

## PROPOSED AMENDMENT: CONSENT CALENDAR AMENDMENTS

***Synopsis of Proposed Amendment:*** This proposed amendment makes technical and conforming changes to various guideline provisions. The proposed amendment accomplishes the following:

- (1) (a) Provides an instruction in §1B1.1 (Application Instructions) that makes clear that the application instructions are to be applied in the order presented in the guideline; (b) amends Application Note 4 to make clear that, absent an instruction to the contrary, multiple specific offense characteristics (or a Chapter Two specific offense characteristic and a Chapter Three adjustment) that are triggered by the same conduct are to be applied cumulatively; and (c) provides an application note concerning the use of abbreviated guideline titles to ease reference to guidelines that have exceptionally long titles.
- (2) Restructures the definitions of "prohibited sexual conduct" in §§2A3.1 (Criminal Sexual Abuse) and 4B1.5 (Repeat and Dangerous Sex Offender Against Minors) to eliminate possible ambiguity regarding the interaction of "means" and "includes".
- (3) Amends the definition of "child pornography" in §§2A3.1 and 4B1.5, and the definition of "visual depiction" in §2G2.4 (Possession of Materials Depicting Minor Engaged in Sexually Explicit Conduct), in light of *Ashcroft v. The Free Speech Coalition, et al.*, 122 S.Ct. 1389 (2002).
- (4) Amends §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) to provide a maximum base offense level of 30 if the defendant receives an adjustment under §3B1.2 (Mitigating Role) to conform this guideline to §2D1.1 (Drug Trafficking), which was amended last amendment cycle.
- (5) Amends the departure provision in Application Note 6 of §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) to conform to Application Note 12 of §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct), which was amended last amendment cycle.
- (6) Amends subsection (b)(5) of §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) to include receipt and distribution in the enhancement for use of a computer. Currently the guideline only applies to offenses in which a computer was used for the transmission of child pornography.
- (7) Responds to new legislation and makes other technical amendments as follows:
  - (a) Amends Appendix A (Statutory Index) and §2N2.1 (Violations of Statutes and Regulations Dealing with any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) in response to new offenses created by the Farm Security and Rural Investment Act of 2002 (the "Act"), Pub. L. 107–171. The first new offense provides a statutory maximum of one year for violating the Animal Health Protection Act (Subtitle E of the Act), or for counterfeiting or destroying certain documents specified in the Animal Health Protection Act. The second new offense provides a statutory maximum term of imprisonment of five years for importing, entering, exporting, or moving any animal or

*article for distribution or sale. The Act also provides a statutory maximum of 10 years for a subsequent violation of either offense.*

- (b) Amends Appendix A (Statutory Index) and §2B1.1 in response to a new offense (19 U.S.C. § 2401f) created by the Trade Act of 2002, Pub. L. 107–210. The new offense provides a statutory maximum term of imprisonment of one year for knowingly making a false statement of material fact for the purpose of obtaining or increasing a payment of federal adjustment assistance to qualifying agricultural commodity producers.*
- (c) Amends Appendix A (Statutory Index), §§2C1.3 (Conflict of Interest; Payment or Receipt of Unauthorized Compensation) and 2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone) in response to the codification of title 40, United States Code, by Pub. L. 107–217. Section 5104(e)(1) of title 40, United States Code, prohibits anyone (except as authorized by the Capitol Police Board) from carrying or having readily accessible a firearm, dangerous weapon, explosive, or an incendiary device on the Capitol Grounds or in any of the Capitol Buildings. The statutory maximum term of imprisonment is five years. The proposed amendment references 40 U.S.C. § 5104(e)(1) to §2K2.5. Section 14309(a) of title 40, United States Code, prohibits certain conflicts of interests of members of the Appalachian Regional Commission and provides a statutory maximum term of imprisonment penalty of two years. Section 14309(b) prohibits certain additional sources of salary and provides a statutory maximum term of imprisonment of not more than one year. The proposed amendment references 40 U.S.C. § 14309(a) and (b) to §2C1.3.*
- (d) Amends Appendix A (Statutory Index) and §2H2.1 (Obstructing an Election or Registration) to provide reference to 18 U.S.C. § 1015(f). Currently, 18 U.S.C. § 1015 is referenced to §§2B1.1 (Fraud, theft, property destruction), 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use). However, 18 U.S.C. 1015(f) specifically relates to knowingly making false statements in order to register to vote, or to vote, in a Federal, State, or local election. The proposed amendment references 18 U.S.C. § 1015(f) to §2H2.1 (Obstructing an Election or Registration).*

**Proposed Amendment:**

- (1) **Provides an Instruction in §1B1.1 (Application Instructions) That Makes Clear That the Application Instructions Are to Be Applied in the Order Presented in the Guideline; Amends Application Note 4 to Make Clear That Multiple Specific Offense Characteristics (or a Chapter Two Specific Offense Characteristic and a Chapter Three Adjustment) Which Are Triggered by the Same Conduct Are to Be Applied Cumulatively; Provides New Application Note Regarding Use of Short Titles in Guidelines**

**§1B1.1. Application Instructions.—Except as specifically directed, the provisions of this manual are to be applied in the following order:**

- (a) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See §1B1.2.
- (b) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.
- (c) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.
- (d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.
- (e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.
- (f) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.
- (g) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.
- (h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.
- (i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

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Commentary

Application Notes:

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4. (A) ***Specific Offense Characteristics.***—The offense level adjustments from more than one specific offense characteristic within an offense guideline are **applied cumulatively** (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. *E.g.*, in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.

(B) ***Adjustments from Different Guideline Sections.***—Absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together). *In some cases, such adjustments (e.g., a Chapter Two specific offense characteristic and a Chapter Three [or Four adjustment]) may be triggered by the same conduct, but are meant to take into account different aspects of that conduct. For example, shooting a police officer during the commission of a robbery may warrant an injury enhancement under §2B3.1(b)(3) and an official victim enhancement under §3A1.1, even though both enhancements are triggered by the shooting of the officer. Section 2B3.1(b)(3) accounts for the injury to the police officer, while §3A1.2(a) accounts for the official status of the victim.*

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7. *Whenever a guideline makes reference to another guideline, a parenthetical restatement of that other guideline's title accompanies the initial reference to that other guideline. This parenthetical is provided only for the convenience of the reader and is not intended to have substantive effect. In the case of lengthy guideline titles, such a parenthetical restatement of the guideline title may be abbreviated for ease of reference. For example, references to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) may be abbreviated as follows: §2B1.1 (Theft, Fraud, and Property Destruction).*

(2) **Restructures the Definitions of "Prohibited Sexual Conduct" in §2A3.1 (Criminal Sexual Abuse) and §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)**

**§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse**

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Commentary

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Application Notes:

1. For purposes of this guideline—

\* \* \*

"Prohibited sexual conduct" ~~(A)~~ means any sexual activity for which a person can be charged with a criminal offense; ~~(B)~~ includes the production of child pornography; and ~~(C)~~. "Prohibited sexual conduct" includes the production of child pornography, but does not include trafficking in, or possession of, child pornography.

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**§4B1.5. Repeat and Dangerous Sex Offender Against Minors**

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Commentary

Application Notes:

4. Application of Subsection (b).—

(A) Definition.—For purposes of subsection (b), "prohibited sexual conduct" means any of the following: (i) means an offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) includes the production of child pornography; or (iii) includes trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography.; and (iv) It does not include receipt or possession of child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

(3) **Amends the Definition of "Child Pornography" in §§2A3.1 and 4B1.5 and the Definition of "Visual Depiction" in §2G2.4 (Possession of Materials Depicting Minor Engaged in Sexually Explicit Conduct),**

**§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse**

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Commentary

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Application Notes:

1. For purposes of this guideline—

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*"Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8) means any visual depiction including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, in which—*

- (A) the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;*
- (B) such visual depiction is a minor engaging in sexually explicit conduct; or*
- (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.*

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**§2G2.4. Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct**

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Commentary

Statutory Provision: 18 U.S.C. § 2252(a)(4).

Application Notes:

1. For purposes of this guideline—

*"Minor" means an individual who had not attained the age of 18 years.*

*"Visual depiction" means any visual depiction described in 18 U.S.C. § 2256(5) ~~and (8)~~ or any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, in which—*

- (A) the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;*
- (B) such visual depiction is a minor engaging in sexually explicit conduct; or*
- (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.*

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**§4B1.5. Repeat and Dangerous Sex Offender Against Minors**

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Commentary

Application Notes:

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3. Application of Subsection (a).—

(A) Definitions.—For purposes of subsection (a):

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(ii) "Sex offense conviction" ~~(H)~~ means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor; and ~~(H)~~ does not include trafficking in, receipt of, or possession of, child pornography. "Child pornography" has the meaning given that term in ~~18 U.S.C. § 2256(8)~~ *Application Note 1 of §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).*

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4. Application of Subsection (b).—

(A) Definition.—For purposes of subsection (b), "prohibited sexual conduct" (i) means an offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) includes the production of child pornography; (iii) includes trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography; and (iv) does not include receipt or possession of child pornography. "Child pornography" has the meaning given that term in ~~18 U.S.C. § 2256(8)~~ *Application Note 1 of §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).*

(4) **Amends §2B1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) to Provide a Maximum Base Offense Level of 30 if the Defendant Receives an Adjustment under §3B1.2 (Mitigating Role)**

**§2D1.11. Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy**

(a) Base Offense Level: The offense level from the Chemical Quantity

Table set forth in subsection (d) or (e), as appropriate, **except that if the defendant receives an adjustment under §3B1.2 (Mitigating Role), the base offense level shall be not more than level 30.**

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- (5) **Conforms Departure Provision in Application Note 6 of §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production)**

**§2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production**

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Commentary

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Application Notes:

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- 6. Upward Departure Provisions.—~~An upward departure may be warranted in either of the following circumstances:~~

————— (A) ~~The defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years.~~

————— (B) ~~The **if the** offense involved more than 10 victims.~~

- (6) **Amends §2G2.2(b)(5) to Include Receipt and Distribution in the Enhancement for Use of a Computer**

**§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic**

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- (b) Specific Offense Characteristics

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- (5) If a computer was used for the transmission, **receipt, or distribution** of the material or a notice or advertisement of the material, increase by **2** levels.

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(7) Amendments to Appendix A (Statutory Index) and Statutory Provisions

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

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Commentary

*Statutory Provisions:* 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1341-1344, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992, 1993(a)(1), (a)(4), 2113(b), 2312-2317, 2332b(a)(1); 19 U.S.C. 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

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§2C1.3. **Conflict of Interest; Payment or Receipt of Unauthorized Compensation**

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Commentary

*Statutory Provisions:* 18 U.S.C. §§ 203, 205, 207, 208, 209, 1909; 40 U.S.C. §14309(a), (b). For additional statutory provision(s), see Appendix A (Statutory Index).

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

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Commentary

*Statutory Provisions:* 18 U.S.C. §§ 241, 242, 245(b)(1)(A), 592, 593, 594, 597, 1015(f); 42 U.S.C. §§ 1973i, 1973j(a), (b). For additional statutory provision(s), see Appendix A (Statutory Index).

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§2K2.5. **Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone**

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Commentary

*Statutory Provisions:* 18 U.S.C. §§ 922(q), 930; 40 U.S.C. § 5104(e)(1).

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

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Commentary

*Statutory Provisions:* 7 U.S.C. §§ 150bb, 150gg, 6810, 7734; 21 U.S.C. §§ 115, 117, 122, 134-134e, 151-158, 331, 333(a)(1), (a)(2), (b), 458-461, 463, 466, 610, 611, 614, 617, 619, 620, 642-644, 676, 8313; 42 U.S.C. § 262. For additional statutory provision(s), see Appendix A (Statutory Index).

**APPENDIX A - STATUTORY INDEX**

7 U.S.C. § 7734	2N2.1	
7 U.S.C. § 8313	2N2.1	
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18 U.S.C. § 1015	2B1.1, 2J1.3, 2L2.1,	
	2L2.2	
18 U.S.C. § 1015(f)	2H2.1	
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19 U.S.C. § 2316	2B1.1	
19 U.S.C. § 2401f	2B1.1	
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38 U.S.C. § 3502	2B1.1	
40 U.S.C. § 5104(e)(1)	2K2.5	
40 U.S.C. § 14309(a), (b)	2C1.3	