and 10 in the new Zone B.

The harmful effects of this new table will be even greater where the defendant is able to convince the court that he or she is entitled to a reduction for acceptance of responsibility. By factoring in the two-level adjustment for acceptance of responsibility, cases at offense levels 9 and 10 because of tax losses between $10,001 and $40,000 (unreported income of roughly $36,000 to $142,000) could fall into Zone A and be eligible for straight probation. Similarly, a case which might otherwise be sentenced at a level 13 (tax loss of $120,000 to $200,000 and understated income of roughly $430,000 to $714,000) would be sentenced, as a result of a two-level reduction for acceptance of responsibility, in the new Zone B and be eligible either for probation with conditions or one month in prison. Such cases are hardly minor offenses deserving of lenient treatment, even if committed by first-time offenders.

The new Sentencing Table drastically undermines the Federal Tax Enforcement Program. Unlike other statutory requirements, the provisions of the Internal Revenue Code touch virtually every individual and business in the country. In order to encourage compliance with the internal revenue laws by all taxpayers, criminal tax prosecutions must be directed at all income levels, occupations, businesses, and geographic locations. However, because of limited resources, only a small number of tax violations can be prosecuted. For example, for calendar year 1988, the number of criminal investigations was only .5% of the number of returns examined and .004% of the number of all returns filed. Similarly, there were approximately 110 million individual income tax returns filed in calendar year 1989, but only 2,472 convictions for tax offenses in that year.

The prospect of imprisonment, even if only for a short period of time, is a more effective deterrent to most people contemplating a violation of the revenue laws than is the prospect of probation or a fine. Consequently, it is extremely important to the enforcement effort that the expenditure of limited resources on investigation and prosecution result in sentences of imprisonment in order to deter those in all categories of tax offenders from violating the internal revenue laws. Application of the new Sentencing Table will result in a significant number of tax violators not being sentenced to terms of imprisonment and will greatly reduce or virtually eliminate the deterrent potential of these prosecutions.

One alternative has been to suggest that a study be conducted over the next year to determine whether changes should be made in the way white collar crimes are sentenced under the Guidelines. The thought has been expressed that any problems caused by applying the new Sentencing Table to tax and antitrust offenses could be remedied once the study has been completed. We believe it makes more sense to conduct the study first and

implement any changes only after the effects of such changes have been fully considered.

The adverse consequences to the enforcement effort flowing from application of the new Sentencing Table to tax and antitrust offenses will not necessarily end in one year, but potentially could be felt for a number of years. Most defendants who commit tax or antitrust offenses in the next year will not be prosecuted or sentenced until several years thereafter. Nevertheless, if sentences under the new Sentencing Table for these offenses are more lenient than those which come later under some other Sentencing Table, defendants will undoubtedly argue for application of the more lenient table. Indeed, because of the ex post facto considerations of Miller v. Florida, 482 U.S. 423 (1986), the Department has historically taken the position that where there are substantive changes to the detriment of the defendant in the Guidelines, the Guidelines in effect at the date of the violation should apply. (But see United States v. Bell, No. CR 91-2016, slip op. (N.D. IA March 30, 1992), where the Department lost the only case in which it varied from its ex post facto position and authorized a request to seek sentencing under 18 U.S.C. § 3553(a)(4)). Consequently, any overly favorable changes in the Sentencing Table implemented now, even if reversed after one year, will have a continuing adverse effect for a number of years.

Continued use of the Sentencing Table effective November 1, 1991, for tax and antitrust offenses is consistent with the fact that no changes were made in this amendment cycle to either the tax or antitrust guidelines. Practitioners, both for the prosecution and for the defense, are familiar with and used to applying the guidelines now in effect, including the Sentencing Table. So long as the underlying guidelines are not changed, it makes sense to continue to use the sentencing table applicable to those guidelines. If changes are to be made in the Sentencing Table which will affect sentences for tax and antitrust offenses, it would be better to wait and do so only after insuring that any changes will not substantially undermine the enforcement effort in these areas.

For these reasons, we urge the Commission to add the proposed Application Note to the new Sentencing Table, together with the proposed conforming Application Notes to §5B1.1 and §5C1.1.

Sincerely,

JAMES A. BRUTON
Acting Assistant Attorney General
Tax Division

PAUL L. MALONEY
Senior Counsel for Policy
Criminal Division

Attachment

Proposed Application Note to Amendment 29, Alternatives to Incarceration and Proposed Conforming Application Notes to §5B1.1 and §5C1.1

Application Note 4 -- Commentary to Sentencing Table:

The Commission intends that this Sentencing Table should not be applied in determining the sentences for tax and antitrust offenses. This Sentencing Table is, therefore, not to be used when sentencing for any tax offense for which the offense level is determined under Part T or for any antitrust offense for which the offense level is determined under Part R. Instead, the Sentencing Table effective on November 1, 1991, is to be used for such offenses.

See also Application Note 3 to §5B1.1 and Application Note 9 §5C1.1.

Application Note 3 for §5B1.1:

Do not apply the provisions of §5B1.1(a)(2), effective November 1, 1992, to tax and antitrust offenses. The Commission intends that, with respect to imposition of a term of probation for any tax offense for which the offense level is determined under Part T and for any antitrust offense for which the offense level is determined under Part R, the provisions of §5B1.1(a)(2), effective November 1, 1991, will continue to apply.

See also Application Note 4 to the Sentencing Table (Chapter 5, Part A).

Application Note 9 for §5C1.1:

Do not apply the provisions of §5C1.1(c) and(d), effective November 1, 1992, to tax and antitrust offenses. The Commission intends that, with respect to imposition of a term of imprisonment for any tax offense for which the offense level is determined under Part T and for any antitrust offense for which the offense level is determined under Part R, the provisions of §5C1.1(c) and (d), effective November 1, 1991, will continue to apply.

See also Application Note 4 to the Sentencing Table (Chapter 5, Part A).

0 1 -9

12 were act(s) of concealment completed after the commission of the offense but during the investigation of the offense?

0 1 -9

13 Extent of Planning. Describe, use other side of page if necessary.

Definition of Loss Component *Note: The source of information for the following questions is specified at the beginning of each question.*

0 1 -7 -8 -9

14 Stipulation to Loss.
PLEA AGREEMENT

0 1 2 -9

15 Type of Loss.
PSR--OFFENSE DESCRIPTION

0 _____ -9

16 Value of Property Taken, Damaged, or Destroyed.
PSR--OFFENSE DESCRIPTION/MAKE INDEPENDENT DETERMINATION

0 _____ -8 -9

17 Value of Property Recovered.
PSR--OFFENSE DESCRIPTION/MAKE INDEPENDENT DETERMINATION

0 1 2 3 4 5 6 7

8 9 10 11 -9

18 Theory of Loss Calculation--Coder.

0 _____ -9

19 Amount of Pecuniary Loss.
PSR--GUIDELINE CALCULATION/WORKSHEETS

0 1 2 -8 -9

20 Challenged Loss.
PSR--ADDENDUM

0 1 2 -8 -9

21 Outcome of Challenge.
SOR/PSR--ADDENDUM

0 _____ -8 -9

22 Arbitrated Loss Amount.
SOR/PSR--ADDENDUM

0 1 2 3 4 5 6 7

8 9 10 11 -9

23 Theory of Loss Calculation--Court.

Are there any other aspects of loss that were problematic to the application of the guideline, e.g., loss components that could have been added. Describe here

Note: For this narrative, please be inclusive--extraneous/irrelevant information can be discarded but pertinent information is more difficult to retrieve.

Appendix F:
Profile of Economic Crimes

Appendix F. Profile of Guideline Economic Offenses

I. Introduction

In undertaking study of "white collar" or economic offenses, the Commission's White Collar Working Group prepared a series of tables profiling the offense and offender characteristics of this group of offense types.

From the Commission's Fiscal Year 1991 data file,[1] a group of 6,600 cases was selected for analysis. Only those cases in which the Commission received complete information from the sentencing court (approximately 80%) were used. This selection helps to ensure that rulings made by the sentencing court that alter recommendations made by the probation officer in the presentence report are incorporated in the data. Additionally, the small number of economic offenses in this group sentenced under the 1988 edition of the guidelines have been excluded due to critical differences in the structure of the loss table that year compared with subsequent years.

The guidelines selected by the working group for study generally encompass those found in Chapter Two, Parts B, F, R, and T (e.g. larceny, theft, embezzlement, fraud, antitrust, and taxes). Guidelines such as robbery and burglary, normally considered to be violent offenses, have been excluded from this analysis.[2]

The group of cases is analyzed by the primary guideline (the guideline that results in the highest adjusted offense level for a given case), with additional information provided on several other aspects of these cases. A series of tables at the end of this Appendix provides detailed sentence and guideline information for each of the selected guidelines under study. Aggregate tables are presented in the body of this section and in Appendix A.

---

[1] MONFY91 - October 1, 1990 through September 30, 1991.

[2] For a listing of the specific guidelines used, refer to Table F-1.

II. Demographic Information

Table F-1 presents the distribution of the primary guideline for the 6,600 economic cases under study. For the purposes of analysis, the Commission's statute-based offense code system has been employed to break out certain sub-groups of offenses within broad guidelines. For example, §2B1.1 is broken into categories of *Theft*, *Larceny*, and *All Others*. In §2B1.1 and the remaining guidelines, the *All Others* category encompasses a range of actual offense types. The frequency of other types of offenses within these guidelines is typically a small percentage of each guideline. These offense types are listed by primary guideline in Table F-7.

Table F-1 shows that §§2B1.1 and 2F1.1 cover more than 80 percent of all economic offense cases.

Table F-1

Distribution of Economic Offense Guidelines (October 1, 1990 through September 30, 1991)

Guideline*	Number	Percent
TOTAL	6,568	100.0
2B1.1 (All Others)	107	1.6
2B1.1 (Embezzlement)	893	13.6
2B1.1 (Larceny)	1,435	21.9
2B1.2 (All Others)	15	0.2
2B1.2 (Auto Theft)	73	1.1
2B1.2 (Larceny)	307	4.7
2B4.1 (Bribery)	19	0.3
2B5.1 (Counterfeiting)	367	5.6
2B5.3 (Copyright Infringement)	70	1.1
2B5.4 (Trademark Infringement)	39	0.6
2F1.1 (All Others)	129	2.0
2F1.1 (Forgery)	289	4.4
2F1.1 (Fraud)	2,560	39.0
2R1.1 (Antitrust)	10	0.2
2T1.1 (Tax Evasion)	51	0.8
2T1.2 (Failure to File)	67	1.0
2T1.3 (Tax Fraud)	44	0.7
2T1.4 (Aiding Tax Fraud)	15	0.2
2T1.5 (Fraudulent Returns)	17	0.3
2T1.9 (Conspiracy-Tax)	29	0.4
2T3.1 & 3.2 (Smuggling)	32	0.5

* For analysis purposes, guidelines with at least ten cases and more than one statutory offense type with a significant number of cases are separated into categories. Additionally, 32 cases selected in the initial group of economic offenses have been excluded due to an insufficient number of cases for useful analysis. Because of this deletion, the following guidelines are not represented in these tables: §2B5.2; §§2T1.6, 1.7, 2.1, 2.2.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

A. Age

In Fiscal Year 1991, the mean and median age of guideline defendants was 34.2 and 32.0 years, respectively. For the economic offenses sample, the mean and median age was 35.8 and 34.0, respectively. The increase in average age of this group relative to the general guideline population is consistent with the general upward trend in age for non-drug, non-violent offenses. Defendant's sentenced under Parts R and T of Chapter Two (antitrust and taxes) are, on average, the oldest defendants, with mean and median ages of 49.5 for antitrust offenses and 43.2 and 43.0 for tax offenses. Table F-2 provides mean and median ages for the various guidelines included in this analysis.

B. Race

In examining the distribution of race, the proportion of white and hispanic defendants sentenced for economic offenses varies significantly from the entire guideline population. White defendants represent 44 percent of all guideline defendants, but 58.6 percent of the economic offense group. Conversely, hispanic defendants represent 24 percent of all guideline defendants, but make up only 7.6 percent of the economic offense group. The proportion of black and other race defendants in the economic offense group is comparable with the overall population. Table F-2 shows a much higher proportion of white defendants (90% and 100%, respectively) in §2B5.3 (criminal infringement of copyright) and §2R1.1 (antitrust). The proportion of black defendants is the highest in §2F1.1 under the offense type of forgery (56%). White defendants comprise about 75 percent of all tax offenders. See Table F-2.

C. Gender

The overall guideline proportion of male to female defendants (83% and 17%, respectively) drops to 69 percent and 31 percent for the economic offense group. Female defendants are found at a higher proportion than the overall guideline population in fraud, larceny, theft, and embezzlement. Male defendants are represented proportionately higher in auto theft, copyright infringement, and antitrust offenses. For a complete distribution of guideline by gender, see Table F-2.

D. Income

Mean monthly income for all guideline defendants is $773 (median of $0). For the economic offense group, the mean monthly income rises to $1,015 (median of $650). Average income is highest for antitrust offenders ($4,452 mean and $3,000 median) and lowest among those sentenced under larceny, embezzlement, and theft guidelines ($932 mean and $642 median). Tax offenders have a mean income of $2,052 monthly ($1,333

median) and those sentenced under the fraud guideline have a mean monthly income of $1,011 ($600 median). The distribution of average income by guideline is provided in Table F-2.

E. Education

In the economic offense group, 26 percent did not graduate from high school compared to 42 percent in the overall guideline population. Almost 37 percent of the economic offense group received some type of college education compared to 25 percent in the overall guideline population. The median education level for the economic offense group is shown in Table F-2.

Table F-2

OFFENDER CHARACTERISTICS BY ECONOMIC OFFENSE GUIDELINES*
(October 1, 1990 through September 30, 1991)

Guideline	TOTAL	Economic Offense Defendant Characteristics															
		Race								Gender				Age		Monthly Income		Education
		White		Black		Hispanic		Other		Male		Female						
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Mean	Median	Mean	Median	Median
2B1.1 (All Others)	107	70	65.4	23	21.5	10	9.4	3	2.8	80	74.8	27	25.2	[illegible]	36.0	$896	$764	High School
2B1.1 (Embezzlement)	893	574	64.3	208	23.3	67	7.5	41	4.6	332	37.2	561	62.8	33.4	32.0	$900	$705	High School
2B1.1 (Larceny)	1,435	744	51.9	520	36.2	84	5.9	72	5.0	975	67.9	459	32.0	34.7	32.5	$909	$576	High School
2B1.2 (All Others)	15	10	66.7	4	26.7	1	6.7	0	0.0	12	80.0	3	20.0	42.5	39.0	$827	$441	Less Than H.S
2B1.2 (Auto Theft)	73	50	68.5	6	8.2	16	21.9	1	1.4	70	95.9	3	4.1	34.9	33.0	$1,127	$833	Less Than H.S
2B1.2 (Larceny)	307	170	55.4	93	30.3	38	12.4	5	1.6	261	85.0	46	15.0	34.1	33.0	$752	$304	GED
2B4.1 (Bribery)	19	15	79.0	3	15.8	0	0.0	1	5.3	17	89.5	2	10.5	45.2	45.0	$1,746	$1,288	Some College
2B5.1 (Counterfeiting)	367	235	64.0	50	13.6	74	20.2	7	1.9	324	88.3	42	11.4	33.5	31.0	$1,044	$511	GED
2B5.3 (Copyright Infringement)	70	63	90.0	1	1.4	4	5.7	2	2.9	65	92.9	5	7.1	39.2	37.0	$1,616	$1,200	High School
2B5.4 (Trademark Infringement)	39	23	59.0	2	5.1	1	2.6	13	33.3	30	76.9	9	23.1	41.6	41.0	$1,270	$1,089	High School
2F1.1 (All Others)	129	83	64.3	27	20.9	16	12.4	3	2.3	107	83.0	22	17.1	39.0	38.0	$944	$660	High School
2F1.1 (Forgery)	289	100	34.6	161	55.7	17	5.9	9	3.1	177	61.3	111	38.4	33.0	31.5	$486	$257	GED
2F1.1 (Fraud)	2,560	1,487	58.1	801	31.3	150	5.9	114	4.5	1,831	71.5	726	28.4	36.9	36.0	$1,075	$660	High School
2R1.1 (Antitrust)	10	10	100.0	0	0.0	0	0.0	0	0.0	10	100.0	0	0.0	49.5	49.5	$4,452	$3,000	Some College
2T1.1 (Tax Evasion)	51	41	80.4	4	7.8	3	5.9	3	5.9	42	82.4	9	17.7	43.7	43.0	[illegible]675	$1,691	Some College
2T1.2 (Failure to File)	67	52	77.6	9	13.4	2	3.0	3	4.5	60	89.6	7	10.5	43.3	44.0	$2,341	$1,647	High School
2T1.3 (Tax Fraud)	44	34	77.3	6	13.6	2	4.6	2	4.6	40	90.9	4	9.1	46.6	46.5	$2,187	$1,667	High School
2T1.4 (Aiding Tax Fraud)	15	10	66.7	4	26.7	1	6.7	0	0.0	14	93.3	1	6.7	46.6	48.0	$1,802	$855	Some College
2T1.5 (Fraudulent Returns)	17	9	52.9	4	23.5	2	11.8	2	11.8	14	82.4	3	17.7	37.7	36.0	$1,432	$1,417	Some College
2T1.9 (Conspiracy-Tax)	29	29	100.0	0	0.0	0	0.0	0	0.0	23	79.3	6	20.7	48.2	48.0	$1,183	$569	Some College
2T3.1 & 3.2 (Smuggling)	32	22	68.8	2	6.3	6	18.8	2	6.3	28	87.5	4	12.5	[illegible]6.3	33.5	$1,790	$1,080	Some College

*Of the 6,600 cases selected for analysis, guidelines with only a few cases (a total of 32 cases) have been excluded. Additionally, the difference between the total number of cases used in the analysis (6 and the total given on the table is due to missing information.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

III. Mode of Conviction

The guilty plea rate for this group is 93.2 percent, seven percent higher than the national rate of 85.6 percent for all offenders. Several of the analysis guidelines vary significantly from this rate. The §2F1.1 'other' category (remaining cases after specific fraud, forgery, and counterfeiting offenses are separated out) has a guilty plea rate of 73 percent. The tax guidelines §2T1.1 and §2T1.9 have guilty plea rates of 75 percent and 45 percent, respectively, compared to a guilty plea rate of 85 to 95 percent for the remaining tax guidelines.

IV. Acceptance of Responsibility

While 80 percent of the overall guideline population received a two-level decrease for acceptance of responsibility, the economic offense group received this reduction at a somewhat higher rate (88%). Several economic offense guidelines were higher or lower than this average such as §2B1.1 (embezzlement) - 95 percent or §2B4.1 (commercial bribery) - 74 percent. Tax guidelines §2T1.4 and §2T1.9, however, stand out for their particularly low acceptance rate (67% and 48%, respectively).

V. Criminal History

Seventy-three percent of the economic offenders were assigned to criminal history category I, compared to 62 percent of all offenders in the general guideline population. Antitrust and tax offenders were most frequently in category I (100% and 87%, respectively), while fraud and larceny, theft, embezzlement offenders were least frequently in category I (76% and 69%, respectively).

VI. Sentences

Type of sentence imposed for economic offenders varies significantly across the selected guidelines. Table F-3 provides the sentence type distribution for the four parts of Chapter Two of the Guidelines Manual selected for analysis. Table F-4 compares the rates of sentences within alternative-eligible ranges for the economic offense group to the overall guideline population.

Tax guidelines §2T1.2 (refers to a class A misdemeanor statute) and §2T1.5 along with the criminal copyright infringement guideline §2B5.3 all have imprisonment rates of 15 percent or lower. The antitrust guideline has the highest incarceration rate of the economic offense group (80%). The overall imprisonment average for the study population is 44

percent, compared to 72 percent. Embezzlers and defendants sentenced under tax guidelines §§2T1.1, 1.2, and 1.3 received the highest proportion of probation with conditions of confinement (about 36%, compared to the group rate of 22% and the overall guideline rate of 8.8%). Embezzlers comprise about three percent of the guideline population and received about ten percent of the split sentences. The overall imposition of split sentences for the economic offense group is about four percent, compared with two percent in the general guideline population. See Table F-8 for a complete listing of sentence type and variation across the selected guidelines. See also Table F-9 for the average length of imprisonment imposed for the guidelines under study.

Table F-3

TYPE OF SENTENCE IMPOSED BY ECONOMIC OFFENSE GUIDELINES*
(October 1, 1990 through September 30, 1991)

Guidelines	TOTAL	Prison		Split Sentence		Probation and Confinement		Probation		Other	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	6,549	2,869	43.8	248	3.8	1,461	22.3	1,936	29.6	35	0.5
Part B Guidelines	3,315	1246	37.6	128	3.9	751	22.7	1166	35.2	22	0.7
Part F Guidelines	2,964	1524	51.4	117	4.0	635	21.4	677	22.8	11	0.4
Part R Guidelines	10	8	80.0	0	0.0	2	20.0	0	0.0	0	0.0
Part T Guidelines	260	91	35.0	3	1.2	73	28.1	91	35.0	2	0.8

*See Table F-1 for a complete listing of the specific guidelines within each sub-part of Chapter Two of the Guidelines Manual. Of the 6,600 cases selected for analysis, 32 cases comprising guidelines with only a few cases each have been excluded. Additionally, the difference between the total number of cases used in the analysis (6,568) and the total given on the table is due to missing information.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table F-4

TYPE OF SENTENCE IMPOSED IN CASES ELIGIBLE FOR A SENTENCING ALTERNATIVE BY ALTERNATIVE RANGES*
(October 1, 1990 through September 30, 1991)

		TOTAL	Prison		Split Sentence		Probation and Confinement		Probation		Other	
			Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Zone A Offense Levels 1 - 6	Economic Offenses	2,009	252	12.5	7	0.4	131	6.5	1,587	79.0	32	1.6
	All Offenses	3,778	804	21.3	14	0.4	236	6.3	2,673	70.8	51	1.4
Zone B Offense Levels 7 - 10	Economic Offenses	2,312	752	32.5	76	3.3	1,232	53.3	251	10.9	1	0.0
	All Offenses	4,368	1,864	42.7	132	3.0	1,907	43.7	461	10.6	4	0.1
Zone C Offense Levels 11 - 12	Economic Offenses	740	484	65.4	147	19.9	58	7.8	50	6.8	1	0.1
	All Offenses	2,169	1,554	71.7	353	16.3	120	5.5	139	6.4	3	0.1

* Of the 6,600 cases selected for analysis, 32 cases comprising guidelines with only a few cases each have been excluded. Additionally, the difference between the total number of cases used in the analysis (6,568) and the total given on the table is due to missing information.

Zone A -- Probation available (see §5B1.1(a)(1))
Zone B -- Probation with condition of confinement available (see §5B1.1(a)(2))
Zone C -- New "split sentence" available (see §§5C1.1(c)(3),(d)(2))

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

VII. Departures

The percentage of within-range sentences for the general guideline population is approximately 80 percent. The within-range percentage for the economic offense group increases to 88 percent. This increase appears to be explained by a significantly lower rate of departures for substantial assistance (5.5% compared to 11.9% overall). Other types of downward and upward departures appear consistent with overall guideline trends. Table F-5 presents departure information across the selected guidelines.

Table F-5

DEPARTURE RATE BY ECONOMIC OFFENSE GUIDELINE*
(October 1, 1990 through September 30, 1991)

GUIDELINE	TOTAL	No Departure (within range)		Upward Departure		Downward Departure		Substantial Assistance Departure	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	6,524	5,772	88.5	96	1.5	301	4.6	356	5.5
2B1.1 (All Others)	107	95	88.8	2	1.9	5	4.7	5	4.7
2B1.1 (Embezzlement)	883	799	90.5	0	0.0	67	7.6	17	1.9
2B1.1 (Larceny)	1,432	1,318	92.0	14	1.0	41	2.9	59	4.1
2B1.2 (All Others)	15	11	73.3	1	6.7	1	6.7	2	13.3
2B1.2 (Auto Theft)	73	63	86.3	0	0.0	2	2.7	8	11.0
2B1.2 (Larceny)	307	260	84.7	7	2.3	6	2.0	34	11.1
2B4.1 (Bribery)	19	15	79.0	0	0.0	1	5.3	3	15.8
2B5.1 (Counterfeiting)	362	284	78.5	2	0.6	18	5.0	58	16.0
2B5.3 (Copyright Infringement)	70	60	85.7	0	0.0	1	1.4	9	12.9
2B5.4 (Trademark Infringement)	39	32	82.1	0	0.0	3	7.7	4	10
2F1.1 (All Others)	129	108	83.7	7	5.4	5	3.9	9	7.0
2F1.1 (Forgery)	288	261	90.6	7	2.4	12	4.2	8	2.8
2F1.1 (Fraud)	2,539	2,233	88.0	52	2.1	127	5.0	127	5.0
2R1.1 (Antitrust)	10	10	100.0	0	0.0	0	0.0	0	0.0
2T1.1 (Tax Evasion)	51	41	80.4	0	0.0	7	13.7	3	5.9
2T1.2 (Failure to File)	66	60	90.9	0	0.0	2	3.0	4	6.1
2T1.3 (Tax Fraud)	42	38	90.5	0	0.0	0	0.0	4	9.5
2T1.4 (Aiding Tax Fraud)	15	11	73.3	2	13.3	2	13.3	0	0.0
2T1.5 (Fraudulent Returns)	17	17	100.0	0	0.0	0	0.0	0	0.0
2T1.9 (Conspiracy-Tax)	28	25	89.3	0	0.0	1	3.6	2	7.1
2T3.1 & 3.2 (Smuggling)	32	31	96.9	1	3.1	0	0.0	0	0.0

*Of the 6,600 cases selected for analysis, 32 cases comprising guidelines with only a few cases each have been excluded. Additionally, the difference between the total number of cases used in the analysis (6,568) and the total given on the table is due to missing information.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

VIII. Fines and Restitution

In the economic offense group, the court imposed a fine in 26 percent of the cases. Restitution was imposed in 45 percent of the cases. In the overall guideline population, the court imposed fines and restitution in 21 percent and 16 percent of cases, respectively. Fines were imposed on antitrust offenders most often (70%), while embezzlers were fined least often (17%). The guideline with the highest mean fine is §2R1.1 (antitrust) at $55,571, while §2B1.1 (larceny only) had the lowest mean fine at $1,169. These guidelines also had the highest and lowest median fine amounts ($25,000 and $300, respectively). An order of restitution was imposed on embezzlers most often (59%), while §2F1.1 (fraud only) has the lowest rate of restitution (0.3%). The guideline with the highest mean amount of restitution is §2F1.1 (other offenses category) at $562,400 ($20,000 median), while §2B5.4 (criminal infringement of trademark) had the lowest mean amount of restitution ordered at $975. Guideline §2T1.3 (tax fraud) had the highest median amount of restitution ordered at $27,925,[3] while guideline §2B5.1 (counterfeit United States bearer obligations) had the lowest median amount of restitution ordered ($203). Table F-6 provides the percentage of cases with fines and restitution imposed, as well as the mean and median amounts for each of the economic offense guidelines.

3Section 2R1.1 technically has the highest mean and median restitution amount at $950,000; however, this figure represents only one case.

Table F-6

Imposition of Fines and Restitution by Economic Offense Guidelines (October 1, 1990 through September 30, 1991)

Guideline	TOTAL	Fine			Restitution		
		Imposed	Mean	Median	Imposed	Mean	Median
TOTAL	6,568	26.0%	$5,715	$1,000	45.0%	$60,016	$4,798
2B1.1 (All Others)	107	25.2%	$2,089	$1,000	45.8%	$13,020	$1,933
2B1.1 (Embezzlement)	893	16.6%	$3,358	$1,000	59.1%	$39,494	$7,010
2B1.1 (Larceny)	1,435	37.8%	$1,169	$300	38.3%	$11,740	$1,537
2B1.2 (All Others)	15	40.0%	$13,309	$1,500	40.0%	$24,500	$6,226
2B1.2 (Auto Theft)	73	20.6%	$7,208	$1,000	45.2%	$20,388	$3,500
2B1.2 (Larceny)	307	22.2%	$8,088	$1,729	36.2%	$24,420	$3,000
2B4.1 (Bribery)	19	47.4%	$9,002	$10,000	36.8%	$34,654	$13,000
2B5.1 (Counterfeiting)	367	24.8%	$2,331	$1,000	21.8%	$1,137	$203
2B5.3 (Copyright Infringement)	70	58.6%	$7,146	$2,000	15.7%	$16,280	$2,000
2B5.4 (Trademark Infringement)	39	53.9%	$2,388	$2,500	7.7%	$975	$367
2F1.1 (All Others)	129	22.5%	$16,362	$2,550	34.1%	$562,400	$20,000
2F1.1 (Forgery)	289	17.3%	$1,332	$1,000	47.8%	$5,936	$1,119
2F1.1 (Fraud)	2,560	21.6%	$9,070	$2,000	0.3%	$85,654	$7,637
2R1.1 (Antitrust)	10	70.0%	$55,571	$25,000	10.0%	$950,000	$950,000
2T1.1 (Tax Evasion)	51	47.1%	$24,738	$5,000	35.3%	$149,539	$24,971
2T1.2 (Failure to File)	67	34.3%	$7,274	$1,000	11.9%	$13,347	$6,196
2T1.3 (Tax Fraud)	44	36.4%	$9,731	$1,806	20.5%	$73,080	$27,925
2T1.4 (Aiding Tax Fraud)	15	26.7%	$5,900	$4,000	33.3%	$24,495	$14,148
2T1.5 (Fraudulent Returns)	17	52.9%	$1,333	$1,000	5.9%	$2,117	$2,117
2T1.9 (Conspiracy-Tax)	29	24.1%	$4,143	$2,000	3.5%	$16,500	$16,500
2T3.1 & 3.2 (Smuggling)	32	62.5%	$12,188	$2,000	3.1%	$4,990	$4,990

*Of the 6,600 cases selected for analysis, 32 cases comprising guidelines with only a few cases each have been excluded. Additionally, the difference between the total number of cases used in the analysis (6,568) and the total given on the table is due to missing information.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table F-7

Distribution of Primary Offense by Economic Offense Guidelines (October 1, 1990 through September 30, 1991)

GUIDELINE	Primary Offense				
	Type	Number	Percent	Cumulative Number	Cumulative Percent
2B1.1	Drug Trafficking	5	4.7	5	4.7
	Drug Simp Poss	1	0.9	6	5.6
	Firearms	1	0.9	7	6.5
	Auto Theft	34	31.8	41	38.3
	Fraud	11	10.3	52	48.6
	Forg/Counterf	11	10.3	63	58.9
	Bribery	1	0.9	64	59.8
	Tax Offenses	1	0.9	65	60.7
	Launder	1	0.9	66	61.7
	Civil Rights	8	7.5	74	69.2
	Admin of Just	7	6.5	81	75.7
	Food & Drug	1	0.9	82	76.6
	Other	25	23.4	107	100.0
2B1.1 (Embezzlement)	Embezzlement	893	100.0	893	100.0
2B1.1 (Larceny)	Larceny	1435	100.0	1435	100.0
2B1.2	Drug Trafficking	2	13.3	2	13.3
	Firearms	1	6.7	3	20.0
	Fraud	2	13.3	5	33.3
	Forg/Counterf	5	33.3	10	66.7
	Admin of Just	4	26.7	14	93.3
	Other	1	6.7	15	100.0
2B1.2 (Auto Theft)	Auto Theft	73	100.0	73	100.0
2B1.2 (Larceny)	Larceny	307	100.0	307	100.0
2B4.1	Bribery	19	100.0	19	100.0

GUIDELINE	Primary Offense				
	Type	Number	Percent	Cumulative Number	Cumulative Percent
2B5.1	Drug Trafficking	1	0.3	1	0.3
	Firearms	2	0.5	3	0.8
	Fraud	3	0.8	6	1.6
	Forg/Counterf	361	98.4	367	100.0
2B5.3	Civil Rights	5	7.1	5	7.1
	Other	65	92.9	70	100.0
2B5.4	Other	39	100.0	39	100.0
2F1.1	Arson	1	0.8	1	0.8
	Drug Trafficking	2	1.6	3	2.3
	Drug Simp Poss	2	1.6	5	3.9
	Firearms	2	1.6	7	5.4
	Auto Theft	1	0.8	8	6.2
	Larceny	24	18.6	32	24.8
	Embezzlement	11	8.5	43	33.3
	Bribery	3	2.3	46	35.7
	Tax Offenses	4	3.1	50	38.8
	Launder	4	3.1	54	41.9
	Extortn/Racket	6	4.7	60	46.5
	Civil Rights	1	0.8	61	47.3
	Immigration	23	17.8	84	65.1
	Admin of Just	12	9.3	96	74.4
	Env/Fish&Wild	3	2.3	99	76.7
	Food & Drug	5	3.9	104	80.6
	Other	25	19.4	129	100.0
2F1.1 (Forgery)	Forg/Counterf	289	100.0	289	100.0
2F1.1 (Fraud)	Fraud	2560	100.0	2560	100.0
2R1.1	Fraud	2	20.0	2	20.0
	Anti-Trust	8	80.0	10	100.0

GUIDELINE	Primary Offense				
	Type	Number	Percent	Cumulative Number	Cumulative Percent
2T1.1	Drug Trafficking	1	2.0	1	2.0
	Larceny	1	2.0	2	3.9
	Fraud	2	3.9	4	7.8
	Tax Offenses	47	92.2	51	100.0
2T1.2	Drug Trafficking	2	3.0	2	3.0
	Fraud	1	1.5	3	4.5
	Tax Offenses	63	94.0	66	98.5
	Gamb/Lottery	1	1.5	67	100.0
2T1.3	Drug Trafficking	3	6.8	3	6.8
	Tax Offenses	40	90.9	43	97.7
	Immigration	1	2.3	44	100.0
2T1.4	Fraud	1	6.7	1	6.7
	Tax Offenses	13	86.7	14	93.3
	Admin of Just	1	6.7	15	100.0
2T1.5	Tax Offenses	17	100.0	17	100.0
2T1.9	Fraud	3	10.3	3	10.3
	Forg/Counterf	1	3.4	4	13.8
	Tax Offenses	21	72.4	25	86.2
	Launder	3	10.3	28	96.6
	Nat Defense	1	3.4	29	100.0
2T3.1 & 3.2	Fraud	1	3.1	1	3.1
	Tax Offenses	29	90.6	30	93.8
	Admin of Just	1	3.1	31	96.9
	Food & Drug	1	3.1	32	100.0

*Of the 6,600 cases selected for analysis, 32 cases comprising guidelines with only a few cases each have been excluded. Additionally, the difference between the total number of cases used in the analysis (6,568) and the total given on the table is due to missing information. Primary Offense is determined by statute of conviction rather than guideline.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

TYPE OF SENTENCE IMPOSED BY ECONOMIC OFFENSE GUIDELINES*
(October 1, 1990 through September 30, 1991)

GUIDELINE	TOTAL	Prison		Split Sentence		Probation and Confinement		Probation		Other	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	6,519	2,845	43.6	248	3.8	1,466	22.4	1,931	29.6	35	0.5
2B1.1 (All Others)	106	57	53.8	3	2.8	18	17.0	28	26.4	0	0.0
2B1.1 (Embezzlement)	885	219	24.8	51	5.8	321	36.3	292	33.0	2	0.2
2B1.1 (Larceny)	1,419	452	31.9	41	2.9	253	17.8	657	46.3	16	1.1
2B1.2 (All Others)	15	10	66.7	0	0.0	3	20.0	2	13.3	0	0.0
2B1.2 (Auto Theft)	72	49	68.1	4	5.6	13	18.1	6	8.3	0	0.0
2B1.2 (Larceny)	306	175	57.2	13	4.3	48	15.7	69	22.6	1	0.3
2B4.1 (Bribery)	19	7	36.8	3	15.8	6	31.6	2	10.5	1	5.3
2B5.1 (Counterfeiting)	364	236	64.8	10	2.8	67	18.4	50	13.7	1	0.3
2B5.3 (Copyright Infringement)	69	10	14.5	3	4.4	17	24.6	38	55.1	1	1.5
2B5.4 (Trademark Infringement)	38	9	23.7	0	0.0	5	13.2	24	63.2	0	0.0
2F1.1 (All Others)	129	78	60.5	6	4.7	15	11.6	29	22.5	1	0.8
2F1.1 (Forgery)	288	135	46.9	2	0.7	60	20.8	91	31.6	0	0.0
2F1.1 (Fraud)	2,547	1311	51.5	109	4.3	560	22.0	557	21.9	10	0.4
2R1.1 (Antitrust)	10	8	80.0	0	0.0	2	20.0	0	0.0	0	0.0
2T1.1 (Tax Evasion)	51	24	47.1	1	2.0	20	39.2	6	11.8	0	0.0
2T1.2 (Failure to File)	66	11	16.7	0	0.0	27	40.9	28	42.4	0	0.0
2T1.3 (Tax Fraud)	44	19	43.2	1	2.3	15	34.1	8	18.2	1	2.3
2T1.4 (Aiding Tax Fraud)	15	6	40.0	1	6.7	3	20.0	5	33.3	0	0.0
2T1.5 (Fraudulent Returns)	16	2	12.5	0	0.0	1	6.3	12	75.0	1	6.3
2T1.9 (Conspiracy-Tax)	28	19	67.9	0	0.0	4	14.3	5	17.9	0	0.0
2T3.1 & 3.2 (Smuggling)	32	8	25.0	0	0.0	2	6.3	22	68.8	0	0.0

*Of the 6,600 cases selected for analysis, 32 cases comprising guidelines with only a few cases each have been excluded. Additionally, the difference between the total number of cases used in the analysis (6,568) and the total given on the table is due to missing information.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table F-9

PROPORTION SENTENCED TO PRISON AND AVERAGE SENTENCE LENGTH BY ECONOMIC OFFENSE GUIDELINES*
(October 1, 1990 through September 30, 1991)

Guideline	TOTAL	Percent of Total	PRISON INFORMATION			
			Number Sentenced to Imprisonment	Percent Sentenced to Imprisonment	Mean Sentence Length	Median Sentence Length
2B1.1 (All Others)	107	1.6	60	56.1	18.9	12.5
2B1.1 (Embezzlement)	893	13.6	269	30.1	11.3	10.0
2B1.1 (Larceny)	1,435	21.9	489	34.1	12.1	9.0
2B1.2 (All Others)	15	0.2	9	60.0	18.7	15.0
2B1.2 (Auto Theft)	73	1.1	53	72.6	12.9	12.0
2B1.2 (Larceny)	307	4.7	185	60.3	16.1	12.0
2B4.1 (Bribery)	19	0.3	10	52.6	8.3	4.5
2B5.1 (Counterfeiting)	367	5.6	239	65.1	16.5	13.0
2B5.3 (Copyright Infringement)	70	1.1	13	18.6	10.6	8.0
2B5.4 (Trademark Infringement)	39	0.6	9	23.1	11.6	12.0
2F1.1 (All Others)	129	2.0	74	57.4	30.7	24.0
2F1.1 (Forgery)	289	4.4	127	43.9	13.6	12.0
2F1.1 (Fraud)	2,560	39.0	1,391	54.3	17.0	12.0
2R1.1 (Antitrust)	10	0.2	8	80.0	6.9	6.5
2T1.1 (Tax Evasion)	51	0.8	24	47.1	17.7	14.5
2T1.2 (Failure to File)	67	1.0	11	16.4	10.7	8.0
2T1.3 (Tax Fraud)	44	0.7	20	45.5	11.0	9.0
2T1.4 (Aiding Tax Fraud)	15	0.2	7	46.7	29.6	18.0
2T1.5 (Fraudulent Returns)	17	0.3	2	11.8	4.5	4.5
2T1.9 (Conspiracy-Tax)	29	0.4	19	65.5	14.5	12.0
2T3.1 & 3.2 (Smuggling)	32	0.5	8	25.0	8.0	5.0
TOTAL	6,568	100.0	3,027	46.1	15.6	12.0

*Of the 6,600 cases selected for analysis, 32 cases comprising guidelines with only a few cases each have been excluded. Additionally, the difference between the total number of cases used in the analysis (6,568) and the total given on the table is due to missing information. Sentences are given in months and do not include alternatives to incarceration in the calculation of prison averages.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2B1.1 **Primary Offense: All Others**

Number of Cases = 107

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(107)	--	8.8	8	*(26,820)*	--	*16.7*	*14*
Criminal History Category	(107)	--	2.2	1	*(26,820)*	--	*2.0*	*1*
Final Guideline Range	(107)	--	--	4-10	*(26,820)*	--	--	*21-27*
Acceptance of Responsibility								
Received	88	82.2	--	--	*21,518*	*80.2*	--	--
Not Received	19	17.8	--	--	*5,300*	*19.8*	--	--
Sentence								
Prison	57	53.8	19.6	13	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	3	2.8	8.0	8	*577*	*2.2*	*8.0*	*8*
Probation and Alternative	18	17.0	2.8	2	*2,436*	*9.1*	*3.1*	*3*
Probation	28	26.4	31.3	24	*3,646*	*13.7*	*31.6*	*36*
Other	0	0.0	--	--	*59*	*0.2*	--	--
Mode of Conviction								
Plea	97	91.5	--	--	*22,771*	*85.2*	--	--
Trial	9	8.5	--	--	*3,955*	*14.8*	--	--
Departure Status:								
No Departure	95	88.8	--	--	*21,352*	*79.9*	--	--
Upward Departure	2	1.9	--	--	*453*	*1.7*	--	--
Departure for Substantial Assistance	5	4.7	--	--	*3,323*	*12.4*	--	--
Other Downward Departure	5	4.7	--	--	*1,575*	*5.9*	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	Adequacy of Criminal History 2 (100.0%)	Substantial Assistance 5 (62.5%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,146 (70.2%)*
2nd	--	Pursuant to a Plea Agreement 1 (12.5%)	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	--	Family Ties and Responsibilities 1 (12.5%)	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	--	General Mitigating Circumstances 1 (12.5%)	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	12	11.3	4,853	17.6
Bottom Quarter	43	40.6	11,464	44.0
Second Quarter	16	15.1	2,720	10.4
Third Quarter	12	11.3	3,317	12.7
Upper Quarter	21	19.8	3,447	13.2
Above Range	2	1.9	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$100 or less	9	8.4	8.4	
More than $100	11	10.3	18.7	
More than $1,000	7	6.5	25.2	
More than $2,000	15	14.0	39.2	
More than $5,000	16	15.0	54.2	
More than $10,000	10	9.4	63.6	
More than $20,000	8	7.5	71.1	
More than $40,000	16	15.0	86.1	
More than $70,000	9	8.4	94.5	
More than $120,000	3	2.8	97.3	
More than $200,000	2	1.9	99.2	
More than $350,000	0	0.0	99.2	
More than $500,000	0	0.0	99.1	
More than $800,000	1	0.9	100.0	
More than $1,500,000	0	0.0	100.0	
More than $2,500,000	0	0.0	100.0	
More than $5,000,000	0	0.0	100.0	
More than $10,000,000	0	0.0	100.0	
More than $20,000,000	0	0.0	100.0	
More than $40,000,000	0	0.0	100.0	
More than $80,000,000	0	0.0	100.0	
Average Loss = $29,962				
Median Loss = $5,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2B1.1 **Primary Offense: Embezzlement**

Number of Cases = 893

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(893)	--	8.4	8	(26,820)	--	16.7	14
Criminal History Category	(893)	--	1.1	1	(26,820)	--	2.0	1
Final Guideline Range	(893)	--	--	2-8	(26,820)	--	--	21-27
Acceptance of Responsibility								
Received	847	94.8	--	--	21,518	80.2	--	--
Not Received	46	5.2	--	--	5,300	19.8	--	--
Sentence								
Prison	219	24.7	12.7	12	19,965	74.8	62.2	33
New Split Sentence	51	5.8	8.2	8	577	2.2	8.0	8
Probation and Alternative	321	36.3	3.2	3	2,436	9.1	3.1	3
Probation	292	33.0	33.1	36	3,646	13.7	31.6	36
Other	2	0.2	--	--	59	0.2	--	--
Mode of Conviction								
Plea	864	96.8	--	--	22,771	85.2	--	--
Trial	29	3.2	--	--	3,955	14.8	--	--
Departure Status:								
No Departure	799	90.5	--	--	21,352	79.9	--	--
Upward Departure	0	--	--	--	453	1.7	--	--
Departure for Substantial Assistance	17	1.9	--	--	3,323	12.4	--	--
Other Downward Departure	67	7.6	--	--	1,575	5.9	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	--	Substantial Assistance 17 (22.1%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,146 (70.2%)*
2nd	--	Diminished Capacity 9 (11.7%)	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	--	General Mitigating Circumstances 6 (7.8%)	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	--	Mental and Emotional Conditions 6 (7.8%)	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	105	11.9	4,853	17.6
Bottom Quarter	606	68.7	11,464	44.0
Second Quarter	78	8.8	2,720	10.4
Third Quarter	66	7.5	3,317	12.7
Upper Quarter	26	2.9	3,447	13.2
Above Range	1	0.1	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$100 or less	24	2.7	2.7	
More than $100	72	8.1	10.8	
More than $1,000	84	9.4	20.2	
More than $2,000	150	16.8	37.0	
More than $5,000	146	16.4	53.4	
More than $10,000	123	13.8	67.2	
More than $20,000	118	13.2	80.4	
More than $40,000	79	8.9	89.3	
More than $70,000	43	4.8	94.1	
More than $120,000	19	2.1	96.2	
More than $200,000	13	1.5	97.7	
More than $350,000	9	1.0	98.7	
More than $500,000	3	0.3	99.0	
More than $800,000	6	0.7	99.7	
More than $1,500,000	3	0.3	100.0	
More than $2,500,000	0	0.0	100.0	
More than $5,000,000	1	0.1	100.1	
More than $10,000,000	0	0.0	100.1	
More than $25,000,000	0	0.0	100.1	
More than $40,000,000	0	0.0	100.1	
More than $80,000,000	0	0.0	100.1	
Average Loss = $38,870				
Median Loss = $5,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2B1.1 **Primary Offense: Larceny**

Number of Cases = 1,435

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(1,435)	--	6.3	5	*(26,820)*	--	*16.7*	*14*
Criminal History Category	(1,435)	--	1.7	1	*(26,820)*	--	*2.0*	*1*
Final Guideline Range	(1,435)	--	--	0-6	*(26,820)*	--	--	*21-27*
Acceptance of Responsibility								
Received	1,247	86.9	--	--	*21,518*	*80.2*	--	--
Not Received	188	13.1	--	--	*5,300*	*19.8*	--	--
Sentence								
Prison	452	31.9	12.7	10	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	41	2.9	7.9	8	*577*	*2.2*	*8.0*	*8*
Probation and Alternative	253	17.8	2.9	2	*2,436*	*9.1*	*3.1*	*3*
Probation	657	46.3	22.9	24	*3,646*	*13.7*	*31.6*	*36*
Other	16	1.1	--	--	*59*	*0.2*	--	--
Mode of Conviction								
Plea	1,338	93.5	--	--	*22,771*	*85.2*	--	--
Trial	93	6.5	--	--	*3,955*	*14.8*	--	--
Departure Status:								
No Departure	1,318	92.0	--	--	*21,352*	*79.9*	--	--
Upward Departure	14	1.0	--	--	*453*	*1.7*	--	--
Departure for Substantial Assistance	41	2.9	--	--	*3,323*	*12.4*	--	--
Other Downward Departure	59	4.1	--	--	*1,575*	*5.9*	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	Adequacy of Criminal History 6 (42.9%)	Substantial Assistance 58 (59.2%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,146 (78.2%)*
2nd	Weapons or Dangerous Instrumentalities 3 (21.4%)	Mental and Emotional Conditions 4 (4.1%)	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (8.4%)*
3rd	Prior Criminal Record, Future Risk 16 (4.2%)	Age 3 (3.1%)	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	Disruption of Governmental Function 1 (7.1%)	Physical Condition 3 (3.1%)	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	103	7.3	4,853	17.6
Bottom Quarter	890	63.3	11,464	44.0
Second Quarter	126	9.0	2,720	10.4
Third Quarter	145	10.3	3,317	12.7
Upper Quarter	125	8.9	3,447	13.2
Above Range	18	1.3	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$100 or less	385	26.8	26.8	
More than $100	259	18.1	44.9	
More than $1,000	123	8.6	53.5	
More than $2,000	161	11.2	64.7	
More than $5,000	124	8.6	73.3	
More than $10,000	111	7.7	81.0	
More than $20,000	103	7.2	88.2	
More than $40,000	50	3.5	91.7	
More than $70,000	59	4.1	95.8	
More than $120,000	34	2.4	98.2	
More than $200,000	15	1.1	99.3	
More than $350,000	1	0.1	99.4	
More than $500,000	8	0.6	100.0	
More than $800,000	1	0.1	100.1	
More than $1,500,000	1	0.1	100.2	
More than $2,500,000	0	0.0	100.2	
More than $5,000,000	0	0.0	100.2	
More than $10,000,000	0	0.0	100.2	
More than $20,000,000	0	0.0	100.2	
More than $40,000,000	0	0.0	100.2	
More than $80,000,000	0	0.0	100.2	
Average Loss = $16,808				
Median Loss = $1,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2B1.2 **Primary Offense: All Others**

Number of Cases = 15

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(15)	--	9.5	8	*(26,820)*	--	*16.7*	*14*
Criminal History Category	(15)	--	2.5	1	*(26,820)*	--	*2.0*	*1*
Final Guideline Range	(15)	--	--	6-12	*(26,820)*	--	--	*21-27*
Acceptance of Responsibility								
Received	11	73.3	--	--	*21,518*	*80.2*	--	--
Not Received	4	26.7	--	--	*5,300*	*19.8*	--	--
Sentence								
Prison	10	66.7	16.8	14	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	0	0.0	--	--	*577*	*2.2*	*8.0*	*8*
Probation and Alternative	3	20.0	5.3	6	*2,436*	*9.1*	*3.1*	*3*
Probation	2	13.3	42.0	42	*3,646*	*13.7*	*31.6*	*36*
Other	0	0.0	--	--	*59*	*0.2*	--	--
Mode of Conviction								
Plea	13	100.0	--	--	*22,771*	*85.2*	--	--
Trial	0	0.0	--	--	*3,955*	*14.8*	--	--
Departure Status:								
No Departure	11	73.3	--	--	*21,352*	*79.9*	--	--
Upward Departure	1	6.7	--	--	*453*	*1.7*	--	--
Departure for Substantial Assistance	2	13.3	--	--	*3,323*	*12.4*	--	--
Other Downward Departure	1	6.7	--	--	*1,575*	*5.9*	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	Adequacy of Criminal History 1 (100.0%)	Substantial Assistance 2 (100.0%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,146 (70.2%)*
2nd	--	--	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	--	--	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	--	--	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	3	20.0	4,853	17.6
Bottom Quarter	4	26.7	11,464	44.0
Second Quarter	2	13.3	2,720	10.4
Third Quarter	3	20.0	3,317	12.7
Upper Quarter	2	13.3	3,447	13.2
Above Range	1	6.7	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$100 or less	0	0.0	0.0	
More than $100	1	6.7	6.7	
More than $1,000	1	6.7	13.4	
More than $2,000	1	6.7	20.1	
More than $5,000	2	13.3	33.4	
More than $10,000	0	0.0	33.4	
More than $20,000	0	0.0	33.4	
More than $40,000	2	13.3	46.7	
More than $70,000	3	20.0	66.7	
More than $120,000	4	26.7	93.4	
More than $200,000	0	0.0	93.4	
More than $350,000	0	0.0	93.4	
More than $500,000	0	0.0	93.4	
More than $800,000	0	0.0	93.4	
More than $1,500,000	0	0.0	93.4	
More than $2,500,000	1	6.7	100.1	
More than $5,000,000	0	0.0	100.1	
More than $10,000,000	0	0.0	100.1	
More than $20,000,000	0	0.0	100.1	
More than $40,000,000	0	0.0	100.1	
More than $80,000,000	0	0.0	100.1	
Average Loss = $218,873				
Median Loss = $70,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2B1.2 **Primary Offense: Auto Theft**

Number of Cases = 73

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(73)	--	10.7	11	*(26,820)*	--	*16.7*	*14*
Criminal History Category	(73)	--	1.8	1	*(26,820)*	--	*2.0*	*1*
Final Guideline Range	(73)	--	--	10-16	*(26,820)*	--	--	*21-27*
Acceptance of Responsibility								
Received	67	91.8	--	--	*21,518*	*80.2*	--	--
Not Received	6	8.2	--	--	*5,300*	*19.8*	--	--
Sentence								
Prison	49	68.1	13.6	12	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	4	5.6	8.5	9	*577*	*2.2*	*8.0*	*8*
Probation and Alternative	13	18.1	2.8	4	*2,436*	*9.1*	*3.1*	*3*
Probation	6	8.3	38.0	36	*3,646*	*13.7*	*31.6*	*36*
Other	0	0.0	--	--	*59*	*0.2*	--	--
Mode of Conviction								
Plea	71	97.3	--	--	*22,771*	*85.2*	--	--
Trial	2	2.7	--	--	*3,955*	*14.8*	--	--
Departure Status:								
No Departure	63	86.3	--	--	*21,352*	*79.9*	--	--
Upward Departure	0	0.0	--	--	*453*	*1.7*	--	--
Departure for Substantial Assistance	8	11.0	--	--	*3,323*	*12.4*	--	--
Other Downward Departure	2	2.7	--	--	*1,575*	*5.9*	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	--	Substantial Assistance 8 (80.0%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,145 (70.2%)*
2nd	--	Cooperation without Motion 1 (10.0)	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	--	Pursuant to a Plea a Agreement 1 (10.0)	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	--	--	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	13	18.1	4,853	17.6
Bottom Quarter	29	40.3	11,464	44.0
Second Quarter	10	13.9	2,720	10.4
Third Quarter	15	20.8	3,317	12.7
Upper Quarter	5	16.9	3,447	13.2
Above Range	0	0.0	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$100 or less	1	1.4	1.4	
More than $100	1	1.4	2.8	
More than $1,000	0	0.0	2.8	
More than $2,000	2	2.7	5.5	
More than $5,000	8	11.0	16.5	
More than $10,000	11	15.1	31.6	
More than $20,000	12	16.4	48.0	
More than $40,000	17	23.3	71.3	
More than $70,000	9	12.3	83.6	
More than $120,000	9	12.3	95.9	
More than $200,000	2	2.7	98.6	
More than $350,000	1	1.4	100.0	
More than $500,000	0	0.0	100.0	
More than $800,000	0	0.0	100.0	
More than $1,500,000	0	0.0	100.0	
More than $2,500,000	0	0.0	100.0	
More than $5,000,000	0	0.0	100.0	
More than $10,000,000	0	0.0	100.0	
More than $20,000,000	0	0.0	100.0	
More than $40,000,000	0	0.0	100.0	
More than $80,000,000	0	0.0	100.0	
Average Loss = $48,412				
Median Loss = $40,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed sing the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2B1.2 **Primary Offense: Larceny**

Number of Cases = 307

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(307)	--	9.1	8	*(26,820)*	--	*16.7*	*14*
Criminal History Category	(307)	--	2.1	1	*(26,820)*	--	*2.0*	*1*
Final Guideline Range	(307)	--	--	6-12	*(26,820)*	--	--	*21-27*
Acceptance of Responsibility								
Received	266	86.6	--	--	*21,518*	*80.2*	--	--
Not Received	41	13.4	--	--	*5,300*	*19.8*	--	--
Sentence								
Prison	175	57.2	16.9	14	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	13	4.2	6.5	6	*577*	*2.2*	*8.0*	*8*
Probation and Alternative	48	15.7	3.1	3	*2,436*	*9.1*	*3.1*	*3*
Probation	69	22.5	37.3	36	*3,646*	*13.7*	*31.6*	*36*
Other	1	0.3	--	--	*59*	*0.2*	--	--
Mode of Conviction								
Plea	288	93.8	--	--	*22,771*	*85.2*	--	--
Trial	19	6.2	--	--	*3,955*	*14.8*	--	--
Departure Status:								
No Departure	260	84.7	--	--	*21,352*	*79.9*	--	--
Upward Departure	7	2.3	--	--	*453*	*1.7*	--	--
Departure for Substantial Assistance	34	11.1	--	--	*3,323*	*12.4*	--	--
Other Downward Departure	6	2.0	--	--	*1,575*	*5.9*	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	Adequacy of Criminal History 4 (57.1%)	Substantial Assistance 8 (80.0%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,146 (70.2%)*
2nd	High Speed Chase 1 (14.3%)	Adequate Punishment 2 (6.3)	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	Pending Cases 1 (14.3%)	Pursuant to a Plea a Agreement 2 (6.3)	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	Charge/Plea not Reflecet Seriousness of Offense 1 (14.3%)	-	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	39	13.0	4,853	17.6
Bottom Quarter	116	38.5	11,464	44.0
Second Quarter	27	9.0	2,720	10.4
Third Quarter	49	16.3	3,317	12.7
Upper Quarter	61	20.3	3,447	13.2
Above Range	9	3.0	545	2.1

Amount of Loss				
Amount	Number	Percent	Cumulative Percent	
$100 or less	18	5.9	5.9	
More than $100	28	9.1	15.0	
More than $1,000	19	6.2	21.2	
More than $2,000	27	8.8	30.0	
More than $5,000	32	10.4	40.4	
More than $10,000	32	10.4	50.8	
More than $20,000	25	8.1	58.9	
More than $40,000	24	7.8	66.7	
More than $70,000	37	12.1	78.8	
More than $120,000	26	8.5	87.3	
More than $200,000	22	7.2	94.5	
More than $350,000	6	2.0	96.5	
More than $500,000	3	1.0	97.5	
More than $800,000	4	1.3	98.8	
More than $1,500,000	3	1.0	99.8	
More than $2,500,000	0	0.0	99.8	
More than $5,000,000	1	0.3	100.1	
More than $10,000,000	0	0.0	100.1	
More than $20,000,000	0	0.0	100.1	
More than $40,000,000	0	0.0	100.1	
More than $80,000,000	0	0.0	100.1	
Average Loss = $92,592				
Median Loss = $10,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2B4.1 **Primary Offense: All Offenses**

Number of Cases = 19

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(19)	--	10.7	10	(26,820)	--	16.7	14
Criminal History Category	(19)	--	1.2	1	(26,820)	--	2.0	1
Final Guideline Range	(19)	--	--	6-12	(26,820)	--	--	21-27
Acceptance of Responsibility								
Received	14	73.7	--	--	21,518	80.2	--	--
Not Received	5	26.3	--	--	5,300	19.8	--	--
Sentence								
Prison	7	36.8	10.4	5	19,965	74.8	62.2	33
New Split Sentence	3	15.8	5	3	577	2.2	8.0	8
Probation and Alternative	6	31.6	6	5	2,436	9.1	3.1	3
Probation	2	10.5	24.0	24	3,646	13.7	31.6	36
Other	1	5.3	--	--	59	0.2	--	--
Mode of Conviction								
Plea	16	84.2	--	--	22,771	85.2	--	--
Trial	3	15.8	--	--	3,955	14.8	--	--
Departure Status:								
No Departure	15	78.9	--	--	21,352	79.9	--	--
Upward Departure	0	0.0	--	--	453	1.7	--	--
Departure for Substantial Assistance	3	15.8	--	--	3,323	12.4	--	--
Other Downward Departure	1	5.3	--	--	1,575	5.9	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	--	Substantial Assistance 3 (75.0%)	Adequacy of Criminal History 132 (34.4%)	Substantial Assistance 3,146 (70.2%)
2nd	--	Criminal History Over-represents Seriousness of Offense 1 (25.0)	High Speed Chase 28 (7.3%)	Pursuant to a Plea Agreement 422 (9.4%)
3rd	--	--	Pursuant to a Plea Agreement 18 (4.7%)	General Mitigating Circumstances 102 (2.3%)
4th	--	--	Prior Criminal Record, Future Risk 16 (4.2%)	Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	5	27.8	4,853	17.6
Bottom Quarter	9	50.0	11,464	44.0
Second Quarter	0	0.0	2,720	10.4
Third Quarter	3	16.7	3,317	12.7
Upper Quarter	1	5.6	3,447	13.2
Above Range	0	0.0	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$2,000 or less	4	21.1	21.1	
More than $2,000	1	5.3	26.4	
More than $5,000	2	10.5	36.9	
More than $10,000	4	21.1	58.0	
More than $20,000	2	10.5	68.5	
More than $40,000	1	5.3	73.8	
More than $70,000	0	0.0	73.8	
More than $120,000	4	21.1	94.9	
More than $200,000	0	0.0	94.9	
More than $350,000	0	0.0	94.9	
More than $500,000	1	5.3	100.2	
More than $800,000	0	0.0	100.2	
More than $1,500,000	0	0.0	100.2	
More than $2,500,000	0	0.0	100.2	
More than $5,000,000	0	0.0	100.2	
More than $10,000,000	0	0.0	100.2	
More than $20,000,000	0	0.0	100.2	
More than $40,000,000	0	0.0	100.2	
More than $80,000,000	0	0.0	100.2	
Average Loss = $58,520				
Median Loss = $10,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2B5.1 **Primary Offense: All Offenses**

Number of Cases = 367

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(367)	–	10.7	9	(26,820)	–	16.7	14
Criminal History Category	(367)	–	1.9	1	(26,820)	–	2.0	1
Final Guideline Range	(367)	–	–	8-14	(26,820)	–	–	21-27
Acceptance of Responsibility								
Received	334	91.0	–	–	21,518	80.2	–	–
Not Received	33	9.0	–	–	5,300	19.8	–	–
Sentence								
Prison	236	64.8	17.1	14	19,965	74.8	62.2	33
New Split Sentence	10	2.7	7.3	8	577	2.2	8.0	8
Probation and Alternative	67	18.4	2.6	2	2,436	9.1	3.1	3
Probation	50	13.7	37.0	36	3,646	13.7	31.6	36
Other	1	0.3	–	–	59	0.2	–	–
Mode of Conviction								
Plea	350	95.6	–	–	22,771	85.2	–	–
Trial	16	4.4	–	–	3,955	14.8	–	–
Departure Status:								
No Departure	284	78.5	–	–	21,352	79.9	–	–
Upward Departure	2	0.6	–	–	453	1.7	–	–
Departure for Substantial Assistance	58	16.0	–	–	3,323	12.4	–	–
Other Downward Departure	18	5.0	–	–	1,575	5.9	–	–

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	Adequacy of Criminal History 2 (100.0%)	Substantial Assistance 57 (78.1%)	Adequacy of Criminal History 132 (34.4%)	Substantial Assistance 3,148 (70.2%)
2nd	–	Diminished Capacity 2 (2.7%)	High Speed Chase 28 (7.3%)	Pursuant to a Plea Agreement 422 (9.4%)
3rd	–	Criminal History Category Over-represents Defendant's Involvement 2 (2.7%)	Pursuant to a Plea Agreement 18 (4.7%)	General Mitigating Circumstances 102 (2.3%)
4th	–	Mental and Emotional Conditions 1 (2.7%)	Prior Criminal Record, Future Risk 16 (4.2%)	Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	87	24.6	4,853	17.6
Bottom Quarter	133	37.6	11,464	44.0
Second Quarter	47	13.3	2,720	10.4
Third Quarter	46	13.0	3,317	12.7
Upper Quarter	37	10.5	3,447	13.2
Above Range	4	1.1	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$2,000 or less	155	42.3	42.3	
More than $2,000	44	12.0	54.3	
More than $5,000	28	7.7	62.0	
More than $10,000	21	5.7	67.7	
More than $20,000	16	4.4	72.1	
More than $40,000	10	2.7	74.8	
More than $70,000	19	5.2	80.0	
More than $120,000	18	4.9	84.9	
More than $200,000	12	3.3	88.2	
More than $350,000	9	2.5	90.7	
More than $500,000	11	3.0	93.7	
More than $800,000	7	1.9	95.6	
More than $1,500,000	7	1.9	97.5	
More than $2,500,000	5	1.4	98.9	
More than $5,000,000	0	0.0	98.9	
More than $10,000,000	4	1.1	100.0	
More than $20,000,000	0	0.0	100.0	
More than $40,000,000	0	0.0	100.0	
More than $80,000,000	0	0.0	100.0	
Average Loss = $230,322				
Median Loss = $2,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2B5.3 **Primary Offense: All Offenses**

Number of Cases = 70

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(70)	--	7.5	7	*(26,820)*	--	*16.7*	*14*
Criminal History Category	(70)	--	1.1	1	*(26,820)*	--	*2.0*	*1*
Final Guideline Range	(70)	--	--	1-7	*(26,820)*	--	--	*21-27*
Acceptance of Responsibility								
Received	67	95.7	--	--	*21,518*	*80.2*	--	--
Not Received	3	4.3	--	--	*5,300*	*19.8*	--	--
Sentence								
Prison	10	14.5	11.8	8	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	3	4.3	10.7	12	*577*	*2.2*	*8.0*	*8*
Probation and Alternative	17	24.6	2.8	2	*2,436*	*9.1*	*3.1*	*3*
Probation	38	55.1	30.0	30	*3,646*	*13.7*	*31.6*	*36*
Other	1	1.4	--	--	*59*	*0.2*	--	--
Mode of Conviction								
Plea	67	95.7	--	--	*22,771*	*85.2*	--	--
Trial	3	4.3	--	--	*3,955*	*14.8*	--	--
Departure Status:								
No Departure	60	85.7	--	--	*21,352*	*79.9*	--	--
Upward Departure	0	0.0	--	--	*453*	*1.7*	--	--
Departure for Substantial Assistance	9	12.9	--	--	*3,323*	*12.4*	--	--
Other Downward Departure	1	1.4	--	--	*1,575*	*5.9*	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	--	Substantial Assistance 9 (90.0%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,145 (70.2%)*
2nd	--	Physical Condition 1 (10.0%)	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	--	--	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	--	--	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	10	14.5	4,853	17.6
Bottom Quarter	48	69.6	11,464	44.0
Second Quarter	6	8.7	2,720	10.4
Third Quarter	3	4.3	3,317	12.7
Upper Quarter	2	2.9	3,447	13.2
Above Range	0	0.0	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$2,000 or less	16	22.9	22.9	
More than $2,000	7	10.0	32.9	
More than $5,000	13	18.6	51.5	
More than $10,000	8	11.4	62.9	
More than $20,000	9	12.9	75.8	
More than $40,000	7	10.0	85.8	
More than $70,000	5	7.1	92.9	
More than $120,000	2	2.9	95.8	
More than $200,000	2	2.9	98.7	
More than $350,000	1	1.4	100.1	
More than $500,000	0	0.0	100.1	
More than $800,000	0	0.0	100.1	
More than $1,500,000	0	0.0	100.1	
More than $2,500,000	0	0.0	100.1	
More than $5,000,000	0	0.0	100.1	
More than $10,000,000	0	0.0	100.1	
More than $20,000,000	0	0.0	100.1	
More than $40,000,000	0	0.0	100.1	
More than $80,000,000	0	0.0	100.1	
Average Loss = $27,900				
Median Loss = $5,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2B5.4 **Primary Offense: All Offenses**

Number of Cases = 39

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(39)	–	7.6	6	*(26,820)*	–	*16.7*	*14*
Criminal History Category	(39)	–	1.2	1	*(26,820)*	–	*2.0*	*1*
Final Guideline Range	(39)	–	–	0-6	*(26,820)*	–	–	*21-27*
Acceptance of Responsibility								
Received	35	89.7	–	–	*21,518*	*80.2*	–	–
Not Received	4	10.3	–	–	*5,300*	*19.8*	–	–
Sentence								
Prison	9	23.7	11.6	12	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	0	0.0	–	–	*577*	*2.2*	*8.0*	*6*
Probation and Alternative	5	13.2	2.4	0	*2,436*	*9.1*	*3.1*	*3*
Probation	24	63.2	28.5	30	*3,646*	*13.7*	*31.6*	*36*
Other	0	0.0	–	–	*59*	*0.2*	–	–
Mode of Conviction								
Plea	39	100.0	–	–	*22,771*	*85.2*	–	–
Trial	0	0.0	–	–	*3,955*	*14.8*	–	–
Departure Status:								
No Departure	32	82.1	–	–	*21,352*	*79.9*	–	–
Upward Departure	0	0.0	–	–	*453*	*1.7*	–	–
Departure for Substantial Assistance	4	10.3	–	–	*3,323*	*12.4*	–	–
Other Downward Departure	3	7.7	–	–	*1,575*	*5.9*	–	–

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	–	Substantial Assistance 4 (57.1%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,145 (70.2%)*
2nd	–	Dollar Loss Overstates Seriousness of Offense 2 (28.6%)	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	–	Pursuant to a Plea Agreement 1 (14.3%)	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	–	–	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	9	23.7	4,853	17.6
Bottom Quarter	27	71.1	11,464	44.0
Second Quarter	1	2.6	2,720	10.4
Third Quarter	0	0.0	3,317	12.7
Upper Quarter	1	2.6	3,447	13.2
Above Range	0	0.0	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$2,000 or less	8	20.5	20.5	
More than $2,000	5	12.8	33.3	
More than $5,000	9	23.1	56.4	
More than $10,000	2	5.1	61.5	
More than $20,000	4	10.3	71.8	
More than $40,000	0	0.0	71.8	
More than $70,000	3	7.7	79.5	
More than $120,000	4	10.3	89.8	
More than $200,000	1	2.6	92.4	
More than $350,000	1	2.6	95.0	
More than $500,000	0	0.0	95.0	
More than $800,000	2	5.1	100.1	
More than $1,500,000	0	0.0	100.1	
More than $2,500,000	0	0.0	100.1	
More than $5,000,000	0	0.0	100.1	
More than $10,000,000	0	0.0	100.1	
More than $20,000,000	0	0.0	100.1	
More than $40,000,000	0	0.0	100.1	
More than $80,000,000	0	0.0	100.1	
Average Loss = $76,795				
Median Loss = $5,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2F1.1 **Primary Offense: All Other Offenses**

Number of Cases = 129

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(129)	--	11.3	9	*(26,820)*	--	*16.7*	*14*
Criminal History Category	(129)	--	1.5	1	*(26,820)*	--	*2.0*	*1*
Final Guideline Range	(129)	--	--	6-12	*(26,820)*	--	--	*21-27*
Acceptance of Responsibility								
Received	86	66.7	--	--	*21,518*	*80.2*	--	--
Not Received	43	33.3	--	--	*5,300*	*19.8*	--	--
Sentence								
Prison	78	60.5	32.8	27	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	6	4.7	9.5	10	*577*	*2.2*	*8.0*	*8*
Probation and Alternative	15	11.6	3.9	4	*2,436*	*9.1*	*3.1*	*3*
Probation	29	22.5	31.4	36	*3,646*	*13.7*	*31.6*	*36*
Other	1	0.8	--	--	*59*	*0.2*	--	--
Mode of Conviction								
Plea	94	72.9	--	--	*22,771*	*85.2*	--	--
Trial	35	27.1	--	--	*3,955*	*14.8*	--	--
Departure Status:								
No Departure	108	83.7	--	--	*21,352*	*79.9*	--	--
Upward Departure	7	5.4	--	--	*453*	*1.7*	--	--
Departure for Substantial Assistance	9	7.0	--	--	*3,323*	*12.4*	--	--
Other Downward Departure	5	3.9	--	--	*1,575*	*5.9*	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	Adequacy of Criminal History 2 (40.0%)	Substantial Assistance 9 (75.0%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,145 (70.2%)*
2nd	Mental and Emotional Conditions 1 (20.0%)	Diminished Capacity 1 (8.3%)	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	Further Obstruction of Justice 1 (20.0%)	General Mitigating Circumstances 1 (8.3%)	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	Prior Criminal Record, Future Risk 1 (20.0%)	Cooperation - Motion Unknown 1 (8.3%)	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	13	10.9	4,853	17.6
Bottom Quarter	59	49.6	11,464	44.0
Second Quarter	12	10.1	2,720	10.4
Third Quarter	10	8.4	3,317	12.7
Upper Quarter	13	10.9	3,447	13.2
Above Range	12	10.1	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$100 or less	30	23.3	23.3	
More than $2,000	12	9.3	32.6	
More than $5,000	15	11.6	44.2	
More than $10,000	7	5.4	49.6	
More than $20,000	14	10.9	60.5	
More than $40,000	10	7.8	68.3	
More than $70,000	10	7.8	76.1	
More than $120,000	3	2.3	78.4	
More than $200,000	6	4.7	83.1	
More than $350,000	1	0.8	83.9	
More than $500,000	3	2.3	86.2	
More than $800,000	7	5.4	91.6	
More than $1,500,000	0	0.0	91.6	
More than $2,500,000	4	3.1	94.7	
More than $5,000,000	3	2.3	97.0	
More than $10,000,000	3	2.3	99.3	
More than $20,000,000	1	0.8	100.1	
More than $40,000,000	0	0.0	100.1	
More than $80,000,000	0	0.0	100.1	
Average Loss = $663,248				
Median Loss = $20,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2F1.1 **Primary Offense: Forgery & Counterfeiting**

Number of Cases = 289

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(289)	--	6.4	6	*(26,820)*	--	*16.7*	*14*
Criminal History Category	(289)	--	2.6	2	*(26,820)*	--	*2.0*	*1*
Final Guideline Range	(289)	--	--	2-8	*(26,820)*	--	--	*21-27*
Acceptance of Responsibility								
Received	256	88.6	--	--	*21,518*	*80.2*	--	--
Not Received	33	11.4	--	--	*5,300*	*19.8*	--	--
Sentence								
Prison	135	46.9	13.6	12	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	2	0.7	8.5	8	*577*	*2.2*	*8.0*	*8*
Probation and Alternative	60	20.8	2.3	2	*2,436*	*9.1*	*3.1*	*3*
Probation	91	31.6	30.9	36	*3,646*	*13.7*	*31.6*	*36*
Other	0	0.0	--	--	*59*	*0.2*	--	--
Mode of Conviction								
Plea	278	96.2	--	--	*22,771*	*85.2*	--	--
Trial	11	3.8	--	--	*3,955*	*14.8*	--	--
Departure Status:								
No Departure	261	90.6	--	--	*21,352*	*79.9*	--	--
Upward Departure	7	2.4	--	--	*453*	*1.7*	--	--
Departure for Substantial Assistance	8	2.8	--	--	*3,323*	*12.4*	--	--
Other Downward Departure	12	4.2	--	--	*1,575*	*5.9*	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	Adequacy of Criminal History 6 (100.0%)	Substantial Assistance 8 (47.1%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,146 (70.2%)*
2nd	-	Diminished Capacity 2 (11.8%)	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	-	Coercion and Duress 2 (11.8%)	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	-	Pursuant to a Plea Agreement 1 (5.9%)	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	21	7.6	4,853	17.6
Bottom Quarter	148	53.2	11,464	44.0
Second Quarter	22	7.9	2,720	10.4
Third Quarter	33	11.9	3,317	12.7
Upper Quarter	48	17.3	3,447	13.2
Above Range	6	2.2	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$2,000 or less	171	59.2	59.2	
More than $2,000	45	15.6	74.8	
More than $5,000	26	9.0	83.4	
More than $10,000	17	5.9	89.3	
More than $20,000	10	3.5	92.8	
More than $40,000	13	4.5	97.3	
More than $70,000	1	0.4	97.7	
More than $120,000	2	0.7	98.4	
More than $200,000	1	0.4	98.8	
More than $350,000	0	0.0	98.8	
More than $500,000	0	0.0	98.8	
More than $800,000	1	0.4	99.2	
More than $1,500,000	1	0.4	99.6	
More than $2,500,000	0	0.0	99.6	
More than $5,000,000	1	0.4	100.0	
More than $10,000,000	0	0.0	100.0	
More than $20,000,000	0	0.0	100.0	
More than $40,000,000	0	0.0	100.0	
More than $80,000,000	0	0.0	100.0	
Average Loss = $30,000				
Median Loss = $0				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2F1.1 **Primary Offense: Fraud**

Number of Cases = 2,560

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(2,560)	–	9.5	9	(26,820)	–	16.7	14
Criminal History Category	(2,560)	–	1.7	1	(26,820)	–	2.0	1
Final Guideline Range	(2,560)	–	–	6-12	(26,820)	–	–	21-27
Acceptance of Responsibility								
Received	2,235	87.3	–	–	21,518	80.2	–	–
Not Received	325	12.7	–	–	5,300	19.8	–	–
Sentence								
Prison	1,311	51.5	18.0	13	19,965	74.8	62.2	33
New Split Sentence	109	4.3	7.4	8	577	2.2	8.0	8
Probation and Alternative	560	22.0	3.3	4	2,436	9.1	3.1	3
Probation	557	21.9	33.0	36	3,646	13.7	31.6	36
Other	10	0.4	–	–	59	0.2	–	–
Mode of Conviction								
Plea	2,373	93.0	–	–	22,771	85.2	–	–
Trial	179	7.0	–	–	3,955	14.8	–	–
Departure Status:								
No Departure	2,233	87.9	–	–	21,352	79.9	–	–
Upward Departure	52	2.0	–	–	453	1.7	–	–
Departure for Subetantial Assistance	127	5.0	–	–	3,323	12.4	–	–
Other Downward Departure	127	5.0	–	–	1,575	5.9	–	–

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	Adequacy of Criminal History 29 (58.4%)	Substantial Assistance 127 (54.0%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,148 (78.2%)*
2nd	Prior Criminal Record, Future Risk 4 (8.3%)	Family Ties and Responsibilities 11 (4.7%)	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (8.4%)*
3rd	Pattern of Conduct 2 (4.2%)	Pursuant to a Plea Agreement 11 (4.7%)	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	Disruption of Governmental Function 1 (2.1%)	General Mitigating Circumstances 11 (4.7%)	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Categor Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	293	11.7	4,853	17.6
Bottom Quarter	1,238	49.4	11,464	44.0
Second Quarter	278	11.1	2,720	10.4
Third Quarter	320	12.8	3,317	12.7
Upper Quarter	311	12.4	3,447	13.2
Above Range	67	2.7	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$100 or less	608	23.8	23.8	
More than $2,000	255	10.0	33.8	
More than $5,000	270	10.6	44.1	
More than $10,000	314	12.3	56.4	
More than $20,000	345	13.5	69.9	
More than $40,000	208	8.1	78.0	
More than $70,000	171	6.7	84.7	
More than $120,000	136	5.3	90.0	
More than $200,000	83	3.2	93.2	
More than $350,000	40	1.6	94.8	
More than $500,000	50	2.0	96.8	
More than $800,000	42	1.6	98.4	
More than $1,500,000	15	0.6	99.0	
More than $2,500,000	12	0.5	99.5	
More than $5,000,000	4	0.2	99.7	
More than $10,000,000	4	0.2	99.9	
More than $20,000,000	1	0.0	99.9	
More than $40,000,000	0	0.0	99.9	
More than $80,000,000	2	0.1	100.0	
Average Loss = $168,651				
Median Loss = $10,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2R1.1 **Primary Offense: All Offenses**

Number of Cases = 10

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(10)	--	8.7	9	*(26,820)*	--	*16.7*	*14*
Criminal History Category	(10)	--	1.0	1	*(26,820)*	--	2.0	*1*
Final Guideline Range	(10)	--	--	4-10	*(26,820)*	--	--	*21-27*
Acceptance of Responsibility								
Received	9	90.0	--	--	*21,518*	*80.2*	--	--
Not Received	1	10.0	--	--	*5,300*	*19.8*	--	--
Sentence								
Prison	8	80.0	6.9	6	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	0	0.0	--	--	*577*	*2.2*	*8.0*	*8*
Probation and Alternative	2	20.0	3.5	4	*2,436*	*9.1*	*3.1*	*3*
Probation	0	0.0	--	--	*3,646*	*13.7*	*31.6*	*36*
Other	0	0.0	--	--	*59*	*0.2*	--	--
Mode of Conviction								
Plea	10	100.0	--	--	*22,771*	*85.2*	--	--
Trial	0	0.0	--	--	*3,955*	*14.8*	--	--
Departure Status:								
No Departure	10	100.0	--	--	*21,352*	*79.9*	--	--
Upward Departure	0	0.0	--	--	*453*	*1.7*	--	--
Departure for Substantial Assistance	0	0.0	--	--	*3,323*	*12.4*	--	--
Other Downward Departure	0	0.0	--	--	*1,575*	*5.9*	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	--	--	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,146 (70.2%)*
2nd	--	--	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	--	--	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	--	--	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	0	0.0	4,853	17.6
Bottom Quarter	2	20.0	11,464	44.0
Second Quarter	3	30.0	2,720	10.4
Third Quarter	4	40.0	3,317	12.7
Upper Quarter	1	10.0	3,447	13.2
Above Range	0	0.0	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$1,000,000 or less	2	20.0	20.0	
More than $1,000,000	2	20.0	40.0	
More than $4,000,000	3	30.0	70.0	
More than $15,000,000	3	30.0	100.0	
More than $50,000,000	0	0.0	100.0	
Average Loss = $5.9m				
Median Loss = $4.0m				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2T1.1 **Primary Offense: All Offenses**

Number of Cases = 51

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(51)	--	10.9	10	(26,820)	--	16.7	14
Criminal History Category	(51)	--	1.1	1	(26,820)	--	2.0	1
Final Guideline Range	(51)	--	--	6-12	(26,820)	--	--	21-27
Acceptance of Responsibility								
Received	36	70.6	--	--	21,518	80.2	--	--
Not Received	15	29.4	--	--	5,300	19.8	--	--
Sentence								
Prison	24	47.1	17.8	14.0	19,965	74.8	62.2	33
New Split Sentence	1	2.0	8.0	8	577	2.2	8.0	8
Probation and Alternative	20	39.2	4.1	4	2,436	9.1	3.1	3
Probation	6	11.8	40.0	30	3,646	13.7	31.6	36
Other	0	0.0	--	--	59	0.2	--	--
Mode of Conviction								
Plea	38	74.5	--	--	22,771	85.2	--	--
Trial	13	25.5	--	--	3,955	14.8	--	--
Departure Status:								
No Departure	41	80.4	--	--	21,352	79.9	--	--
Upward Departure	0	0.0	--	--	453	1.7	--	--
Departure for Substantial Assistance	3	5.9	--	--	3,323	12.4	--	--
Other Downward Departure	7	13.7	--	--	1,575	5.9	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	--	Substantial Assistance 3 (37.5%)	Adequacy of Criminal History 132 (34.4%)	Substantial Assistance 3,148 (70.2%)
2nd	--	Cooperation - Motion Unknown 1 (12.5%)	High Speed Chase 28 (7.3%)	Pursuant to a Plea Agreement 422 (9.4%)
3rd	--	Mental and Emotional Conditions 1 (12.5%)	Pursuant to a Plea Agreement 18 (4.7%)	General Mitigating Circumstances 102 (2.3%)
4th	--	Family Ties and Responsibilities 1 (12.5%)	Prior Criminal Record, Future Risk 16 (4.2%)	Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	8	16.0	4,853	17.6
Bottom Quarter	26	52.0	11,464	44.0
Second Quarter	5	10.0	2,720	10.4
Third Quarter	6	12.0	3,317	12.7
Upper Quarter	5	10.0	3,447	13.2
Above Range	0	0.0	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$2,000 or less	3	5.9	5.9	
More than $2,000	5	9.8	15.7	
More than $5,000	1	2.0	17.7	
More than $10,000	5	9.8	27.5	
More than $20,000	14	27.5	55.0	
More than $40,000	7	13.7	68.7	
More than $70,000	4	7.8	76.5	
More than $120,000	3	5.9	82.4	
More than $200,000	2	3.9	86.3	
More than $350,000	5	9.8	96.1	
More than $500,000	2	3.9	100.0	
More than $800,000	0	0.0	100.0	
More than $1,500,000	0	0.0	100.0	
More than $2,500,000	0	0.0	100.0	
More than $5,000,000	0	0.0	100.0	
More than $10,000,000	0	0.0	100.0	
More than $20,000,000	0	0.0	100.0	
More than $40,000,000	0	0.0	100.0	
More than $80,000,000	0	0.0	100.0	
Average Loss = $86,569				
Median Loss = $20,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2T1.2 **Primary Offense:** All Offenses

Number of Cases = 67

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(67)	--	6.7	7	*(26,820)*	--	*16.7*	*14*
Criminal History Category	(67)	--	1.3	1	*(26,820)*	--	*2.0*	*1*
Final Guideline Range	(67)	--	--	1-7	*(26,820)*	--	--	*21-27*
Acceptance of Responsibility								
Received	63	94.0	--	--	*21,518*	*80.2*	--	--
Not Received	4	6.0	--	--	*5,300*	*19.8*	--	--
Sentence								
Prison	11	16.7	10.7	8	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	0	0.0	--	--	*577*	*2.2*	*8.0*	*8*
Probation and Alternative	27	40.9	3.9	4	*2,436*	*9.1*	*3.1*	*3*
Probation	28	42.4	27.0	24	*3,646*	*13.7*	*31.6*	*36*
Other	0	0.0	--	--	*59*	*0.2*	--	--
Mode of Conviction								
Plea	60	89.6	--	--	*22,771*	*85.2*	--	--
Trial	7	10.4	--	--	*3,955*	*14.8*	--	--
Departure Status:								
No Departure	60	90.9	--	--	*21,352*	*79.9*	--	--
Upward Departure	0	0.0	--	--	*453*	*1.7*	--	--
Departure for Substantial Assistance	4	6.1	--	--	*3,323*	*12.4*	--	--
Other Downward Departure	2	3.0	--	--	*1,575*	*5.9*	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	--	Substantial Assistance 4 (66.7%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,146 (70.2%)*
2nd	--	Coercion and Duress 1 (16.7%)	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	--	Pursuant to a Plea Agreement 1 (16.7%)	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	--	--	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	4	6.2	4,853	17.6
Bottom Quarter	43	66.2	11,464	44.0
Second Quarter	6	9.2	2,720	10.4
Third Quarter	7	10.8	3,317	12.7
Upper Quarter	5	7.7	3,447	13.2
Above Range	0	0.0	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$2,000 or less	18	26.9	26.9	
More than $2,000	11	16.4	43.3	
More than $5,000	6	9.0	52.3	
More than $10,000	3	4.5	56.8	
More than $20,000	7	10.4	67.2	
More than $40,000	10	14.9	82.1	
More than $70,000	9	13.4	95.5	
More than $120,000	3	4.5	100.0	
More than $200,000	0	0.0	100.0	
More than $350,000	0	0.0	100.0	
More than $500,000	0	0.0	100.0	
More than $800,000	0	0.0	100.0	
More than $1,500,000	0	0.0	100.0	
More than $2,500,000	0	0.0	100.0	
More than $5,000,000	0	0.0	100.0	
More than $10,000,000	0	0.0	100.0	
More than $20,000,000	0	0.0	100.0	
More than $40,000,000	0	0.0	100.0	
More than $80,000,000	0	0.0	100.0	
Average Loss = $24,0[illegible]				
Median Loss = $6,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2T1.3 **Primary Offense: All Offenses**

Number of Cases = 44

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(44)	–	8.6	9	*(26,820)*	–	*16.7*	*14*
Criminal History Category	(44)	–	1.2	1	*(26,820)*	–	*2.0*	*1*
Final Guideline Range	(44)	–	–	4-10	*(26,820)*	–	–	*21-27*
Acceptance of Responsibility								
Received	36	81.8	–	–	*21,518*	*80.2*	–	–
Not Received	8	18.2	–	–	*5,300*	*19.8*	–	–
Sentence								
Prison	19	43.2	11.3	10	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	1	2.3	8.0	8	*577*	*2.2*	*8.0*	*8*
Probation and Alternative	15	34.1	2.2	2	*2,436*	*9.1*	*3.1*	*3*
Probation	8	18.2	39.0	36	*3,646*	*13.7*	*31.6*	*36*
Other	1	2.3	–	–	*59*	*0.2*	–	–
Mode of Conviction								
Plea	37	84.1	–	–	*22,771*	*85.2*	–	–
Trial	7	15.9	–	–	*3,955*	*14.8*	–	–
Departure Status:								
No Departure	38	90.5	–	–	*21,352*	*79.9*	–	–
Upward Departure	0	0.0	–	–	*453*	*1.7*	–	–
Departure for Substantial Assistance	4	9.5	–	–	*3,323*	*12.4*	–	–
Other Downward Departure	0	0.0	–	–	*1,575*	*5.9*	–	–

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	–	Substantial Assistance 4 (100.0%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,146 (70.2%)*
2nd	–	–	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	–	–	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	–	–	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	5	11.4	4,853	17.6
Bottom Quarter	25	56.8	11,464	44.0
Second Quarter	6	13.6	2,720	10.4
Third Quarter	4	9.1	3,317	12.7
Upper Quarter	3	6.8	3,447	13.2
Above Range	1	2.3	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$2,000 or less	12	27.3	27.3	
More than $2,000	2	4.5	31.8	
More than $5,000	4	9.1	40.9	
More than $10,000	9	20.5	61.4	
More than $20,000	6	13.9	75.3	
More than $40,000	5	11.4	86.7	
More than $70,000	2	4.5	91.2	
More than $120,000	3	6.8	98.0	
More than $200,000	1	2.3	100.3	
More than $350,000	0	0.0	100.3	
More than $500,000	0	0.0	100.3	
More than $800,000	0	0.0	100.3	
More than $1,500,000	0	0.0	100.3	
More than $2,500,000	0	0.0	100.3	
More than $5,000,000	0	0.0	100.3	
More than $10,000,000	0	0.0	100.3	
More than $20,000,000	0	0.0	100.3	
More than $40,000,000	0	0.0	100.3	
More than $[illegible]	0	0.0	100.3	
Average Loss = $25,778				
Median Loss = $10,000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather then the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2T1.4 **Primary Offense:** All Offenses

Number of Cases = 15

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(15)	–	10.9	11	*(26,820)*	–	*16.7*	*14*
Criminal History Category	(15)	–	1.2	1	*(26,820)*	–	*2.0*	*1*
Final Guideline Range	(15)	–	–	12-18	*(26,820)*	–	–	*21-27*
Acceptance of Responsibility								
Received	10	66.7	–	–	*21,518*	*80.2*	–	–
Not Received	5	33.3	–	–	*5,300*	*19.8*	–	–
Sentence								
Prison	6	40.0	33.5	30	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	1	6.7	6.0	6	*577*	*2.2*	*6.0*	*6*
Probation and Alternative	3	20.0	3.3	2	*2,436*	*9.1*	*3.1*	*3*
Probation	5	33.3	36.0	36	*3,646*	*13.7*	*31.6*	*36*
Other	0	0.0	–	–	*59*	*0.2*	–	–
Mode of Conviction								
Plea	12	80.0	–	–	*22,771*	*85.2*	–	–
Trial	3	20.0	–	–	*3,955*	*14.8*	–	–
Departure Status:								
No Departure	11	73.3	–	–	*21,352*	*79.9*	–	–
Upward Departure	2	13.3	–	–	*453*	*1.7*	–	–
Departure for Substantial Assistance	0	0.0	–	–	*3,323*	*12.4*	–	–
Other Downward Departure	2	13.3	–	–	*1,575*	*5.9*	–	–

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	Several Persons Injured 2 (100.0%)	Physical Condition 2 (100.0%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,146 (70.2%)*
2nd	–	–	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	–	–	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	–	–	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	2	13.3	4,853	17.6
Bottom Quarter	7	46.7	11,464	44.0
Second Quarter	1	6.7	2,720	10.4
Third Quarter	1	6.7	3,317	12.7
Upper Quarter	1	6.7	3,447	13.2
Above Range	3	20.0	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$2,000 or less	4	26.7	26.7	
More than $2,000	0	0.0	26.7	
More than $5,000	1	6.7	33.4	
More than $10,000	1	6.7	40.1	
More than $20,000	2	13.3	53.4	
More than $40,000	2	13.3	66.7	
More than $70,000	2	13.3	80.0	
More than $120,000	1	6.7	86.7	
More than $200,000	1	6.7	93.4	
More than $350,000	0	0.0	93.4	
More than $500,000	1	6.7	100.1	
More than $800,000	0	0.0	100.1	
More than $1,500,000	0	0.0	100.1	
More than $2,500,000	0	0.0	100.1	
More than $5,000,000	0	0.0	100.1	
More than $10,000,000	0	0.0	100.1	
More than $20,000,000	0	0.0	100.1	
More than $40,000,000	0	0.0	100.1	
More than [illegible]	0	0.0	100.1	
Average Loss = $73,000				
Median Loss = $[illegible],000				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2T1.5 **Primary Offense: All Offenses**

Number of Cases = 17

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(15)	--	4.1	4	*(26,820)*	--	*16.7*	*14*
Criminal History Category	(15)	--	1.2	1	*(26,820)*	--	*2.0*	*1*
Final Guideline Range	(15)	--	--	0-6	*(26,820)*	--	--	*21-27*
Acceptance of Responsibility								
Received	16	94.1	--		*21,518*	*80.2*	--	--
Not Received	1	5.9	--	--	*5,300*	*19.8*	--	--
Sentence								
Prison	2	12.5	4.5	4	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	0	0.0	--	-	*577*	*2.2*	*8.0*	*8*
Probation and Alternative	1	6.3	0.0	0	*2,436*	*9.1*	*3.1*	*3*
Probation	12	75.0	21.0	18	*3,646*	*13.7*	*31.6*	*36*
Other	1	6.3	--	--	*59*	*0.2*	--	--
Mode of Conviction								
Plea	17	100.0	--	--	*22,771*	*85.2*	--	--
Trial	0	0.0	--	--	*3,955*	*14.8*	--	--
Departure Status:								
No Departure	17	100.0	--	--	*21,352*	*79.9*	--	--
Upward Departure	0	0.0	--	--	*453*	*1.7*	--	--
Departure for Subetantial Assistance	0	0.0	--	--	*3,323*	*12.4*	--	--
Other Downward Departure	0	0.0	--	--	*1,575*	*5.9*	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	-	-	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,145 (70.2%)*
2nd	-	-	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	-	-	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	-	-	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	0	0.0	4,853	17.6
Bottom Quarter	14	87.5	11,464	44.0
Second Quarter	1	6.3	2,720	10.4
Third Quarter	0	0.0	3,317	12.7
Upper Quarter	1	6.3	3,447	13.2
Above Range	0	0.0	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$2,000 or less	--	--	0.0	
More than $2,000	--	--	0.0	
More than $5,000	--	--	0.0	
More than $10,000	--	--	0.0	
More than $20,000	--	--	0.0	
More than $40,000	--	--	0.0	
More than $70,000	--	--	0.0	
More than $120,000	--	--	0.0	
More than $200,000	--	--	0.0	
More than $350,000	--	--	0.0	
More than $500,000	--	--	0.0	
More than $800,000	--	--	0.0	
More than $1,500,000	--	--	0.0	
More than $2,500,000	--	--	0.0	
More than $5,000,000	--	--	0.0	
More than $10,000,000	--	--	0.0	
More than $20,000,000	--	--	0.0	
More than $40,000,000	--	--	0.0	
More than $80,000,000	--	--	0.0	
Average Loss = N/A				
Median Loss = N/A				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2T1.9 **Primary Offense: All Offenses**

Number of Cases = 29

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(29)	–	11.2	12	*(26,820)*	–	*16.7*	*14*
Criminal History Category	(29)	–	1.2	1	*(26,820)*	–	*2.0*	*1*
Final Guideline Range	(29)	–	–	10-16	*(26,820)*	–	–	*21-27*
Acceptance of Responsibility								
Received	14	48.3	–	–	*21,518*	*80.2*	–	–
Not Received	15	51.7	–	–	*5,300*	*19.8*	–	–
Sentence								
Prison	19	67.9	14.5	12	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	0	0.0	–	-	*577*	*2.2*	*8.0*	*8*
Probation and Alternative	4	14.3	3.5	3	*2,436*	*9.1*	*3.1*	*3*
Probation	5	17.9	34.8	36	*3,646*	*13.7*	*31.6*	*36*
Other	0	0.0	–	–	*59*	*0.2*	–	–
Mode of Conviction								
Plea	13	44.8	–	–	*22,771*	*85.2*	–	–
Trial	16	55.2	–	–	*3,955*	*14.8*	–	–
Departure Status:								
No Departure	25	89.3	–	–	*21,352*	*79.9*	–	–
Upward Departure	0	0.0	–	–	*453*	*1.7*	–	–
Departure for Substantial Assistance	2	7.1	–	–	*3,323*	*12.4*	–	–
Other Downward Departure	1	3.6	–	–	*1,575*	*5.9*	–	–

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	–	Substantial Assistance 2 (66.7%)	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,146 (70.2%)*
2nd	–	Diminished Capacity 1 (33.3%)	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	–	–	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	–	–	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	3	10.7	4,853	17.6
Bottom Quarter	19	67.9	11,464	44.0
Second Quarter	2	7.1	2,720	10.4
Third Quarter	1	3.6	3,317	12.7
Upper Quarter	3	10.7	3,447	13.2
Above Range	0	0.0	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$2,000 or less	–	–	0.0	
More than $2,000	–	–	0.0	
More than $5,000	–	–	0.0	
More than $10,000	–	–	0.0	
More than $20,000	–	–	0.0	
More than $40,000	–	–	0.0	
More than $70,000	–	–	0.0	
More than $120,000	–	–	0.0	
More than $200,000	–	–	0.0	
More than $350,000	–	–	0.0	
More than $500,000	–	–	0.0	
More than $800,000	–	–	0.0	
More than $1,500,000	–	–	0.0	
More than $2,500,000	–	–	0.0	
More than $5,000,000	–	–	0.0	
More than $10,000,000	–	–	0.0	
More than $20,000,000	–	–	0.0	
More than $40,000,000	–	–	0.0	
More than $80,000,000	–	–	0.0	
Average Loss = N/A				
Median Loss = N/A				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

PROFILE OF ECONOMIC OFFENSES - FY91

Primary Guideline: 2T3.1 & 2T3.2 **Primary Offense: All Offenses**

Number of Cases = 32

	Economic Offense Cases				All Guideline Cases			
	Number	Percent	Mean	Median	Number	Percent	Mean	Median
Final Offense Level	(29)	--	5.3	4	*(26,820)*	--	*16.7*	*14*
Criminal History Category	(29)	--	1.0	1	*(26,820)*	--	*2.0*	*1*
Final Guideline Range	(29)	--	--	0-6	*(26,820)*	--	--	*21-27*
Acceptance of Responsibility								
Received	27	84.4	--	--	*21,518*	*80.2*	--	--
Not Received	5	15.6	--	--	*5,300*	*19.8*	--	--
Sentence								
Prison	8	25.0	8.0	5	*19,965*	*74.8*	*62.2*	*33*
New Split Sentence	0	0.0	--	-	*577*	*2.2*	*8.0*	*8*
Probation and Alternative	2	6.3	1.5	2	*2,436*	*9.1*	*3.1*	*3*
Probation	22	68.8	27.8	36	*3,646*	*13.7*	*31.6*	*36*
Other	0	0.0	--	--	*59*	*0.2*	--	--
Mode of Conviction								
Plea	31	96.9	--	--	*22,771*	*85.2*	--	--
Trial	1	3.1	--	--	*3,955*	*14.8*	--	--
Departure Status:								
No Departure	31	96.9	--	--	*21,352*	*79.9*	--	--
Upward Departure	1	3.1	--	--	*453*	*1.7*	--	--
Departure for Substantial Assistance	0	0.0	--	--	*3,323*	*12.4*	--	--
Other Downward Departure	0	0.0	--	--	*1,575*	*5.9*	--	--

Top Four Most Frequently Given Reasons For Departure:	Upward Departures	Downward Departures	Upward Departures	Downward Departures
1st	-	-	*Adequacy of Criminal History 132 (34.4%)*	*Substantial Assistance 3,146 (70.2%)*
2nd	-	-	*High Speed Chase 28 (7.3%)*	*Pursuant to a Plea Agreement 422 (9.4%)*
3rd	-	-	*Pursuant to a Plea Agreement 18 (4.7%)*	*General Mitigating Circumstances 102 (2.3%)*
4th	-	-	*Prior Criminal Record, Future Risk 16 (4.2%)*	*Criminal History Category Over-represents Defendant's Involvement 98 (2.2%)*

Position of Sentence Relative to Guideline Range	Economic Offense Cases		All Guideline Cases	
	Number	Percent	Number	Percent
Below Range	0	10.7	4,853	17.6
Bottom Quarter	25	78.1	11,464	44.0
Second Quarter	1	3.1	2,720	10.4
Third Quarter	3	9.4	3,317	12.7
Upper Quarter	2	6.3	3,447	13.2
Above Range	1	3.1	545	2.1

Amount of Loss

Amount	Number	Percent	Cumulative Percent	
$2,000 or less	21	65.6	65.6	
More than $2,000	4	12.5	78.1	
More than $5,000	3	9.4	87.5	
More than $10,000	1	3.1	90.6	
More than $20,000	2	6.3	96.9	
More than $40,000	0	0.0	96.9	
More than $70,000	0	0.0	96.9	
More than $120,000	0	0.0	96.9	
More than $200,000	1	3.1	100.0	
More than $350,000	0	0.0	100.0	
More than $500,000	0	0.0	100.0	
More than $800,000	0	0.0	100.0	
More than $1,500,000	0	0.0	100.0	
More than $2,500,000	0	0.0	100.0	
More than $5,000,000	0	0.0	100.0	
More than $10,000,000	0	0.0	100.0	
More than $20,000,000	0	0.0	100.0	
More than $40,000,000	0	0.0	100.0	
More than $80,000,000	0	0.0	100.0	
Average Loss = $8,531				
Median Loss = $0				

*These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the relevant guidelines for amendment years 1989 and 1990, but excludes about 20 percent of the cases due to missing or incomplete information from the sentencing judge.

**The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. Generally, this manner of calculation will underestimate the true amount of loss.

Table F-62
Percentage of Cases Receiving Selected Enhancements and Adjustments for 2B1.1 Larceny Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Enhancement or Adjustment			
		More than Minimal Planning	Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	385	7.0	0.0	1.0	3.0
More than $100	257	15.0	1.0	0.0	4.0
More than $1,000	122	38.0	4.0	2.0	4.0
More than $2,000	161	50.0	2.0	2.0	8.0
More than $5,000	124	54.0	4.0	2.0	10.0
More than $10,000	111	63.0	3.0	1.0	13.0
More than $20,000	103	65.0	6.0	4.0	10.0
More than $40,000	50	64.0	4.0	4.0	10.0
More than $70,000	59	69.0	10.0	12.0	2.0
More than $120,000	34	65.0	6.0	6.0	9.0
More than $200,000	15	67.0	13.0	7.0	7.0
More than $350,000	1	100.0	0.0	0.0	0.0
More than $500,000	8	75.0	50.0	0.0	13.0
More than $800,000	1	100.0	100.0	0.0	0.0
More than $1,500,00	1	0.0	0.0	0.0	100.0
Total	1432	36.0	3.0	2.0	6.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-63
Percentage of Cases Receiving Selected Enhancements and Adjustments for 2B1.1 Embezzlement Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Enhancement or Adjustment			
		More than Minimal Planning	Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	24	38.0	0.0	8.0	4.0
More than $100	72	25.0	1.0	0.0	13.0
More than $1,000	84	38.0	0.0	0.0	8.0
More than $2,000	150	53.0	2.0	1.0	12.0
More than $5,000	146	62.0	1.0	1.0	9.0
More than $10,000	123	72.0	0.0	1.0	17.0
More than $20,000	118	69.0	4.0	0.0	25.0
More than $40,000	79	89.0	3.0	0.0	34.0
More than $70,000	43	88.0	7.0	0.0	42.0
More than $120,000	19	89.0	5.0	5.0	58.0
More than $200,000	13	92.0	0.0	0.0	69.0
More than $350,000	9	89.0	11.0	0.0	33.0
More than $500,000	3	100.0	0.0	0.0	33.0
More than $800,000	5	100.0	0.0	0.0	60.0
More than $1,500,00	3	100.0	0.0	0.0	100.0
More than 5,000,000	1	100.0	0.0	0.0	100.0
Total	892	64.0	2.0	1.0	20.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-64
Percentage of Cases Receiving Selected Enhancements and Adjustments for All Other 2B1.1 Cases Sentenced During Fiscal Year 1991[1]

Loss Category	Number	Enhancement or Adjustment			
		More than Minimal Planning	Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	9	0.0	0.0	0.0	0.0
More than $100	11	18.0	0.0	0.0	9.0
More than $1,000	7	57.0	0.0	14.0	29.0
More than $2,000	15	73.0	3.0	0.0	20.0
More than $5,000	16	31.0	6.0	0.0	25.0
More than $10,000	10	70.0	10.0	0.0	20.0
More than $20,000	8	50.0	25.0	0.0	0.0
More than $40,000	14	79.0	14.0	7.0	7.0
More than $70,000	9	67.0	11.0	11.0	11.0
More than $120,000	5	100.0	20.0	0.0	0.0
More than $200,000	2	100.0	50.0	0.0	0.0
More than $800,000	1	100.0	0.0	0.0	0.0
Total	107	54.0	10.0	3.0	13.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-65
Percentage of Cases Receiving Selected Enhancements and Adjustments for 2B1.2 Auto Theft Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Enhancement or Adjustment			
		More than Minimal Planning	Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	1	0.0	0.0	100.0	0.0
More than $100	1	0.0	0.0	0.0	0.0
More than $2,000	2	50.0	0.0	0.0	0.0
More than $5,000	8	75.0	0.0	0.0	0.0
More than $10,000	11	55.0	0.0	0.0	0.0
More than $20,000	12	67.0	0.0	17.0	0.0
More than $40,000	17	59.0	18.0	12.0	0.0
More than $70,000	9	89.0	22.0	0.0	0.0
More than $120,000	9	67.0	11.0	11.0	22.0
More than $200,000	2	100.0	0.0	0.0	0.0
More than $350,000	1	100.0	0.0	0.0	0.0
Total	73	66.0	8.0	8.0	3.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-66
Percentage of Cases Receiving Selected Enhancements and Adjustments for 2B1.2 Larceny Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Enhancement or Adjustment			
		More than Minimal Planning	Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	18	17.0	0.0	0.0	6.0
More than $100	28	25.0	0.0	4.0	4.0
More than $1,000	19	47.0	0.0	0.0	0.0
More than $2,000	27	26.0	0.0	4.0	0.0
More than $5,000	32	31.0	6.0	3.0	0.0
More than $10,000	32	44.0	6.0	3.0	0.0
More than $20,000	25	36.0	4.0	4.0	4.0
More than $40,000	24	63.0	4.0	4.0	0.0
More than $70,000	37	38.0	3.0	16.0	0.0
More than $120,000	26	42.0	4.0	12.0	0.0
More than $200,000	22	55.0	18.0	5.0	5.0
More than $350,000	5	80.0	0.0	0.0	20.0
More than $500,000	3	67.0	67.0	0.0	0.0
More than $800,000	5	80.0	20.0	0.0	0.0
More than $1,500,00	3	33.0	0.0	33.0	33.0
More than 5,000,000	1	100.0	100.0	0.0	0.0
Total	307	40.0	5.0	6.0	2.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-67
Percentage of Cases Receiving Selected Enhancements and Adjustments for All Other 2B1.2 Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Enhancement or Adjustment			
		More than Minimal Planning	Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	1	0.0	0.0	0.0	0.0
More than $1,000	1	100.0	0.0	0.0	0.0
More than $2,000	1	100.0	0.0	0.0	0.0
More than $5,000	2	0.0	0.0	0.0	0.0
More than $40,000	2	50.0	0.0	0.0	0.0
More than $70,000	2	100.0	50.0	0.0	0.0
More than $120,000	4	50.0	0.0	25.0	0.0
More than $200,000	1	100.0	100.0	0.0	0.0
More than $1,000,000	1	100.0	0.0	0.0	100.0
Total	15	60.0	13.0	7.0	7.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-68
Percentage of Cases Receiving Selected Adjustments for 2B4.1 Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Adjustment		
		Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	4	0.0	0.0	50.0
More than $100	1	0.0	0.0	0.0
More than $1,000	2	0.0	0.0	50.0
More than $2,000	4	0.0	0.0	0.0
More than $5,000	2	0.0	0.0	0.0
More than $10,000	1	0.0	0.0	100.0
More than $40,000	4	0.0	25.0	0.0
More than $200,000	1	0.0	0.0	100.0
Total	19	0.0	5.0	26.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-69
Percentage of Cases Receiving Selected Adjustments for 2B5.2 Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Adjustment		
		Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	155	3.0	6%.0	1.0
More than $100	44	2.0	11.0	0.0
More than $1,000	27	11.0	15.0	0.0
More than $2,000	21	10.0	10.0	0.0
More than $5,000	17	6.0	24.0	6.0
More than $10,000	10	10.0	10.0	0.0
More than $20,000	19	16.0	16.0	0.0
More than $40,000	18	6.0	0.0	11.0
More than $70,000	12	17.0	25.0	17.0
More than $120,000	9	22.0	22.0	22.0
More than $200,000	11	36.0	0.0	0.0
More than $350,000	7	43.0	0.0	0.0
More than $500,000	7	43.0	29.0	29.0
More than $800,000	5	0.0	0.0	20.0
More than $2,500,00	4	50.0	25.0	0.0
Total	366	9.0	10.0	3.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-70
Percentage of Cases Receiving Selected Adjustments for 2B5.3 Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Adjustment		
		Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	16	0.0	6.0	0.0
More than $100	7	29.0	0.0	0.0
More than $1,000	13	23.0	0.0	0.0
More than $2,000	8	25.0	0.0	0.0
More than $5,000	9	22.0	11.0	11.0
More than $10,000	7	43.0	14.0	14.0
More than $20,000	5	20.0	20.0	0.0
More than $40,000	2	0.0	0.0	0.0
More than $70,000	2	0.0	0.0	0.0
More than $120,000	1	100.0	0.0	0.0
Total	70	20.0	6.0	3.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-71
Percentage of Cases Receiving Selected Adjustments for 2B5.4 Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Adjustment		
		Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	8	0.0	0.0	0.0
More than $100	5	0.0	0.0	0.0
More than $1,000	9	11.0	11.0	0.0
More than $2,000	2	0.0	0.0	0.0
More than $5,000	4	0.0	0.0	0.0
More than $20,000	3	0.0	0.0	0.0
More than $40,000	4	25.0	0.0	0.0
More than $70,000	1	100.0	0.0	0.0
More than $120,000	1	0.0	0.0	0.0
More than $350,000	2	0.0	0.0	0.0
Total	39	8.0	3.0	0.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-72
Percentage of Cases Receiving Selected Enhancements and Adjustments for 2F1.1 Fraud Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Enhancement or Adjustment			
		More than Minimal Planning	Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	603	40.0	3.0	4.0	2.0
More than $1,000	1	100.0	0.0	0.0	0.0
More than $2,000	255	61.0	2.0	6.0	4.0
More than $5,000	298	70.0	3.0	4.0	3.0
More than $10,000	316	83.0	5.0	4.0	6.0
More than $20,000	341	81.0	7.0	6.0	5.0
More than $40,000	206	88.0	10.0	2.0	8.0
More than $70,000	168	89.0	11.0	8.0	12.0
More than $120,000	136	93.0	10.0	6.0	11.0
More than $200,000	83	88.0	17.0	13.0	14.0
More than $350,000	40	95.0	23.0	0.0	15.0
More than $500,000	50	96.0	26.0	8.0	6.0
More than $800,000	41	100.0	32.0	5.0	27.0
More than $1,500,000	14	100.0	21.0	0.0	21.0
More than $2,500,000	12	92.0	42.0	0.0	25.0
More than $5,000,000	4	100.0	50.0	0.0	0.0
More than 10,000,000	4	100.0	50.0	0.0	25.0
More than $20,000,000	1	100.0	0.0	0.0	0.0
More than $80,000,000	2	100.0	100.0	0.0	100.0
Total	2546	72.0	8.0	5.0	6.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-73
Percentage of Cases Receiving Selected Enhancements and Adjustments for 2F1.1 Forgery Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Enhancement or Adjustment			
		More than Minimal Planning	Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	171	25.0	1.0	1.0	2.0
More than $100	1	100.0	0.0	0.0	0.0
More than $2,000	44	50.0	2.0	5.0	0.0
More than $5,000	26	65.0	0.0	8.0	0.0
More than $10,000	17	71.0	12.0	6.0	6.0
More than $20,000	10	80.0	30.0	10.0	0.0
More than $40,000	13	85.0	0.0	8.0	15.0
More than $70,000	1	100.0	0.0	0.0	0.0
More than $120,000	2	100.0	0.0	50.0	0.0
More than $200,000	1	100.0	0.0	0.0	0.0
More than $800,000	1	100.0	0.0	0.0	0.0
More than $1,500,00	1	100.0	100.0	0.0	0.0
Total	288	41.0	3.0	3.0	2.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-74
Percentage of Cases Receiving Selected Enhancements and Adjustments for All Other 2F1.1 Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Enhancement or Adjustment			
		More than Minimal Planning	Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	28	46.0	4.0	0.0	0.0
More than $2,000	11	55.0	0.0	0.0	0.0
More than $5,000	8	50.0	0.0	25.0	0.0
More than $10,000	7	57.0	0.0	0.0	0.0
More than $20,000	14	79.0	7.0	0.0	14.0
More than $40,000	9	78.0	44.0	0.0	22.0
More than $70,000	9	67.0	0.0	11.0	11.0
More than $120,000	3	100.0	67.0	33.0	0.0
More than $200,000	6	83.0	17.0	33.0	17.0
More than $350,000	1	100.0	100.0	0.0	0.0
More than $800,000	6	100.0	50.0	17.0	33.0
More than $2,500,000	4	100.0	50.0	0.0	25.0
More than $5,000,000	3	100.0	33.0	0.0	33.0
More than $10,000,000	3	100.0	100.0	0.0	0.0
More than $20,000,000	1	100.0	0.0	0.0	0.0
Total	113	68.0	17.0	6.0	9.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-75
Percentage of Cases Receiving Selected Adjustments for 2R1.1 Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Adjustment		
		Aggravating Role	Mitigating Role	Abuse of Trust
$400,000 or less	2	0.0	0.0	0.0
More than $400,000	5	0.0	0.0	0.0
More than $1,000,000	3	0.0	0.0	0.0
Total	6	0.0	0.0	0.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-76
Percentage of Cases Receiving Selected Adjustments for 2T1.1 Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Adjustment		
		Aggravating Role	Mitigating Role	Abuse of Trust
$2.000 or less	3	0.0	0.0	0.0
More than $2.000	4	0.0	0.0	0.0
More than $5.000	2	0.0	0.0	0.0
More than $10.000	5	0.0	0.0	0.0
More than $20.000	14	7.0	0.0	0.0
More than $40.000	8	0.0	13.0	13.0
More than $70.000	4	0.0	25.0	0.0
More than $120.000	3	0.0	0.0	0.0
More than $200.000	2	0.0	0.0	0.0
More than $350.000	4	50.0	0.0	0.0
More than $500.000	2	100.0	0.0	0.0
Total	51	10.0	4.0	2.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-77
Percentage of Cases Receiving Selected Adjustments for 2T1.2 Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Adjustment		
		Aggravating Role	Mitigating Role	Abuse of Trust
$2,000 or less	11	0.0	0.0	0.0
More than $2,000	6	17.0	0.0	0.0
More than $5,000	3	0.0	0.0	0.0
More than $10,000	6	0.0	0.0	0.0
More than $20,000	10	0.0	0.0	0.0
More than $40,000	9	0.0	0.0	0.0
More than $70,000	3	0.0	0.0	0.0
Total	48	2.0	0.0	0.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-78
Percentage of Cases Receiving Selected Adjustments for 2T1.3 Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Adjustment		
		Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	10	0.0	0.0	0.0
More than $2,000	2	0.0	0.0	0.0
More than $5,000	4	0.0	0.0	0.0
More than $10,000	8	0.0	0.0	0.0
More than $20,000	6	0.0	0.0	0.0
More than $40,000	5	0.0	0.0	0.0
More than $70,000	2	0.0	0.0	50.0
More than $120,000	3	0.0	0.0	33.0
Total	40	0.0	0.0	8.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-79
Percentage of Cases Receiving Selected Adjustments for 2T1.4 Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Adjustment		
		Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	4	0.0	0.0	25.0
More than $5,000	1	0.0	0.0	0.0
More than $10,000	1	0.0	0.0	0.0
More than $20,000	2	0.0	0.0	0.0
More than $40,000	2	100.0	0.0	0.0
More than $70,000	2	0.0	0.0	50.0
More than $120,000	1	0.0	0.0	0.0
More than $200,000	1	0.0	0.0	0.0
More than $500,000	1	0.0	0.0	0.0
Total	15	13.0	0.0	13.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-80
Percentage of Cases Receiving Selected Adjustments for 2T1.5 Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Adjustment		
		Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	17	6.0	0.0	0.0
Total	17	6.0	0.0	0.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-81
Percentage of Cases Receiving Selected Adjustments for 2T1.9 Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Adjustment		
		Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	1	0.0	0.0	0.0
More than $20,000	28	7.0	14.0	4.0
Total	29	7.0	14.0	3.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Table F-82
Percentage of Cases Receiving Selected Adjustments for 2T3.1 and 2T3.2 Cases Sentenced During Fiscal Year 1991[1]

Amount of Loss	Number	Adjustment		
		Aggravating Role	Mitigating Role	Abuse of Trust
$100 or less	21	0.0	5.0	5.0
More than $2,000	4	0.0	0.0	0.0
More than $5,000	3	0.0	0.0	0.0
More than $10,000	1	1.0	0.0	0.0
More than $20,000	2	0.0	0.0	0.0
More than $200,000	1	0.0	0.0	0.0
Total	32	3.0	3.0	3.0

1. This sample of cases was drawn from the population of cases sentenced during fiscal year 1991 and includes only cases sentenced under the 1989 or later guidelines for which the information reported represents the known findings of the sentencing court. Of the relevant cases, about 20 percent were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Appendix G:
Offense Loss Tables

Table G-1
Distribution by Theory of Loss
for Cases Sentenced during Fiscal Year 1991
by Guideline Applied[1]

Theory of Loss	Guideline Applied					
	§2B1.1		§2F1.1		Total	
	Number (Weighted)	Percent	Number (Weighted)	Percent	Number (Weighted)	Percent
No Pecuniary Loss	0	0.0	291	9.8	291	5.4
Actual Amount Taken	1,754	73.5	1,539	51.7	3,293	61.5
Intended Loss	71	3.0	383	12.9	454	8.5
Fair Market Value	84	3.5	68	2.3	152	2.8
Replacement Cost	50	2.1	0	0.0	50	0.9
Net Loss	23	1.0	71	2.4	94	1.8
Misrepresentation	50	2.1	34	1.1	84	1.6
Face Value of Loans	1	0.0	106	3.6	107	2.0
Unpaid Loans	0	0.0	36	1.2	36	0.7
Multiple Theories	58	2.5	102	3.4	160	3.0
Other	213	8.9	145	4.9	358	6.7
Missing Data	78	3.3	198	6.7	276	5.2
Total	2,382	100.0	2,973	100.0	5,355	100.0

1. This sample of cases was drawn from the population of cases sentenced pursuant to §§2B1.1 and 2F1.1 for amendment year 1989 or later for which the information reported reflects the known findings of the sentencing court. The number of cases reported reflects the weighted values of the 191 cases sampled.

Table G-2
Distribution of Position within the Sentencing Range
for §2B1.1 Cases Sentenced during Fiscal Year 1991[1]

Loss Category	Total	Position Within Sentencing Range													
		Below Range		Within Range 1st Quarter		Within Range 2nd Quarter		Within Range 3rd Quarter		Within Range 4th Quarter		Above Range		Missing	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
$2,000 or less	971	16	1.6	747	76.9	46	4.7	46	4.7	56	5.8	11	1.1	49	5.0
More than $2,000	326	29	8.9	222	68.1	37	11.3	15	4.6	17	5.2	4	1.2	2	0.6
More than $5,000	286	26	9.1	181	63.3	37	12.9	14	4.9	21	7.3	5	1.7	2	0.7
More than $10,000	244	41	16.8	135	55.3	39	16.0	12	4.9	12	4.9	2	0.8	3	1.2
More than $20,000	229	55	24.0	108	47.2	24	10.5	15	6.6	18	7.9	6	2.6	3	1.3
More than $40,000	145	33	22.8	65	44.8	21	14.5	5	3.4	18	12.4	2	1.4	1	0.7
More than $70,000	111	34	30.6	30	27.0	22	19.8	6	5.4	15	13.5	2	1.8	2	1.8
More than $120,000	56	8	14.3	27	48.2	8	14.3	3	5.4	7	12.5	3	5.4	0	0.0
More than $200,000	30	6	20.0	10	33.3	5	16.7	4	13.3	5	16.7	0	0.0	0	0.0
More than $350,000	10	2	20.0	4	40.0	2	20.0	0	0.0	2	20.0	0	0.0	0	0.0
More than $500,000	11	0	0.0	4	36.4	3	27.3	1	9.1	0	0.0	3	27.3	0	0.0
More than $800,000	13	2	15.4	4	30.8	2	15.4	0	0.0	5	38.5	0	0.0	0	0.0
Total	2,432	252	10.4	1,537	63.2	246	10.1	121	5.0	176	7.2	38	1.6	62	2.5

1. These data were drawn from the population of cases sentenced during fiscal year 1991 and represent those cases sentenced pursuant to §§2B1.1, 2B1.2, or 2F1.1 for amendment year 1989 or later for which the information reported reflects the known findings of the sentencing court. Of the 7,442 cases, 1,655 were excluded due to an earlier version of the guidelines, missing data for "more than minimal planning," or because the report of the sentencing hearing was not received.

Table G-3
Distribution of Position within the Sentencing Range
for §2B1.2 Cases Sentenced during Fiscal Year 1991[1]

Loss Category	Total	Position Within Sentencing Range													
		Below Range		Within Range 1st Quarter		Within Range 2nd Quarter		Within Range 3rd Quarter		Within Range 4th Quarter		Above Range		Missing	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
$2,000 or less	67	1	1.5	38	56.7	4	6.0	9	13.4	11	16.4	4	6.0	0	0.0
More than $2,000	30	1	3.3	10	33.3	4	13.3	2	6.7	11	36.7	2	6.7	0	0.0
More than $5,000	42	2	4.8	19	45.2	6	14.3	3	7.1	11	26.2	1	2.4	0	0.0
More than $10,000	43	3	7.0	18	41.9	9	20.9	2	4.7	10	23.3	1	2.3	0	0.0
More than $20,000	37	5	13.5	13	35.1	8	21.6	6	16.2	5	13.5	0	0.0	0	0.0
More than $40,000	43	9	20.9	17	39.5	6	14.0	3	7.0	5	11.6	2	4.7	1	2.3
More than $70,000	49	18	36.7	13	26.5	7	14.3	4	8.2	4	8.2	2	4.1	1	2.0
More than $120,000	39	11	28.2	16	41.0	2	5.1	2	5.1	7	17.9	0	0.0	1	2.6
More than $200,000	24	6	25.0	5	20.8	5	20.8	1	4.2	5	20.8	1	4.2	1	4.2
More than $350,000	7	3	42.9	2	28.6	0	0.0	1	14.3	1	14.3	0	0.0	0	0.0
More than $500,000	3	0	0.0	1	33.3	0	0.0	1	33.3	1	33.3	0	0.0	0	0.0
More than $800,000	9	2	22.2	1	11.1	4	44.4	0	0.0	2	22.2	0	0.0	0	0.0
Total	393	61	15.5	153	38.9	55	14.0	34	8.7	73	18.6	13	3.3	4	1.0

1. These data were drawn from the population of cases sentenced during fiscal year 1991 and represent those cases sentenced pursuant to §§2B1.1, 2B1.2, or 2F1.1 for amendment year 1989 or later for which the information reported reflects the known findings of the sentencing court. Of the 7,442 cases, 1,655 were excluded due to an earlier version of the guidelines, missing data for "more than minimal planning," or because the report of the sentencing hearing was not received.

Table G-4
Distribution of Position within the Sentencing Range
for §2F1.1 Cases Sentenced during Fiscal Year 1991[1]

Loss Category	Total	Position Within Sentencing Range													
		Below Range		Within Range 1st Quarter		Within Range 2nd Quarter		Within Range 3rd Quarter		Within Range 4th Quarter		Above Range		Missing	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
$2,000 or less	807	24	3.0	527	65.3	73	9.0	47	5.8	98	12.1	19	2.4	19	2.4
More than $2,000	312	22	7.1	165	52.9	46	14.7	23	7.4	45	14.4	7	2.2	4	1.3
More than $5,000	304	29	9.5	156	51.3	44	14.5	25	8.2	36	11.8	11	3.6	3	1.0
More than $10,000	337	46	13.6	172	51.0	56	16.6	18	5.3	30	8.9	8	2.4	7	2.1
More than $20,000	367	61	16.6	170	46.3	55	15.0	21	5.7	41	11.2	16	4.4	3	0.8
More than $40,000	231	44	19.0	85	36.8	36	15.6	24	10.4	33	14.3	8	3.5	1	0.4
More than $70,000	181	44	24.3	72	39.8	29	16.0	11	6.1	18	9.9	4	2.2	3	1.7
More than $120,000	141	27	19.1	56	39.7	21	14.9	8	5.7	20	14.2	6	4.3	3	2.1
More than $200,000	90	25	27.8	29	32.2	12	13.3	3	3.3	19	21.1	1	1.1	1	1.1
More than $350,000	41	6	14.6	18	43.9	4	9.8	3	7.3	6	14.6	4	9.8	0	0.0
More than $500,000	51	16	31.4	14	27.5	6	11.8	3	5.9	10	19.6	1	2.0	1	2.0
More than $800,000	100	17	17.0	31	31.0	11	11.0	4	4.0	24	24.0	12	12.0	1	1.0
Total	2,962	361	12.2	1,495	50.5	393	13.3	190	6.4	380	12.8	97	3.3	46	1.6

1. These data were drawn from the population of cases sentenced during fiscal year 1991 and represent those cases sentenced pursuant to §§2B1.1, 2B1.2, or 2F1.1 for amendment year 1989 or later for which the information reported reflects the known findings of the sentencing court. Of the 7,442 cases, 1,655 were excluded due to an earlier version of the guidelines, missing data for "more than minimal planning," or because the report of the sentencing hearing was not received.

Appendix H:
More than Minimal Planning Tables

Table H-1
Distribution of Imprisonment Imposed
for Cases Sentenced during Fiscal Year 1991
by Application of *More than Minimal Planning*[1]

More than Minimal Planning	Total	Imprisonment								
		Total			Prison & Supervised Release[2]			New Split Sentence[3]		
		Number	Percent	Average Term of Imprisonment[4]	Number	Percent	Average Term of Imprisonment[5]	Number	Percent	Average Prison Equivalency[6]
More than Minimal Planning Not Applied	2,459	669	27.2	10.1	624	25.4	10.1	45	1.8	11.2
More than Minimal Planning Applied	3,328	1,960	58.9	18.1	1,773	53.3	18.1	187	5.6	10.0
Total	5,787	2,629	45.4	16.1	2,397	41.4	16.6	232	4.0	10.2

1. These data were drawn from the population of cases sentenced during fiscal year 1991 and represent those cases sentenced pursuant to §§2B1.1, 2B1.2, or 2F1.1 for amendment year 1989 or later for which the information reported reflects the known findings of the sentencing court. Of the 7,442 cases, 1,655 were excluded due to an earlier version of the guidelines, missing data for "more than minimal planning," or because the report of the sentencing hearing was not received.

2. This category includes defendants sentenced to only a term of imprisonment and defendants sentenced to a term of imprisonment followed by a term of supervised release with no conditions of community confinement or home detention.

3. The *New Split Sentence* category includes defendants sentenced to a term of imprisonment followed by a term of supervised release that includes a condition of a term of community confinement or home detention that, when added together, comprise at least the minimum guideline sentence established by the sentencing court.

4. Difference in *Average Term of Imprisonment* is significant at the 0.05 level (t = -11.0, df = 2627).

5. Difference in *Average Term of Imprisonment* for defendant sentenced to terms of *Prison and Supervised Release* is significant at the 0.05 level (t = -11.4, df = 2380).

6. The difference in average prison equivalency for cases with and without "More than Minimal Planning" is not statistically different at the 0.05 level (t = 0.9, df = 230).

ole H-2
Distribution of Probation Imposed for Cases Sentenced during Fiscal Year 1991 by Application of *More than Minimal Planning*[1]

More than Minimal Planning	Total	Probation								
		Total		Probation and Confinement[2]				Probation Only		
		Number	Percent	Number	Percent	Average Term of Probation[3]	Average Term of Confinement[4]	Number	Percent	Average Term of Probation[5]
More than Minimal Planning Not Applied	2,459	1,712	69.6	393	16.0	39.1	3.3	1,319	53.6	26.9
More than Minimal Planning Applied	3,328	1,333	40.1	876	26.3	42.2	4.0	457	13.7	35.6
Total	5,787	3,045	52.6	1,269	21.9	41.3	3.8	1,776	30.7	29.6

1. These data were drawn from the population of cases sentenced during fiscal year 1991 and represent those cases sentenced pursuant to §§2B1.1, 2B1.2, or 2F1.1 for amendment year 1989 or later for which the information reported reflects the known findings of the sentencing court. Of the 7,442 cases, 1,655 were excluded due to an earlier version of the guidelines, missing data for "more than minimal planning," or because the report of the sentencing hearing was not received.

2. The *Probation and Confinement* category includes defendants sentenced to a term of probation with conditions that include a term of home detention, community confinement, and/or intermittent confinement.

3. Difference in *Average Term of Probation* for defendants sentenced to terms of *Probation and Confinement* is significant at the 0.05 level (t = -3.5, df = 1099.3).

4. Difference in *Average Term of Confinement* for defendants sentenced to terms of *Probation and Confinement* is significant at the 0.05 level (t = -5.3, df = 1074).

5. Difference in *Average Term of Probation* for defendants sentenced to *Probation Only* is significant at the 0.05 level (t = -5.3, df = 1074).

Table H-3
Distribution of Monetary Sanctions Imposed for Cases Sentenced during Fiscal Year 1991 by Application of *More than Minimal Planning*[1]

More than Minimal Planning	Total	Monetary Sanctions											
		No Fine or Restitution Ordered		Restitution Ordered/No Fine		Fine Ordered/ No Restitution		Both Fine and Restitution Ordered		Amount of Payment Ordered[2]			
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Total	Mean	Median	Sum
More than Minimal Planning Not Applied	2,459	834	33.9	765	31.1	654	26.6	206	8.4	1,629	6,352	1,000	10,347,408
More than Minimal Planning Applied	3,328	1,149	34.5	1,613	48.5	343	10.3	223	6.7	2,193	77,617	7,000	170,214,081
Total	5,787	1,946	33.6	2,378	41.1	997	17.2	429	7.4	3,822	48,031	3,227	183,574,482

1. These data were drawn from the population of cases sentenced during fiscal year 1991 and represent those cases sentenced pursuant to §§2B1.1, 2B1.2, or 2F1.1 for amendment year 1989 or later for which the information reported reflects the known findings of the sentencing court. Of the 7,442 cases, 1,655 were excluded due to an earlier version of the guidelines, missing data for "more than minimal planning," or because the report of the sentencing hearing was not received.

2. Difference in *Amount of Payment Ordered* is significant at the 0.05 level (t = -5.2, df = 3748).

.ble H-4
Distribution of Position with the Sentencing Range for Cases Sentenced during Fiscal Year 1991 by Application of *More than Minimal Planning*[1]

More than Minimal Planning	Total	Position Within Sentencing Range													
		Below Range		Within Range 1st Quarter		Within Range 2nd Quarter		Within Range 3rd Quarter		Within Range 4th Quarter		Above Range		Missing	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
More than Minimal Planning Not Applied	2,459	135	5.5	1,635	66.5	239	2.7	125	5.1	211	8.6	44	1.8	70	2.9
More than Minimal Planning Applied	3,328	539	16.2	1,530	46.0	455	1.4	220	6.6	418	12.6	104	3.1	42	1.3
Total	5,787		11.7	3,165	54.7	694	1.0	345	6.0	629	10.9	148	2.6	112	1.9

1. These data were drawn from the population of cases sentenced during fiscal year 1991 and represent those cases sentenced pursuant to §§2B1.1, 2B1.2, or 2F1.1 for amendment year 1989 or later for which the information reported reflects the known findings of the sentencing court. Of the 7,442 cases, 1,655 were excluded due to an earlier version of the guidelines, missing data for "more than minimal planning," or because the report of the sentencing hearing was not received.

Table H-5
Distribution of Position within the Sentencing Range for Cases Sentenced during Fiscal Year 1991 without *More than Minimal Planning*[1]

Less Category	Total	Position Within Sentencing Range													
		Below Range		Within Range 1st Quarter		Within Range 2nd Quarter		Within Range 3rd Quarter		Within Range 4th Quarter		Above Range		Missing	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
2,000 or less	1,348	17	1.3	1,010	74.9	79	5.9	58	4.3	106	7.9	19	1.4	59	4.4
More than 2,000	304	8	2.6	212	69.7	27	8.9	17	5.6	35	11.5	4	1.3	1	0.3
More than 5,000	246	13	5.3	165	67.1	31	12.6	10	4.1	20	8.1	4	1.6	3	1.2
More than 10,000	165	19	11.5	81	49.1	33	20.0	14	8.5	12	7.3	2	1.2	4	2.4
More than 20,000	152	25	16.4	68	44.7	34	22.4	12	7.9	8	5.3	3	2.0	2	1.3
More than 40,000	82	9	11.0	39	47.6	18	22.0	3	3.7	9	11.0	3	3.7	1	1.2
More than 70,000	72	22	30.6	25	34.7	9	12.5	5	6.9	9	12.5	2	2.8	0	0.0
More than 120,000	46	14	30.4	20	43.5	2	4.3	4	8.7	4	8.7	2	4.3	0	0.0
More than 200,000	28	6	21.4	10	35.7	3	10.7	2	7.1	6	21.4	1	3.6	0	0.0
More than 350,000	5	1	20.0	2	40.0	0	0.0	0	0.0	1	20.0	1	20.0	0	0.0
More than 500,000	5	1	20.0	0	0.0	0	0.0	0	0.0	1	20.0	3	60.0	0	0.0
More than 800,000	6	0	0.0	3	50.0	3	50.0	0	0.0	0	0.0	0	0.0	0	0.0
Total	2,459	135	5.5	1,635	66.5	239	9.7	125	5.1	211	8.6	44	1.8	70	2.8

1. These data were drawn from the population of cases sentenced during fiscal year 1991 and represent those cases sentenced pursuant to §§2B1.1, 2B1.2, or 2F1.1 for amendment year 1989 or later for which the information reported reflects the known findings of the sentencing court. Of the 7,442 cases, 1,655 were excluded due to an earlier version of the guidelines, missing data for "more than minimal planning," or because the report of the sentencing hearing was not received.

Table H-6
Distribution of Position within the Sentencing Range for Cases Sentenced during Fiscal Year 1991 with *More than Minimal Planning*[1]

Loss Category	Total	Position Within Sentencing Range													
		Below Range		Within Range 1st Quarter		Within Range 2nd Quarter		Within Range 3rd Quarter		Within Range 4th Quarter		Above Range		Missing	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
2,000 or less	497	24	4.8	302	60.8	44	8.9	44	8.9	59	11.9	15	3.0	9	1.8
More than 2,000	364	44	12.1	185	50.8	60	16.5	23	6.3	38	10.4	9	2.5	5	1.4
More than 5,000	386	44	11.4	191	49.5	56	14.5	32	8.3	48	12.4	13	3.4	2	0.5
More than 10,000	459	71	15.5	244	53.2	71	15.5	18	3.9	40	8.7	9	2.0	6	1.3
More than 20,000	481	96	20.0	223	46.4	53	11.0	30	6.2	56	11.6	19	4.0	4	0.8
More than 40,000	337	77	22.8	128	38.0	45	13.4	29	8.6	47	13.9	9	2.7	2	0.6
More than 70,000	269	74	27.5	90	33.5	49	18.2	16	5.9	28	10.4	6	2.2	6	2.2
More than 120,000	190	32	16.8	79	41.6	29	15.3	9	4.7	30	15.8	7	3.7	4	2.1
More than 200,000	116	31	26.7	34	29.3	19	16.4	6	5.2	23	19.8	1	0.9	2	1.7
More than 350,000	53	10	18.9	22	41.5	6	11.3	4	7.5	8	15.1	3	5.7	0	0.0
More than 500,000	60	15	25.0	19	31.7	9	15.0	5	8.3	10	16.7	1	1.7	1	1.7
More than 800,000	116	21	18.1	33	28.4	14	12.1	4	3.4	31	26.7	12	10.3	1	0.9
Total	3,328	539	16.2	1,550	46.6	455	13.7	220	6.6	418	12.6	104	3.1	42	1.3

1. These data were drawn from the population of cases sentenced during fiscal year 1991 and represent those cases sentenced pursuant to §§2B1.1, 2B1.2, or 2F1.1 for amendment year 1989 or later for which the information reported reflects the known findings of the sentencing court. Of the 7,442 cases, 1,655 were excluded due to an earlier version of the guidelines, missing data for "more than minimal planning," or because the report of the sentencing hearing was not received.

Table H-7
Distribution of Departure Status
for Cases Sentenced during Fiscal Year 1991
by Application of *More than Minimal Planning*[1]

Application of *More than Minimal Planning*	Total	Departure Status									
		No Departure		Upward Departure		Downward Departures		Substantial Assistance		Missing Data/ Not Applicable	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
More than Minimal Planning Not Applied	2,459	2,313	93.3	26	1.1	51	2	59	2	10	0.4
More than Minimal Planning Applied	3,328	2,798	83.3	63	2.5	215	9	205	8	47	1.9
All Cases	25,093	19,945	79.5	412	1.6	1,482	5.9	3,152	12.6	102	0.4

1. These data were drawn from the population of cases sentenced during fiscal year 1991 and represent those cases sentenced pursuant to §§2B1.1, 2B1.2, or 2F1.1 for amendment year 1989 or later for which the information reported reflects the known findings of the sentencing court. Of the 7,442 cases, 1,655 were excluded due to an earlier version of the guidelines, missing data for "more than minimal planning," or because the report of the sentencing hearing was not received.

Table H-8

More Than Minimal Planning by Loss Category for §2B1.1, §2B1.2, and §2F1.1[1]

Loss Category	Total	More than Minimal Planning	
		Number	Percent
$2,000 or less	1,845	497	26.9
More than $2,000	668	364	54.5
More than $5,000	632	386	61.1
More than $10,000	624	459	73.6
More than $20,000	633	481	76.0
More than $40,000	419	337	80.4
More than $70,000	341	269	78.9
More than $120,000	236	190	80.5
More than $200,000	144	116	80.6
More than $350,000	58	53	91.4
More than $500,000	65	60	92.3
More than $800,000	122	116	95.1
Total	5,787	3,328	57.5

1. These data were drawn from the population of cases sentenced during fiscal year 1991 and represent those cases sentenced pursuant to §§2B1.1, 2B1.2, or 2F1.1 for amendment year 1989 or later for which the information reported reflects the known findings of the sentencing court. Of the 7,442 cases, 1,655 were excluded due to an earlier version of the guidelines, missing data for "more than minimal planning," or because the report of the sentencing hearing was not received.

Table H-9
Theory of *More than Minimal Planning*
by Guideline Applied[1]

Guideline Applied	Total (Weighted)	Theory of *More than Minimal Planning*							
		Multiple Acts		Planning		Concealment		Multiple Reasons	
		Number (Weighted)	Percent	Number (Weighted)	Percent	Number (Weighted)	Percent	Number (Weighted)	Percent
U.S.S.G. §2B1.1	949	530	55.8	60	6.4	47	4.9	312	33.9
U.S.S.G. §2F1.1	1,785	771	43.2	374	21.0	103	5.8	538	30.1
Total	2,734	1,301	47.6	435	15.9	150	5.5	849	31.1

1. A sample of 191 cases was drawn from cases sentenced under the 1989 or later §2B1.1 or §2F1.1 guidelines for which the information reported represented the known findings of the sentencing court. The number of cases reported reflects the weighted values of the 191 cases sampled when "more than minimal planning" was applied and the theory of "more than minimal planning" was reported in the sentencing documents.

Table H-10

Distribution of Cases with Components of *More than Minimal Planning* for Cases Sentenced during Fiscal Year 1991 by Guideline Applied[1]

Component of *More than Minimal Planning*	Guideline Applied					
	§2B1.1		§2F1.1		Total	
	Number	Percent	Number	Percent	Number	Percent
Concealment during the Offense	854	35.4	1,403	47.1	2,257	41.9
Post-Offense Concealment	71	3.0	74	2.5	145	2.7
Planning	1,032	42.8	2,226	74.8	3,258	60.5
Use of an Organization	135	5.7	573	19.3	708	13.2
Multiple Victims	234	9.7	1,115	37.5	1,349	25.0
Multiple Acts	1,374	57.0	2,215	74.4	3,589	66.6
Multiple Acts and Planning	873	36.2	1,752	58.9	2,626	48.7
Concealment and Planning	531	22.0	1,184	39.8	1,715	31.8

1. A sample of 191 cases was drawn from cases sentenced under the 1989 or later §2B1.1 or §2F1.1 guidelines for which the information reported represented the known findings of the sentencing court. The of cases reported reflects the weighted values of the 191 cases sampled.

Table H-11

Dominant Theory for Applying *More than Minimal Planning* by Guideline and By Loss Category[1]

Loss Category	2B1.1 Cases	2F1.1 Cases
$2,000 or less	Multiple Acts	Planning
More Than $2,000	Multiple Acts	Multiple Acts
More Than $5,000	Multiple Indicia	Multiple Acts
More Than $10,000	Multiple Indicia	Multiple Acts
More Than $20,000	Multiple Acts	Multiple Acts
More than $40,000	Multiple Acts	Multiple Indicia
More Than $70,000	Multiple Acts	Multiple Acts
More Than $120,000	Multiple Acts	Multiple Acts
More Than $200,000	Multiple Acts	Multiple Indicia
More Than $350,000	No Cases	Planning
More Than $500,000	No Cases	Planning
More Than $800,000	Planning	Multiple Indicia
More Than $1,500,000	Multiple Indicia	Multiple Acts
More Than $2,500,000	No Cases	Multiple Indicia
More Than $5,000,000	Multiple Indicia	Planning
More Than $10,000,000	No Cases	Multiple Indicia
More Than $20,000,000	No Cases	Planning

1. A sample of 191 cases was drawn from cases sentenced under the 1989 or later §2B1.1 or §2F1.1 guidelines for which the information reported represented the known findings of the sentencing court. The number of cases reported reflects the weighted values of the 191 cases sampled when "more than minimal planning" was applied and the theory of "more than minimal planning" was reported in the sentencing documents.

Appendix I:
Incremental Punishment and Comparisons to Past Practice Tables

Table I-1

Comparison of 1987 Fraud and Tax Loss Tables

Offense Level	1987 Fraud Loss Range	1987 Tax Loss Range
11	> $50,000	> $40,000
12	> $100,000	> $80,000
13	> $200,000	> $150,000
14	> $500,000	> $300,000
15	> $1,000,000	> $500,000
16	> $2,000,000	> $1,000,000
17	> $5,000,000	> $2,000,000
18		> $5,000,000

Table I-2

AVERAGE SENTENCE LENGTH BY SELECTED LOSS AMOUNTS
GUIDELINES 2F1.1 AND 2B1.1*
(October 1, 1990 through September 30, 1991)

-Criminal History Category I-

Loss Amount	Guideline and Sentence												(Comparable Parole Guideline Range)
	§2B1.1						§2F1.1						
	TOTAL		Average Offense Level		Sentence		TOTAL		Average Offense Level		Sentence		
	Number	Percent	Mean	Median	Mean	Median	Number	Percent	Mean	Median	Mean	Median	(in months)
TOTAL	**858**	**100.0**	**10.0**	**9.0**	**7.5**	**6.0**	**1,197**	**100.0**	**11.2**	**10.0**	**11.2**	**6.0**	
2,000	134	15.6	7.5	7.0	2.8	2.0	120	10.0	7.3	7.0	3.3	2.0	10 or less
5,000	127	14.8	8.4	8.0	4.4	2.0	135	11.3	8.4	8.0	5.0	4.0	
10,000	181	21.1	8.9	9.0	4.7	4.0	193	16.1	9.1	9.0	5.4	4.0	
20,000	166	19.4	10.2	10.0	7.4	6.0	221	18.5	10.1	10.0	7.9	6.0	
40,000	98	11.4	11.2	11.0	9.4	8.0	144	12.0	11.7	11.0	11.9	10.0	12 - 18
70,000	61	7.1	12.7	12.0	12.8	12.5	119	9.9	12.6	12.0	12.6	10.0	
120,000	42	4.9	13.4	13.0	15.0	13.0	95	7.9	13.8	13.0	17.4	15.0	
200,000	23	2.7	14.8	14.0	18.3	18.0	54	4.5	14.6	14.0	18.0	15.5	24 - 36
350,000	13	1.5	15.2	15.0	18.8	18.0	34	2.8	16.9	17.0	31.5	24.0	
500,000	6	0.7	17.8	17.0	31.2	25.5	40	3.3	18.1	18.0	28.4	27.0	
800,000	7	0.8	19.3	19.0	32.4	32.0	42	3.5	18.8	19.0	33.4	31.5	

*Includes only cases with complete guideline application information from the sentencing court. Only cases sentenced under guideline amendment years 1989 and 1990 are included here. Loss amounts are represented by the lower limit of the amount range. Of the 2,730 applicable cases, only the 2,055 cases sentenced to a period of incarceration (including alternative forms) for which complete sentencing information was available are included in these calculations.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Appendix J:
Abuse of Trust Tables

Table J-1
Distribution of Imprisonment Imposed for Embezzlement Cases Sentenced during Fiscal Year 1991 by Application of Abuse of Trust[1]

Aggravating Role Adjustment	Total	Imprisonment								
		Total			Prison & Supervised Release[2]			New Split Sentence[3]		
		Number	Percent	Average Term of Imprisonment[4]	Number	Percent	Average Term of Imprisonment[5]	Number	Percent	Average Prison Equivalency[6]
Abuse of Trust Enhancement Applied	175	124	70.9	13.8	97	55.4	16.3	27	15.4	23.6
Abuse of Trust Enhancement Not Applied	718	148	20.6	9.5	121	16.9	10.4	27	3.8	21.8
Total	893	269	30.1	11.4	218	24.4	13.0	54	6.1	22.7

1. This sample of cases only includes cases sentenced under the 1989 or later guidelines during fiscal year 1991 for which the information reported represents the known findings of the sentencing court. Of the 1,117 cases, 234 were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

2. This category includes defendants sentenced to only a term of imprisonment (N = 7) and defendants sentenced to a term of imprisonment followed by a term of supervised release with no conditions of community confinement or home detention (N = 208).

3. The *New Split Sentence* category includes defendants sentenced to a term of imprisonment followed by a term of supervised release that includes a condition of a term of community confinement or home detention that, when added together, comprise at least the minimum guideline sentence established by the sentencing court.

4. Difference in Total *Average Term of Imprisonment* is significant at the 0.05 level (t = -4.2, df = 270).

5. Difference in *Average Term of Imprisonment* for defendants sentenced to terms of *Prison and Supervised Release* is significant at the 0.05 level (t = -4.9, df = 194.6).

6. The *Average Prison Equivalency* is the average of the total imprisonment imposed and the total community corrections imposed.

Table J-2
Distribution of Probation Imposed
for Embezzlement Cases Sentenced during Fiscal Year 1991
by Application of Abuse of Trust[1]

Aggravating Role Adjustment	Total	Probation								
		Total		Probation and Confinement[2]				Probation Only		
		Number	Percent	Number	Percent	Average Term of Probation	Average Term of Confinement[3]	Number	Percent	Average Term of Probation
Abuse of Trust Enhancement Applied	175	50	28.6	34	19.4	42.4	4.8	16	9.1	39.0
Abuse of Trust Enhancement Not Applied	718	563	78.4	280	39.0	43.6	3.5	283	39.4	32.9
Total	893	613	68.7	314	35.2	43.5	3.7	299	33.5	33.1

1. This sample of cases only includes cases sentenced under the 1989 or later guidelines during fiscal year 1991 for which the information reported represents the known findings of the sentencing court. Of the 1,117 cases, 234 were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

2. The *Probation and Confinement* category includes defendants sentenced to a term of probation with conditions that include a term of home detention, community confinement, and/or intermittent confinement.

3. Difference in *Average Term of Confinement* for defendants sentenced to terms of *Probation and Confinement* is significant at the 0.05 level (t = -4.0, df = 44.4).

Table J-3
Distribution of Monetary Sanctions Imposed
for Embezzlement Cases Sentenced during Fiscal Year 1991
by Application of Abuse of Trust[1]

Aggravating Role Adjustment	Total	Monetary Sanctions											
		No Fine or Restitution Ordered		Restitution Ordered/No Fine		Fine Ordered/ No Restitution		Both Fine and Restitution Ordered		Amount of Payment Ordered[2]			
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Total	Mean	Median	Sum
Abuse of Trust Enhancement Applied	175	54	30.9	94	53.7	21	12.0	6	3.4	123	85,114	21,109	10,469,117
Abuse of Trust Enhancement Not Applied	718	210	29.3	390	54.3	80	11.1	38	5.3	507	21,849	4,808	11,062,460
Total	893	264	29.6	484	54.2	101	11.3	44	4.9	630	34,107	5,218	21,112,646

1. This sample of cases only includes cases sentenced under the 1989 or later guidelines during fiscal year 1991 for which the information reported represents the known findings of the sentencing court. Of the 1,117 cases, 234 were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

2. Difference in *Amount of Payment Ordered* is significant at the 0.05 level (t = -4.9, df = 628).

Table J-4
Distribution of Position with the Sentencing Range
for Embezzlement Cases Sentenced during Fiscal Year 1991
by Application of Abuse of Trust[1]

Aggravating Role Adjustment	Total	Position Within Sentencing Range											
		Below Range		Within Range 1st Quarter		Within Range 2nd Quarter		Within Range 3rd Quarter		Within Range 4th Quarter		Above Range	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Abuse of Trust Enhancement Applied	175	36	20.6	99	56.6	22	12.6	7	4.0	10	5.7	1	0.6
Abuse of Trust Enhancement Not Applied	718	87	12.1	518	72.1	64	8.9	27	3.8	18	2.5	4	0.6
Total	893	123	13.8	617	69.1	86	9.6	34	3.8	28	3.1	5	0.6

1. This sample of cases only includes cases sentenced under the 1989 or later guidelines during fiscal year 1991 for which the information reported represents the known findings of the sentencing court. Of the 1,117 cases, 234 were deleted due to either the use of an earlier version of the guidelines or because the report of the sentencing hearing was not received for the case.

Appendix K:
Tax Offense Tables

Table K-1

TYPE OF SENTENCE IMPOSED FOR GUIDELINE TAX CASES BY SENTENCING YEAR

YEAR	TOTAL	Type of Guideline Sentence Imposed									
		Prison		Split Sentence		Probation and Confinement		Probation Only		Other Cases	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
1989	113	54	47.8	3	2.7	15	13.3	40	35.4	1	0.9
1990	209	84	40.2	9	4.3	23	11.0	89	42.6	4	1.9
1991	331	113	34.1	3	0.9	87	26.3	126	38.1	2	0.6

YEAR	TOTAL	Average Length of Guideline Sentence Imposed		
		Mean (in months)	Median (in months)	Proportion of Guideline Defendants Receiving a Sentence to Prison or an Alternative
1989	54	27	12	63.8%
1990	84	17	12	55.5%
1991	113	18	12	61.3%

SOURCE: U.S. Sentencing Commission, 1989-1991 Data Files.

Table K-2

TYPE OF SENTENCE IMPOSED FOR PRE-GUIDELINE TAX CASES BY SENTENCING YEAR

YEAR	TOTAL	Type of Pre-Guideline Sentence Imposed*				Length of Pre-Guideline Sentence Imposed*	
		Prison		Probation		Mean (in months)	Median (in months)
		Number	Percent	Number	Percent		
1984	1,185	592	50.0	593	50.0	17.2	8.5
1985	1,193	605	50.7	588	49.3	18.6	9.0
1986	1,338	622	46.5	716	53.5	18.0	6.0
1987	1,299	656	50.5	643	49.5	19.3	8.0
1988	1,233	591	47.9	642	52.1	20.1	12.0
1989	1,004	484	48.2	520	51.8	20.1	9.0
1990**	745	342	45.9	403	54.1	19.6	12.0

*Of the approximately 8,000 pre-guideline cases, 50 of the defendants sentenced to a term of imprisonment served their sentence in a local jail facility at night or on weekends. Additionally, 219 defendants (183 probation sentences and 36 prison sentences) served all or part of their sentence in a residential community treatment center. These are not separated out on this table due to the unavailability of sentence length.

**FPSSIS data collection of sentencing information was terminated in September of 1990.

SOURCE: Administrative Office of the U.S. Courts 1984-1990 FPSSIS Data Files.

Table K-3

SPECIFIC GUIDELINE USED FOR GUIDELINE TAX OFFENSE CASES BY SENTENCING YEAR

Guideline	Year					
	1989		1990		1991	
	Number	Percent	Number	Percent	Number	Percent
2T1.1	19	16.7	25	11.6	65	19.5
2T1.2	4	3.5	39	18.1	80	24.0
2T1.3	13	11.4	38	17.6	55	16.5
2T1.4	3	2.6	7	3.2	24	7.2
2T1.5	9	7.9	19	8.8	26	7.8
2T1.6	0	0.0	0	0.0	2	0.6
2T1.7	1	0.9	3	1.4	5	1.5
2T1.8	0	0.0	0	0.0	0	0.0
2T1.9	18	15.8	21	9.7	33	9.9
2T2.1	2	1.8	7	3.2	1	0.3
2T2.2	0	0.0	1	0.5	1	0.3
2T3.1	32	28.1	40	18.5	22	6.6
2T3.2	13	11.4	16	7.4	19	5.7
TOTAL	114	100.0	216	100.0	333	100.0

SOURCE: U.S. Sentencing Commission 1989-1991 Data Files.

PROFILE OF GUID. /E TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.1	Final Offense Level = 1 - 6	Criminal History Category I	Number of Cases = 4

Type	Value	N	%
Sentence mean prison term = 4.5 median prison term = 4.5	Prison	2	50.0
	Split Sentence	0	0.0
	Probation with Confinement	1	25.0
	Probation Only	1	25.0
	Other	0	0.0
Fine Imposed*	(Yes = 0.0%)	$–	$–
Restitution Ordered*	(Yes = 25.0%)	$1,419	$1,419
Mode of Conviction	Plea	3	75.0
	Trial	1	25.0
Loss Amount*		$1,500	$2,000
Acceptance of Responsibility	Received	3	75.0
	Not Received	1	25.0
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	2	50.0
	Second Quarter	0	0.0
	Third Quarter	1	25.0
	Upper Quarter	1	25.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	4	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	–	
	–	–	
Income From Criminal Activity	Yes	0	0.0
	No	4	100.0
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	4	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	4	100.0
Impede Discovery	Yes	0	0.0
	No	4	100.0

Age*		33.8	36.0
Gender	Male	3	75.0
	Female	1	25.0
Monthly Income*		$675	$600
Median Education		Less Than High School	

Race	White	4	100.0
	Black	0	0.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendme years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentenci court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant lo category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups a designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDELINE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.1	Final Offense Level = 7 - 8	Criminal History Category I	Number of Cases = 10

Type	Value	N	%
Sentence mean prison term = 2.0 median prison term = 2.0	Prison	1	10.0
	Split Sentence	0	0.0
	Probation with Confinement	6	60.0
	Probation Only	3	30.0
	Other	0	0.0
Fine Imposed*	(Yes=60.0%)	$13,950	$4,240
Restitution Ordered*	(Yes=30.0%)	$20,225	$22,637
Mode of Conviction	Plea	9	90.0
	Trial	1	10.0
Loss Amount*		$18,000	$20,000
Acceptance of Responsibility	Received	10	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	3	30.0
	Bottom Quarter	5	50.0
	Second Quarter	2	20.0
	Third Quarter	0	0.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	8	80.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	2	20.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	-	Previous Employment Record	
	-	-	
Income From Criminal Activity	Yes	0	0.0
	No	10	100.0
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	10	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	10	100.0
Impede Discovery	Yes	0	0.0
	No	10	100.0

Age*		44.1	43.5
Gender	Male	9	90.0
	Female	1	10.0
Monthly Income*		$2,135	$1,800
Median Education		High School	

Race	White	6	60.0
	Black	1	10.0
	Hispanic	1	10.0
	Other	2	20.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDE .E TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.1 | **Final Offense Level = 9 - 10** | **Criminal History Category I** | **Number of Cases = 16**

Type	Value	N	%
Sentence	Prison	5	31.3
	Split Sentence	0	0.0
mean prison term = 5.8	Probation with Confinement	10	62.5
median prison term = 6.0	Probation Only	1	6.3
	Other	0	0.0
Fine Imposed*	(Yes=31.3%)	$7,800	$5,000
Restitution Ordered*	(Yes=43.8%)	$28,089	$20,088
Mode of Conviction	Plea	14	87.5
	Trial	2	12.5
Loss Amount*		$31,562	$30,000
Acceptance of Responsibility	Received	14	87.5
	Not Received	2	12.5
Position of Sentence Relative to Guideline Range	Below Range	1	6.7
	Bottom Quarter	10	66.7
	Second Quarter	3	20.0
	Third Quarter	0	0.0
	Upper Quarter	1	6.7
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	11	68.8
	Upward Departure	0	0.0
	Departure for Substantial Assistance	2	12.5
	Other Downward Departure	3	18.8
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	--	Substantial Assistance	
	--	Family Ties and Responsibilities	
Income From Criminal Activity	Yes	6	37.5
	No	10	62.5
Role in the Offense	Mitigating Role	2	12.5
	No Role Adjustment	13	81.3
	Aggravating Role	1	6.3
Obstruction of Justice	Yes	0	0.0
	No	16	100.0
Impede Discovery	Yes	1	6.3
	No	14	93.7

Age*		41.6	43.0
Gender	Male	14	87.5
	Female	2	12.5
Monthly Income*		$2,740	$2,000
Median Education		Some College	

Race	White	14	87.5
	Black	1	6.3
	Hispanic	0	0.0
	Other	1	6.3

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment yea 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. Th values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for th comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDELINE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.1 | **Final Offense Level = 7 - 10** | **Criminal History Category I** | **Number of Cases = 25**

Type	Value	N	%
Sentence	Prison	6	24.0
	Split Sentence	0	0.0
mean prison term = 5.0	Probation with Confinement	16	64.0
median prison term = 6.0	Probation Only	3	12.0
	Other	0	0.0
Fine Imposed*	(Yes = 44.0%)	$11,155	$5,000
Restitution Ordered*	(Yes = 40.0%)	$25,730	$21,363
Mode of Conviction	Plea	22	88.0
	Trial	3	12.0
Loss Amount*		$26,600	$20,000
Acceptance of Responsibility	Received	23	92.0
	Not Received	2	8.0
Position of Sentence Relative to Guideline Range	Below Range	4	16.7
	Bottom Quarter	14	58.3
	Second Quarter	5	20.8
	Third Quarter	0	0.0
	Upper Quarter	1	4.2
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	19	76.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	1	4.0
	Other Downward Departure	5	20.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	Substantial Assistance	
	--	Family Ties and Responsibilities	
Income From Criminal Activity	Yes	5	20.0
	No	20	80.0
Role in the Offense	Mitigating Role	2	8.0
	No Role Adjustment	22	88.0
	Aggravating Role	1	4.0
Obstruction of Justice	Yes	0	0.0
	No	25	100.0
Impede Discovery	Yes	1	4.0
	No	24	96.0

Age*		43.2	43.0
Gender	Male	22	88.0
	Female	3	12.0
Monthly Income*		$2,565	$2,000
Median Education		Tech., Vocat., or Mltry.	

Race	White	20	80.0
	Black	2	8.0
	Hispanic	1	4.0
	Other	2	8.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDE .IE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.1 | **Final Offense Level = 11 - 12** | **Criminal History Category I** | **Number of Cases = 5**

Type	Value	N	%
Sentence	Prison	3	60.0
	Split Sentence	1	20.0
mean prison term = 8.3	Probation with Confinement	1	20.0
median prison term = 8.0	Probation Only	0	0.0
	Other	0	0.0
Fine Imposed*	(Yes = 80.0%)	$30,000	$14,500
Restitution Ordered*	(Yes = 60.0%)	$35,104	$35,884
Mode of Conviction	Plea	4	80.0
	Trial	1	20.0
Loss Amount*		$66,000	$40,000
Acceptance of Responsibility	Received	3	60.0
	Not Received	2	40.0
Position of Sentence Relative to Guideline Range	Below Range	2	40.0
	Bottom Quarter	1	20.0
	Second Quarter	0	0.0
	Third Quarter	2	40.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	4	80.0
	Upward Departure	0	0.0
	Departure for Subetantial Assistance	0	0.0
	Other Downward Departure	1	20.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	No Reason Given	
	–	–	
Income From Criminal Activity	Yes	1	20.0
	No	4	80.0
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	5	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	1	20.0
	No	4	80.0
Impede Discovery	Yes	0	0.0
	No	5	100.0

Age*		52.4	58.0
Gender	Male	4	80.0
	Female	1	20.0
Monthly Income*		$4,699	$4,053
Median Education		High School	

Race	White	4	80.0
	Black	1	20.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDELINE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.2 | **Final Offense Level = 1 - 6** | **Criminal History Category I** | **Number of Cases = 26**

Type	Value	N	%
Sentence mean prison term = 2.5 median prison term = 2.5	Prison	2	8.0
	Split Sentence	0	0.0
	Probation with Confinement	1	4.0
	Probation Only	22	88.0
	Other	0	0.0
Fine Imposed*	(Yes=50.0%)	$9,055	$1,000
Restitution Ordered*	(Yes=15.4%)	$3,673	$3,332
Mode of Conviction	Plea	25	96.2
	Trial	1	3.9
Loss Amount*		$2,269	$1,000
Acceptance of Responsibility	Received	26	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	23	92.0
	Second Quarter	1	4.0
	Third Quarter	1	4.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	26	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	–	
	–	–	
Income From Criminal Activity	Yes	0	0.0
	No	26	100.0
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	26	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	26	100.0
Impede Discovery	Yes	1	3.9
	No	25	96.2

Age*		43.1	41.5
Gender	Male	22	84.6
	Female	4	15.4
Monthly Income*		$1,754	$1,124
Median Education		Some College	

Race	White	21	80.8
	Black	1	3.9
	Hispanic	2	7.7
	Other	2	7.7

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDE E TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.2 | **Final Offense Level = 7 - 8** | **Criminal History Category I** | **Number of Cases = 13**

Type	Value	N	%
Sentence	Prison	1	7.7
	Split Sentence	0	0.0
mean prison term = 5.0	Probation with Confinement	12	92.3
median prison term = 5.0	Probation Only	0	0.0
	Other	0	0.0
Fine Imposed*	(Yes = 30.8%)	$1,625	$1,500
Restitution Ordered*	(Yes = 15.4%)	$40,628	$40,628
Mode of Conviction	Plea	13	100.0
	Trial	0	0.0
Loss Amount*		$32,308	$40,000
Acceptance of Responsibility	Received	13	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	6	46.2
	Second Quarter	3	23.1
	Third Quarter	3	23.1
	Upper Quarter	1	7.7
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	11	91.7
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	1	8.3
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	--	Coercion and Duress	
	--	--	
Income From Criminal Activity	Yes	0	0.0
	No	13	100.0
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	13	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	13	100.0
Impede Discovery	Yes	0	0.0
	No	13	100.0

Age*		43.6	44.0
Gender	Male	13	100.0
	Female	0	0.0
Monthly Income*		$3,104	$2,904
Median Education		Some College	

Race	White	12	100.0
	Black	0	0.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment year 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUID. .NE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.2 **Final Offense Level = 9 - 10** **Criminal History Category I** **Number of Cases = 17**

Type	Value	N	%
Sentence mean prison term = 10.0 median prison term = 10.0	Prison	2	11.8
	Split Sentence	0	0.0
	Probation with Confinement	12	70.6
	Probation Only	3	17.6
	Other	0	0.0
Fine Imposed*	(Yes = 17.6%)	$4,667	$5,000
Restitution Ordered*	(Yes = 5.9%)	$10,000	$10,000
Mode of Conviction	Plea	13	76.5
	Trial	4	23.5
Loss Amount*		$56,294	$70,000
Acceptance of Responsibility	Received	15	88.2
	Not Received	2	11.8
Position of Sentence Relative to Guideline Range	Below Range	3	17.6
	Bottom Quarter	10	58.8
	Second Quarter	2	11.8
	Third Quarter	1	5.9
	Upper Quarter	1	5.9
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	14	82.4
	Upward Departure	0	0.0
	Departure for Substantial Assistance	3	17.6
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	Substantial Assistance	
	–	--	
Income From Criminal Activity	Yes	4	23.5
	No	13	76.5
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	17	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	17	100.0
Impede Discovery	Yes	0	0.0
	No	17	100.0

Age*		44.2	45.0
Gender	Male	15	88.2
	Female	2	11.8
Monthly Income*		$2,833	$1,500
Median Education		Tech., Vocat, or Mitry.	

Race	White	12	70.6
	Black	4	23.5
	Hispanic	0	0.0
	Other	1	5.9

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDE E TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.2 **Final Offense Level = 7 - 10** **Criminal History Category I** **Number of Cases = 30**

Type	Value	N	%
Sentence mean prison term = 8.3 median prison term = 8.0	Prison	3	10.0
	Split Sentence	0	0.0
	Probation with Confinement	24	80.0
	Probation Only	3	10.0
	Other	0	0.0
Fine Imposed*	(Yes = 23.3%)	$2,929	$2,000
Restitution Ordered*	(Yes = 10.0%)	$30,179	$22,159
Mode of Conviction	Plea	26	86.7
	Trial	4	13.3
Loss Amount*		$45,900	$40,000
Acceptance of Responsibility	Received	28	93.3
	Not Received	2	6.7
Position of Sentence Relative to Guideline Range	Below Range	3	10.0
	Bottom Quarter	16	53.3
	Second Quarter	5	16.7
	Third Quarter	4	13.3
	Upper Quarter	2	6.7
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	25	86.2
	Upward Departure	0	0.0
	Departure for Substantial Assistance	3	10.3
	Other Downward Departure	1	3.4
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	Substantial Assistance	
	–	Coercion and Duress	
Income From Criminal Activity	Yes	4	13.3
	No	26	86.7
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	30	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	30	100.0
Impede Discovery	Yes	0	0.0
	No	30	100.0

Age*		44.0	44.5
Gender	Male	28	93.3
	Female	2	6.7
Monthly Income*		$2,959	$2,775
Median Education		Some College	

Race	White	24	82.8
	Black	4	13.8
	Hispanic	0	0.0
	Other	1	3.5

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDELINE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.2 | **Final Offense Level = 11 - 12** | **Criminal History Category I** | **Number of Cases = 2**

Type	Value	N	%
Sentence mean prison term = 16.0 median prison term = 16.0	Prison	1	50.0
	Split Sentence	0	0.0
	Probation with Confinement	0	0.0
	Probation Only	1	50.0
	Other	0	0.0
Fine Imposed*	(Yes=50.0%)	$15,000	$15,000
Restitution Ordered*	(Yes=0.0%)	$--	$--
Mode of Conviction	Plea	1	50.0
	Trial	1	50.0
Loss Amount*		$60,000	$60,000
Acceptance of Responsibility	Received	1	50.0
	Not Received	1	50.0
Position of Sentence Relative to Guideline Range	Below Range	1	50.0
	Bottom Quarter	0	0.0
	Second Quarter	0	0.0
	Third Quarter	0	0.0
	Upper Quarter	1	50.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	1	50.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	1	50.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	Pursuant to a Plea Agreement	
	–	–	
Income From Criminal Activity	Yes	0	0.0
	No	2	100.0
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	2	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	2	100.0
Impede Discovery	Yes	0	0.0
	No	2	100.0

Age*		48.5	48.5
Gender	Male	2	100.0
	Female	0	0.0
Monthly Income*		$2,625	$2,625
Median Education		High School	

Race	White	2	100.0
	Black	0	0.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991).. The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDELINE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.3 | **Final Offense Level = 1 - 6** | **Criminal History Category I** | **Number of Cases = 12**

Type	Value	N	%
Sentence mean prison term = 3.0 median prison term = 3.0	Prison	1	8.3
	Split Sentence	0	0.0
	Probation with Confinement	3	25.0
	Probation Only	7	58.3
	Other	1	8.3
Fine Imposed*	(Yes = 58.3%)	$1,500	$1,000
Restitution Ordered*	(Yes = 25.0%)	$6,354	$6,956
Mode of Conviction	Plea	12	100.0
	Trial	0	0.0
Loss Amount*		$1,563	$0
Acceptance of Responsibility	Received	12	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	11	91.7
	Second Quarter	0	0.0
	Third Quarter	1	8.3
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	12	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	-		
	-	-	
Income From Criminal Activity	Yes	0	0.0
	No	12	100.0
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	12	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	12	100.0
Impede Discovery	Yes	0	0.0
	No	12	100.0

Age*		42.4	43.0
Gender	Male	10	83.3
	Female	2	16.7
Monthly Income*		$3,223	$2,021
Median Education		Some College	

Race	White	11	91.7
	Black	1	8.3
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDELINE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.3 | **Final Offense Level = 7 - 8** | **Criminal History Category I** | **Number of Cases = 8**

Type	Value	N	%
Sentence mean prison term = 0.0 median prison term = 0.0	Prison	0	0.0
	Split Sentence	0	0.0
	Probation with Confinement	7	87.5
	Probation Only	1	12.5
	Other	0	0.0
Fine Imposed*	(Yes=37.5%)	$4,900	$2,500
Restitution Ordered*	(Yes=0.0%)	$–	$–
Mode of Conviction	Plea	8	100.0
	Trial	0	0.0
Loss Amount*		$13,750	$10,000
Acceptance of Responsibility	Received	8	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	1	12.5
	Bottom Quarter	3	37.5
	Second Quarter	4	50.0
	Third Quarter	0	0.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	7	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	–	
	–	–	
Income From Criminal Activity	Yes	1	12.5
	No	7	87.5
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	8	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	8	100.0
Impede Discovery	Yes	0	0.0
	No	8	100.0

Age*		53.3	53.5
Gender	Male	7	87.5
	Female	1	12.5
Monthly Income*		$2,184	$2,160
Median Education		High School	

Race	White	5	62.5
	Black	2	25.0
	Hispanic	1	12.5
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDL ,E TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.3 **Final Offense Level = 9 - 10** **Criminal History Category I** **Number of Cases = 9**

Type	Value	N	%
Sentence	Prison	5	55.6
	Split Sentence	0	0.0
mean prison term = 12.8	Probation with Confinement	4	44.4
median prison term = 6.0	Probation Only	0	0.0
	Other	0	0.0
Fine Imposed*	(Yes = 11.1%)	$5,000	$5,000
Restitution Ordered*	(Yes = 44.4%)	$28,863	$28,476
Mode of Conviction	Plea	7	77.8
	Trial	2	22.2
Loss Amount*		$27,778	$20,000
Acceptance of Responsibility	Received	6	66.7
	Not Received	3	33.3
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	7	77.8
	Second Quarter	0	0.0
	Third Quarter	1	11.1
	Upper Quarter	0	0.0
	Above Range	1	11.1

Type	Value	N	%
Departures	No Departure	8	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	–	
	–	–	
Income From Criminal Activity	Yes	2	22.2
	No	7	77.8
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	9	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	2	22.2
	No	7	77.8
Impede Discovery	Yes	0	0.0
	No	9	100.0

Age*		41.4	42.0
Gender	Male	8	88.9
	Female	1	11.1
Monthly Income*		$1,403	$1,339
Median Education		Tech., Vocat., or Mitry.	

Race	White	6	66.7
	Black	3	33.3
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment year 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. Th values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category a determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for th comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDL .IE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.3 **Final Offense Level = 7 - 10** **Criminal History Category I** **Number of Cases = 17**

Type	Value	N	%
Sentence mean prison term = 12.8 median prison term = 6.0	Prison	5	29.4
	Split Sentence	0	0.0
	Probation with Confinement	11	64.7
	Probation Only	1	5.9
	Other	0	0.0
Fine Imposed*	(Yes = 23.5%)	$4,925	$3,750
Restitution Ordered*	(Yes = 23.5%)	$28,863	$28,476
Mode of Conviction	Plea	15	88.2
	Trial	2	11.8
Loss Amount*		$21,176	$20,000
Acceptance of Responsibility	Received	14	82.4
	Not Received	3	17.7
Position of Sentence Relative to Guideline Range	Below Range	1	5.9
	Bottom Quarter	10	58.8
	Second Quarter	4	23.5
	Third Quarter	1	5.9
	Upper Quarter	0	0.0
	Above Range	1	5.9

Type	Value	N	%
Departures	No Departure	15	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	–	
	--	--	
Income From Criminal Activity	Yes	3	17.6
	No	14	82.4
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	17	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	2	11.8
	No	15	88.2
Impede Discovery	Yes	0	0.0
	No	17	100.0

Age*		47.0	46.0
Gender	Male	15	88.2
	Female	2	11.8
Monthly Income*		$1,768	$1,345
Median Education		High School	

Race	White	11	64.7
	Black	5	29.4
	Hispanic	1	5.9
	Other	0	0.0

Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U S Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDL IE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.3	Final Offense Level = 11 - 12	Criminal History Category I	Number of Cases = 4

Type	Value	N	%
Sentence (mean prison term = 5.3, median prison term = 5.0)	Prison	3	75.0
	Split Sentence	1	25.0
	Probation with Confinement	0	0.0
	Probation Only	0	0.0
	Other	0	0.0
Fine Imposed*	(Yes = 50.0%)	$52,000	$52,000
Restitution Ordered*	(Yes = 0.0%)	$--	$--
Mode of Conviction	Plea	4	100.0
	Trial	0	0.0
Loss Amount*		$42,500	$25,000
Acceptance of Responsibility	Received	4	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	2	50.0
	Bottom Quarter	2	50.0
	Second Quarter	0	0.0
	Third Quarter	0	0.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	2	50.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	2	50.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	--	Substantial Assistance	
	--	--	
Income From Criminal Activity	Yes	3	75.0
	No	1	25.0
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	4	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	1	25.0
	No	3	75.0
Impede Discovery	Yes	1	25.0
	No	3	75.0

Age*		50.5	51.0
Gender	Male	4	100.0
	Female	0	0.0
Monthly Income*		$2,205	$2,099
Median Education		Tech., Vocat., or Mltry.	

Race	White	3	75.0
	Black	0	0.0
	Hispanic	0	0.0
	Other	1	25.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment yea 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. Th values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category s determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for th comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDELINE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.4 | **Final Offense Level = 1 - 6** | **Criminal History Category I** | **Number of Cases = 5**

Type	Value	N	%
Sentence mean prison term = 0.0 median prison term = 0.0	Prison	0	0.0
	Split Sentence	0	0.0
	Probation with Confinement	1	20.0
	Probation Only	4	80.0
	Other	0	0.0
Fine Imposed*	(Yes = 40.0%)	$2,800	$2,800
Restitution Ordered*	(Yes = 40.0%)	$10,802	$10,802
Mode of Conviction	Plea	5	100.0
	Trial	0	0.0
Loss Amount*		$1,000	$0
Acceptance of Responsibility	Received	4	80.0
	Not Received	1	20.0
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	5	100.0
	Second Quarter	0	0.0
	Third Quarter	0	0.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	5	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	–	
	–	–	
Income From Criminal Activity	Yes	n/a	–
	No	n/a	–
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	5	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	5	100.0
Impede Discovery	Yes	n/a	–
	No	n/a	–

Age*		41.8	39.0
Gender	Male	4	80.0
	Female	1	20.0
Monthly Income*		$3,015	$0
Median Education		Some College	

Race	White	4	80.0
	Black	0	0.0
	Hispanic	1	20.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDE E TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.4 | **Final Offense Level = 7 - 8** | **Criminal History Category I** | **Number of Cases = 1**

Type	Value	N	%
Sentence mean prison term = 0.0 median prison term = 0.0	Prison	0	0.0
	Split Sentence	0	0.0
	Probation with Confinement	1	100.0
	Probation Only	0	0.0
	Other	0	0.0
Fine Imposed*	(Yes=0.0%)	$–	$–
Restitution Ordered*	(Yes=0.0%)	$–	$–
Mode of Conviction	Plea	1	100.0
	Trial	0	0.0
Loss Amount*		$20,000	$20,000
Acceptance of Responsibility	Received	1	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	1	100.0
	Second Quarter	0	0.0
	Third Quarter	0	0.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	1	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	–	
	–	–	
Income From Criminal Activity	Yes	n/a	–
	No	n/a	–
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	1	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	1	100.0
Impede Discovery	Yes	n/a	–
	No	n/a	–

Age*		45.0	45.0
Gender	Male	1	100.0
	Female	0	0.0
Monthly Income*		$1,040	$1,040
Median Education		Some College	

Race	White	0	0.0
	Black	1	100.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDELINE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.4 | **Final Offense Level = 9 - 10** | **Criminal History Category I** | **Number of Cases = 1**

Type	Value	N	%
Sentence mean prison term = 0.0 median prison term = 0.0	Prison	0	0.0
	Split Sentence	0	0.0
	Probation with Confinement	1	100.0
	Probation Only	0	0.0
	Other	0	0.0
Fine Imposed*	(Yes = 100.0%)	$3,000	$3,000
Restitution Ordered*	(Yes = 0.0%)	$–	$–
Mode of Conviction	Plea	1	100.0
	Trial	0	0.0
Loss Amount*		$20,000	$20,000
Acceptance of Responsibility	Received	1	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	0	0.0
	Second Quarter	1	100.0
	Third Quarter	0	0.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	1	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	–	
	–	–	
Income From Criminal Activity	Yes	n/a	–
	No	n/a	–
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	1	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	1	100.0
Impede Discovery	Yes	n/a	–
	No	n/a	–

Age*		35.0	35.0
Gender	Male	1	100.0
	Female	0	0.0
Monthly Income*		$1,420	$1,420
Median Education		Some College	

Race	White	0	0.0
	Black	1	100.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDE ,E TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.4 | **Final Offense Level = 7 - 10** | **Criminal History Category I** | **Number of Cases = 2**

Type	Value	N	%
Sentence	Prison	0	0.0
	Split Sentence	0	0.0
mean prison term = 0.0	Probation with Confinement	2	100.0
median prison term = 0.0	Probation Only	0	0.0
	Other	0	0.0
Fine Imposed*	(Yes=50.0%)	$3,000	$3,000
Restitution Ordered*	(Yes=0.0%)	$--	$--
Mode of Conviction	Plea	2	100.0
	Trial	0	0.0
Loss Amount*		$20,000	$20,000
Acceptance of Responsibility	Received	2	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	1	50.0
	Second Quarter	1	50.0
	Third Quarter	0	0.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	2	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	--	--	
	--	--	
Income From Criminal Activity	Yes	n/a	--
	No	n/a	--
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	2	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	2	100.0
Impede Discovery	Yes	n/a	--
	No	n/a	--

Age*		40.0	40.0
Gender	Male	2	100.0
	Female	0	0.0
Monthly Income*		$1,230	$1,230
Median Education		Some College	

Race	White	0	0.0
	Black	2	100.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment year 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. Th values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category a determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for th comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDL NE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.4 | **Final Offense Level = 11 - 12** | **Criminal History Category I** | **Number of Cases = 0**

Type	Value	N	%
Sentence mean prison term = median prison term =	Prison Split Sentence Probation with [redacted] Probation Other		
Fine Imposed*	(Yes = %)	$	$
Restitution Ordered*	(Yes = %)	$	$
Mode of Conviction	Plea Trial		
Loss Amount*		$	$
Acceptance of Responsibility	Received Not Received		
Position of Sentence Relative to Guideline Range	Below Range Bottom Quarter Second Quarter Third Quarter Upper Quarter Above Range		

Type	Value	N	%
Departures	No Departure Upward Departure Departure for Substantial Assistance Other Downward Departure		
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	Substantial Assistance	
	–	–	
Income From Criminal Activity	Yes No		
Role in the Offense	Mitigating Role No Role Adjustment Aggravating Role		
Obstruction of Justice	Yes No		
Inspects Discovery	Yes No		

Age*			
Gender	Male Female		
Monthly Income*			
Median Education		Some College	

Race	White Black Hispanic Other		

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE. U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDL IE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.5 **Final Offense Level = 1 - 6** **Criminal History Category I** **Number of Cases = 15**

Type	Value	N	%
Sentence mean prison term = 1.0 median prison term = 1.0	Prison	1	7.1
	Split Sentence	1	7.1
	Probation with Confinement	11	78.6
	Probation Only	1	7.1
	Other	0	0.0
Fine Imposed*	(Yes=53.3%)	$1,469	$1,000
Restitution Ordered*	(Yes=6.7%)	$2,117	$2,117
Mode of Conviction	Plea	15	100.0
	Trial	0	0.0
Loss Amount*		$n/a	$n/a
Acceptance of Responsibility	Received	15	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	13	92.9
	Second Quarter	1	7.1
	Third Quarter	0	0.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	15	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	–	
	–	–	
Income From Criminal Activity	Yes	n/a	–
	No	n/a	–
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	14	93.3
	Aggravating Role	1	6.7
Obstruction of Justice	Yes	0	0.0
	No	15	100.0
Impede Discovery	Yes	n/a	–
	No	n/a	–

Age*		38.5	36.0
Gender	Male	12	80.0
	Female	3	20.0
Monthly Income*		$1,477	$1,417
Median Education		College Graduate	

Race	White	9	60.0
	Black	3	20.0
	Hispanic	1	6.7
	Other	2	13.3

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUID. NE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.5 **Final Offense Level = 7 8** **Criminal History Category I** **Number of Cases = 0**

Type	Value	N	%
Sentence mean prison term = median prison term =	Prison Split Sentence Probation with [illegible] [illegible] Other		
Fine Imposed	(Yes=%)	$	$
Restitution Ordered*	(Yes=%)	$	$
Mode of Conviction	Plea Trial		
Loss Amount*		$	$
Acceptance of Responsibility	Received Not Received		
Position of Sentence Relative to Guideline Range	Below Range Bottom Quarter Second Quarter Third Quarter Upper Quarter Above Range		

Type	Value	N	%
Departures	No Departure Upward Departure Departure for Substantial Assistance Other Downward Departure		
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	–	
	–	–	
Income From Criminal Activity	Yes No		
Role in the Offense	Mitigating Role No Role Adjustment Aggravating Role		
Obstruction of Justice	Yes No		
Impede Discovery	Yes No		

Age*			
Gender	Male Female		
Monthly Income*		$	$
Median Education			

Race	White Black Hispanic Other		

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDL /E TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.5 | **Final Offense Level = 9 - 10** | **Criminal History Category I** | **Number of Cases = 0**

Type	Value	N	%
Sentence mean prison term = median prison term =	Prison Split Sentence Probation with Confinement Probation Only Other		
Fine Imposed*	(Yes = %)	$	$
Restitution Ordered*	(Yes = %)	$	$
Mode of Conviction	Plea Trial		
Loss Amount*		$	$
Acceptance of Responsibility	Received Not Received		
Position of Sentence Relative to Guideline Range	Below Range Bottom Quarter Second Quarter Third Quarter Upper Quarter Above Range		

Type	Value	N	%
Departures	Departure Upward Departure Departure for Substantial Assistance Other Downward Departure		
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	Substantial Assis...	
	–	–	
Income From Criminal Activity	Yes No		
Role in the Offense	Mitigating Role No Role Adjustment Aggravating Role		
Obstruction of Justice	Yes No		
Impede Discovery	Yes No		

Age*			
Gender	Male Female		
Monthly Income*			
Median Education		Some College	

Race	White Black Hispanic Other		

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment year 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. Th values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category a determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for th comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDE[illegible]NE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.5 **Final Offense Level = 7 - 10** **Criminal History Category I** **Number of Cases = 0**

Type	Value	N	%
Sentence mean prison term = median prison term =	Prison Split Sentence Probation with Confinement Probation Only Other		
Fine Imposed*	(Yes = %)	$	$
Restitution Ordered*	(Yes = %)	$	$
Mode of Conviction	Plea Trial		
Loss Amount*		$	$
Acceptance of Responsibility	Received Not Received		
Position of Sentence Relative to Guideline Range	Below Range Bottom Quarter Second Quarter Third Quarter Upper Quarter Above Range		

Type	Value	N	%
Departures	No Departure Upward Departure Departure for Substantial Assistance Other Downward Departure		
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	Substantial Assistance	
	–	–	
Income From Criminal Activity	Yes No		
Role in the Offense	Mitigating Role No Role Adjustment Aggravating Role		
Obstruction of Justice	Yes No		
Impede Discovery	Yes No		

Age*			
Gender	Male Female		
Monthly Income*			
Median Education		Some College	

Race	White Black Hispanic Other		

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUID IE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.5 | **Final Offense Level = 11 - 12** | **Criminal History Category I** | **Number of Cases = 0**

Type	Value	N	%
Sentence mean prison term = median prison term =	Prison Split Sentence Probation with Confinement Probation Only Other		
Fine Imposed*	(Yes = %)	$	$
Restitution Ordered*	(Yes = %)	$	$
Mode of Conviction	Plea Trial		
Loss Amount*		$	$
Acceptance of Responsibility	Received Not Received		
Position of Sentence Relative to Guideline Range	Below Range Bottom Quarter Second Quarter Third Quarter Upper Quarter Above Range		

Type	Value	N	%
Departures	No Departure Upward Departure Departure for Substantial Assistance Other Downward Departure		
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	Substantial Assistance	
	–	–	
Income From Criminal Activity	Yes No		
Role in the Offense	Mitigating Role No Role Adjustment Aggravating Role		
Obstruction of Justice	Yes No		
Impede Discovery	Yes No		

Age*			
Gender	Male Female		
Monthly Income*			
Median Education		Some College	

Race	White Black Hispanic Other		

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment year 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUID. .NE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.9 | **Final Offense Level = 1 - 6** | **Criminal History Category I** | **Number of Cases = 4**

Type	Value	N	%
Sentence mean prison term = 6.0 median prison term = 6.0	Prison	1	25.0
	Split Sentence	0	0.0
	Probation with Confinement	1	25.0
	Probation Only	2	50.0
	Other	0	0.0
Fine Imposed*	(Yes=25.0%)	$2,000	$2,000
Restitution Ordered*	(Yes=0.0%)	$-	$-
Mode of Conviction	Plea	4	100.0
	Trial	0	0.0
Loss Amount*		$n/a	$n/a
Acceptance of Responsibility	Received	4	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	3	75.0
	Second Quarter	0	0.0
	Third Quarter	0	0.0
	Upper Quarter	1	25.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	4	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	--	--	
	--	--	
Income From Criminal Activity	Yes	n/a	--
	No	n/a	--
Role in the Offense	Mitigating Role	4	100.0
	No Role Adjustment	0	0.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	4	100.0
Impede Discovery	Yes	n/a	--
	No	n/a	--

Age*		49.0	44.0
Gender	Male	0	0.0
	Female	4	100.0
Monthly Income*		$713	$0
Median Education		Some College	

Race	White	4	100.0
	Black	0	0.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDE E TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.9	Final Offense Level = 7 - 8	Criminal History Category I	Number of Cases = 5

Type	Value	N	%
Sentence	Prison	1	20.0
	Split Sentence	0	0.0
mean prison term = 2.0	Probation with Confinement	3	60.0
median prison term = 2.0	Probation Only	1	20.0
	Other	0	0.0
Fine Imposed*	(Yes=60.0%)	$4,333	$2,000
Restitution Ordered*	(Yes=0.0%)	$–	$–
Mode of Conviction	Plea	5	100.0
	Trial	0	0.0
Loss Amount*		$n/a	$n/a
Acceptance of Responsibility	Received	5	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	1	20.0
	Bottom Quarter	1	20.0
	Second Quarter	2	40.0
	Third Quarter	0	0.0
	Upper Quarter	1	20.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	3	75.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	1	25.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	Substantial Assistance	
	–	–	
Income From Criminal Activity	Yes	n/a	–
	No	n/a	–
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	5	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	5	100.0
Impede Discovery	Yes	n/a	–
	No	n/a	–

Age*		40.4	40.0
Gender	Male	4	80.0
	Female	1	20.0
Monthly Income*		$1,848	$2,340
Median Education		Some College	

Race	White	5	100.0
	Black	0	0.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment ye 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. T values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for t comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUID .NE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.9 | **Final Offense Level = 9 - 10** | **Criminal History Category I** | **Number of Cases = 4**

Type	Value	N	%
Sentence mean prison term = 9.0 median prison term = 9.0	Prison	2	66.7
	Split Sentence	0	0.0
	Probation with Confinement	0	0.0
	Probation Only	1	33.3
	Other	0	0.0
Fine Imposed*	(Yes=75.0%)	$4,667	$2,000
Restitution Ordered*	(Yes=0.0%)	$--	$--
Mode of Conviction	Plea	3	75.0
	Trial	1	25.0
Loss Amount*		$n/a	$n/a
Acceptance of Responsibility	Received	2	50.0
	Not Received	2	50.0
Position of Sentence Relative to Guideline Range	Below Range	1	33.3
	Bottom Quarter	1	33.3
	Second Quarter	0	0.0
	Third Quarter	0	0.0
	Upper Quarter	1	33.3
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	3	75.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	1	25.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	--	Substantial Assistance	
	--	--	
Income From Criminal Activity	Yes	n/a	--
	No	n/a	--
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	4	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	1	25.0
	No	3	75.0
Impede Discovery	Yes	n/a	--
	No	n/a	--

Age*		49.0	47.0
Gender	Male	4	100.0
	Female	0	0.0
Monthly Income*		$6,084	$6,084
Median Education		College Graduate	

Race	White	4	100.0
	Black	0	0.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDE[illegible]E TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.9 | **Final Offense Level = 7 - 10** | **Criminal History Category I** | **Number of Cases = 9**

Type	Value	N	%
Sentence	Prison	3	37.5
	Split Sentence	0	0.0
mean prison term = 6.7	Probation with Confinement	3	37.5
median prison term = 6.0	Probation Only	2	25.0
	Other	0	0.0
Fine Imposed*	(Yes = 66.7%)	$4,500	$2,000
Restitution Ordered*	(Yes = 0.0%)	$–	$–
Mode of Conviction	Plea	8	88.9
	Trial	1	11.1
Loss Amount*		$n/a	$n/a
Acceptance of Responsibility	Received	7	77.8
	Not Received	2	22.2
Position of Sentence Relative to Guideline Range	Below Range	2	25.0
	Bottom Quarter	2	25.0
	Second Quarter	2	25.0
	Third Quarter	0	0.0
	Upper Quarter	2	25.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	6	75.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	2	25.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	Substantial Assistance	
	–	–	
Income From Criminal Activity	Yes	n/a	–
	No	n/a	–
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	9	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	1	11.1
	No	8	88.9
Impede Discovery	Yes	n/a	–
	No	n/a	–

Age*		44.2	42.0
Gender	Male	8	88.9
	Female	1	11.1
Monthly Income*		$3,542	$2,600
Median Education		Some College	

Race	White	9	100.0
	Black	0	0.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDELINE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §2T1.9 | **Final Offense Level = 11 - 12** | **Criminal History Category I** | **Number of Cases = 1**

Type	Value	N	%
Sentence	Prison	1	100.0
	Split Sentence	0	0.0
mean prison term = 15.0	Probation with Confinement	0	0.0
median prison term = 15.0	Probation Only	0	0.0
	Other	0	0.0
Fine Imposed*	(Yes = 0.0%)	$--	$--
Restitution Ordered*	(Yes = 100.0%)	$16,500	$16,500
Mode of Conviction	Plea	0	0.0
	Trial	1	100.0
Loss Amount*		$n/a	$n/a
Acceptance of Responsibility	Received	1	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	0	0.0
	Second Quarter	0	0.0
	Third Quarter	1	100.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	1	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	--	--	
	--	--	
Income From Criminal Activity	Yes	n/a	--
	No	n/a	--
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	1	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	1	100.0
Impede Discovery	Yes	n/a	--
	No	n/a	--

Age*		31.0	31.0
Gender	Male	1	100.0
	Female	0	0.0
Monthly Income*		$1,000	$1,000
Median Education		College Graduate	

Race	White	1	100.0
	Black	0	0.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDL IE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §§2T3.1 & 3.2 **Final Offense Level = 1 - 6** **Criminal History Category I** **Number of Cases = 23**

Type	Value	N	%
Sentence mean prison term = 4.7 median prison term = 4.0	Prison	3	13.0
	Split Sentence	0	0.0
	Probation with Confinement	1	4.4
	Probation Only	19	82.6
	Other	0	0.0
Fine Imposed*	(Yes = 78.3%)	$2,236	$1,750
Restitution Ordered*	(Yes = 0.0%)	$–	$–
Mode of Conviction	Plea	22	95.7
	Trial	1	4.4
Loss Amount*		$913	$0
Acceptance of Responsibility	Received	19	82.6
	Not Received	4	17.4
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	20	87.0
	Second Quarter	0	0.0
	Third Quarter	2	8.7
	Upper Quarter	1	4.4
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	23	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	–	
	–	–	
Income From Criminal Activity	Yes	n/a	–
	No	n/a	–
Role in the Offense	Mitigating Role	1	4.4
	No Role Adjustment	22	95.7
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	23	100.0
Impede Discovery	Yes	n/a	–
	No	n/a	–

Age*		35.0	34.0
Gender	Male	20	87.0
	Female	3	13.0
Monthly Income*		$2,003	$1,250
Median Education		Some College	

Race	White	17	73.9
	Black	1	4.4
	Hispanic	3	13.0
	Other	2	8.7

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUID. .NE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §§2T3.1 & 3.2 **Final Offense Level = 7 - 8** **Criminal History Category I** **Number of Cases = 1**

Type	Value	N	%
Sentence mean prison term = 0.0 median prison term = 0.0	Prison	0	0.0
	Split Sentence	0	0.0
	Probation with Confinement	1	100.0
	Probation Only	0	0.0
	Other	0	0.0
Fine Imposed*	(Yes = 0.0%)	$–	$–
Restitution Ordered*	(Yes = 100.0%)	$4,990	$4,990
Mode of Conviction	Plea	1	100.0
	Trial	0	0.0
Loss Amount*		$20,000	$20,000
Acceptance of Responsibility	Received	1	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	0	0.0
	Second Quarter	1	100.0
	Third Quarter	0	0.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	1	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	–	
	–	–	
Income From Criminal Activity	Yes	n/a	–
	No	n/a	–
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	1	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	1	100.0
Impede Discovery	Yes	n/a	–
	No	n/a	–

Age*		26.0	26.0
Gender	Male	1	100.0
	Female	0	0.0
Monthly Income*		$0	$0
Median Education		Less Than High School	

Race	White	1	100.0
	Black	0	0.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §§2T3.1 & 3.2 | **Final Offense Level = 9 - 10** | **Criminal History Category I** | **Number of Cases = 1**

Type	Value	N	%
Sentence	Prison	1	100.0
	Split Sentence	0	0.0
mean prison term = 4.0	Probation with Confinement	0	0.0
median prison term = 4.0	Probation Only	0	0.0
	Other	0	0.0
Fine Imposed*	(Yes = 0.0%)	$–	$–
Restitution Ordered*	(Yes = 0.0%)	$–	$–
Mode of Conviction	Plea	1	100.0
	Trial	0	0.0
Loss Amount*		$10,000	$10,000
Acceptance of Responsibility	Received	1	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	1	100.0
	Second Quarter	0	0.0
	Third Quarter	0	0.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	1	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	–	
	–	–	
Income From Criminal Activity	Yes	n/a	–
	No	n/a	–
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	0	0.0
	Aggravating Role	1	100.0
Obstruction of Justice	Yes	0	0.0
	No	1	100.0
Impede Discovery	Yes	n/a	–
	No	n/a	–

Age*		56.0	56.0
Gender	Male	1	100.0
	Female	0	0.0
Monthly Income*		$1,904	$1,904
Median Education		College Graduate	

Race	White	1	100.0
	Black	0	0.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUID. .NE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §§2T3.1 & 3.2 | **Final Offense Level = 7 - 10** | **Criminal History Category I** | **Number of Cases = 2**

Type	Value	N	%
Sentence mean prison term = 4.0 median prison term = 4.0	Prison	1	50.0
	Split Sentence	0	0.0
	Probation with Confinement	1	50.0
	Probation Only	0	0.0
	Other	0	0.0
Fine Imposed*	(Yes = 0.0%)	$--	$--
Restitution Ordered*	(Yes = 50.0%)	$4,990	$4,990
Mode of Conviction	Plea	2	100.0
	Trial	0	0.0
Loss Amount*		$15,000	$15,000
Acceptance of Responsibility	Received	2	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	Below Range	0	0.0
	Bottom Quarter	1	50.0
	Second Quarter	1	50.0
	Third Quarter	0	0.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	2	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	--	--	
	--	--	
Income From Criminal Activity	Yes	n/a	
	No	n/a	--
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	1	50.0
	Aggravating Role	1	50.0
Obstruction of Justice	Yes	0	0.0
	No	2	100.0
Impede Discovery	Yes	n/a	--
	No	n/a	--

Age*		41.0	41
Gender	Male	2	100.0
	Female	0	0.0
Monthly Income*		$952	$952
Median Education		Tech., Vocat., or Mltry.	

Race	White	2	100.0
	Black	0	0.0
	Hispanic	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment years 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. The values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category as determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for the comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.

PROFILE OF GUIDI IE TAX OFFENDERS
(October 1, 1990 through September 30, 1991)

Guideline = §§2T3.1 & 3.2 **Final Offense Level = 11 - 12** **Criminal History Category I** **Number of Cases = 1**

Type	Value	N	%
Sentence	Prison	1	100.0
	Split Sentence	0	0.0
mean prison term = 10.0	Probation with Confinement	0	0.0
median prison term = 10.0	Probation Only	0	0.0
	Other	0	0.0
Fine Imposed*	(Yes = 100.0%)	$200,000	$200,000
Restitution Ordered*	(Yes = 0.0%)	$–	$–
Mode of Conviction	Plea	1	100.0
	Trial	0	0.0
Loss Amount*		$200,000	$200,000
Acceptance of Responsibility	Received	1	100.0
	Not Received	0	0.0
Position of Sentence Relative to Guideline Range	[illegible]	0	0.0
	Bottom Quarter	1	100.0
	Second Quarter	0	0.0
	Third Quarter	0	0.0
	Upper Quarter	0	0.0
	Above Range	0	0.0

Type	Value	N	%
Departures	No Departure	1	100.0
	Upward Departure	0	0.0
	Departure for Substantial Assistance	0	0.0
	Other Downward Departure	0	0.0
Most Frequently Given Reasons for Departures	Upward Departures	Downward Departures	
	–	–	
	–	–	
Income From Criminal Activity	Yes	n/a	–
	No	n/a	–
Role in the Offense	Mitigating Role	0	0.0
	No Role Adjustment	1	100.0
	Aggravating Role	0	0.0
Obstruction of Justice	Yes	0	0.0
	No	1	100.0
Impede Discovery	Yes	n/a	–
	No	n/a	–

Age*		64.0	64.0
Gender	Male	1	100.0
	Female	0	0.0
Monthly Income*		$5,700	$5,700
Median Education		Graduate Degree	

Race	White	1	100.0
	Black	0	0.0
	[illegible]	0	0.0
	Other	0	0.0

*Numbers in these rows are the mean and median.

These data have been selected from the Commission's fiscal year 1991 data file (October 1, 1990 through September 30, 1991). The sample represents all of the tax guidelines for amendment yea 1989 and 1990 with a sufficient number cases for analysis, but excludes about 20 percent of the cases due to missing or incomplete guideline application information from the sentencing court. Th values given for amount of loss are derived from the loss table relevant to each case. The average and median amounts given are computed using the lower limit of the relevant loss category d determined by the sentencing court, rather than the actual amount. This manner of calculation will generally underestimate the true amount of loss. Final offense level groups are designed for th comparison of tax offenses and offenders at the levels in which alternatives to incarceration are available.

SOURCE: U.S. Sentencing Commission 1991 Data File, MONFY91.