

112(b) of the Victims of Trafficking and Violence Protection Act of 2000 (the "Act"), Pub. L. 106-386.

*The directive confers emergency authority on the Commission to amend the federal sentencing guidelines to reflect changes to 18 U.S.C. §§ 1581(a) (Peonage), 1583 (Enticement into Slavery), and 1584 (Sale into Involuntary Servitude). The Commission is also directed to consider how to address four new statutes: 18 U.S.C. § 1589 (Forced Labor); 18 U.S.C. § 1590 (Trafficking with Respect to Peonage, Involuntary Servitude or Forced Labor); 18 U.S.C. § 1591 (Sex Trafficking of Children by Force, Fraud or Coercion); and 18 U.S.C. § 1592 (Unlawful Conduct with Respect to Documents in Furtherance of Peonage, Involuntary Servitude or Forced Labor).*

*Specifically, the Commission is directed to "review and, if appropriate, amend the sentencing guidelines applicable to . . . the trafficking of persons including . . . peonage, involuntary servitude, slave trade offenses, and possession, transfer or sale of false immigration documents in furtherance of trafficking, and the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act."*

*The Commission is directed to "take all appropriate measures to ensure that these sentencing guidelines . . . are sufficiently stringent to deter and adequately reflect the heinous nature of these offenses." The Commission is also directed to "consider providing sentencing enhancements" in cases which involve: (A) a large number of victims; (B) a pattern of continued and flagrant violations; (C) the use or threatened use of a dangerous weapon; or (D) the death or bodily injury of any person.*

*To address this multi-faceted directive, this proposed amendment makes changes to several existing guidelines and creates a new guideline for criminal violations of the Migrant and Seasonal Agricultural Worker Protection Act. Although the directive instructs the Commission to amend the guidelines applicable to the Fair Labor Standards Act (29 U.S.C. § 201 et. seq.), a criminal violation of the Act is only a Class B misdemeanor. See 29 U.S.C. § 216. Thus, the guidelines are not applicable to those offenses.*

*The proposed amendment references the new offense at 18 U.S.C. § 1591 to §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct). Section 1591 punishes a defendant who participates in the transporting or harboring of a person, or who benefits from participating in such a venture, with the knowledge that force, fraud or coercion will be used to cause that person to engage in a commercial sex act or with knowledge that the person is not 18 years old and will be forced to engage in a commercial sex act. Despite the statute's inclusion in a chapter of title 18 devoted mainly to peonage offenses, section 1591 offenses are analogous to the offenses referenced to the prostitution guideline.*

*Section 2G1.1(b)(2) is proposed to be amended to include a [6][9] level increase for victimization of children who have not attained the age of 12 years, a [4][6] level increase for victimization of children who have not attained the age of 14 years, and a [2][3] level increase for children who have not attained the age of 16 years. This change increases by [2][5] levels the punishment for victimization of a child under 12 years of age and creates an additional*

*category of victims – children between the ages of 12 and 14 years. These changes were proposed in recognition of Congress's distinction in section 1591 between offenses involving minors under 14 years of age (statutory cap of "any term of years or life") and offenses involving minors between 14 and 18 years of age (statutory cap of "not more than 20 years"). This change conforms the guidelines to the penalties of section 1591.*

*The special instruction at §2G1.1(d)(2) has been added to ensure that attempts to violate section 1591 are not to be referred to §2X1.1 (Attempt, Solicitation, or Conspiracy). This change implements Congress's direction in 18 U.S.C. § 1594 that "whoever attempts to violate section...1591 shall be punishable in the same manner as a completed violation of that section."*

*An additional application note – Application Note 12 – has been added to §2G1.1 to provide an encouraged upward departure when an offense "involved substantially more than [6][10][25] victims." This encouraged upward departure was added in response to Congress's directive that the Commission consider enhanced sentencing in cases which involve "a large number of victims." A departure note is provided, rather than an enhancement, because of the current special grouping rule in §2G1.1(d)(1) regarding multiple victims that requires that counts involving different victims not be grouped.*

*Section 1591 cases have been alternatively referred in Appendix A to §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material). This has been done in anticipation that some portion of section 1591 cases will involve children being forced or coerced to engage in commercial sex acts for the purpose of producing pornography. Such offenses, as recognized by the higher base offense level at §2G2.1, are more serious because they both involve specific harm to an individual victim and further an additional criminal purpose, commercial pornography. In the interest of consistency and proportionality, the same changes have been made to §2G2.1 as those discussed above for §2G1.1.*

*The proposed amendment conforms to the view that §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) continues to be an appropriate tool for determining sentences for violations of 18 U.S.C. §§ 1581, 1583, and 1584 . Section 2H4.1 is also designed to cover offenses under three new statutes, 18 U.S.C. §§1589, 1590, and 1592. Section 1589 punishes defendants who provide or obtain the labor services of another by the use of threats of serious harm or physical restraint against a person, or by a scheme or plan intended to make the person believe that if he or she did not perform the labor or services, he or she would suffer physical restraint or serious harm. This statute also applies to defendants who provide or obtain labor services of another by abusing or threatening abuse of the law or the legal process. See 18 U.S.C. §1589. Section 1590 punishes defendants who harbor, transport, or are otherwise involved in obtaining, a person for labor or services. Section 1592 punishes a defendant who knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person in the course of a violation of §§ 1581 (peonage), 1583 (enticement into slavery), 1584 (sale into involuntary servitude), 1589 (forced labor), 1590 (trafficking with respect to these offenses), 1591 (sex trafficking of children by force, fraud or coercion), or 1594(a) (attempts to violate*

*these offenses). Section 1592 also punishes a defendant who, with intent to violate § 1581, § 1583, § 1584, § 1589, § 1590, or § 1591, knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person. These statutes prohibit the types of behaviors which have been traditionally sentenced under §2H4.1.*

*The proposed amendment provides an alternative, less punitive base offense level for those who violate 18 U.S.C. § 1592, an offense which limits participation in peonage cases to the destruction or wrongful confiscation of a passport or other immigration document. This alternative, lower base level reflects the lower statutory maximum sentence set for section 1592 offenses (i.e., 5 years). The amendment proposes level [15] as the appropriate level because similar offenses involving documents are punishable at level 15 under §2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship or Legal Resident Status or a United States Passport). However, the proposed amendment also includes an additional, bracketed base offense level of [18].*

*Section 2H4.1(b)(2) has been expanded to provide a 2-level increase if a dangerous weapon was brandished or its use was threatened, with an increase to 4 levels for actual use. Currently, only actual use of a dangerous weapon is covered. This change reflects Congress's directive to consider an enhancement for the "use or threatened use of a dangerous weapon."*

*The proposed amendment adds an enhancement at §2H4.1(b)(3), for offenses involving more than [6][10][25] victims. This change reflects Congress's directive to consider an enhancement for cases "involving a large number of victims." Also, §2H4.1, Application Note 3, which formerly provided an encouraged upward departure for offenses involving more than 10 victims, has been altered to encourage departure "if the offense involved substantially more than [6][10][25] victims."*

*The proposed amendment also adds §2H4.1 to the list of guidelines in §2X1.1 that expressly cover attempts and conspiracies. This change implements Congress's direction in 18 U.S.C. § 1594 that "whoever attempts to violate § 1581, § 1583, § 1584, § 1589, § 1590, or § 1591 shall be punishable in the same manner as a completed violation of that section." With the exception of section 1591, all the specified statutes are referenced to §2H4.1. Conforming amendments are made to the title of §2H4.1.*

*The proposed amendment creates a new guideline, §2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act), in response to Congress's directive to amend the guidelines applicable to such offenses. These offenses, which have a statutory maximum sentence of one year imprisonment for first offenses and three years imprisonment for subsequent offenses, currently are not referred to any specific guideline. The Department of Justice and Department of Labor both recommend creation of a discrete guideline for these offenses. The proposed base offense level (level [4][6]) has been proposed in recognition of the small statutory maximum sentences set for these cases by Congress. Similarly, §2H4.2(b)(1), an enhancement for bodily injury, and §2H4.2(b)(2), an enhancement for offenders who commit their offenses after previously sustaining a civil penalty for similar misconduct, have been established to respond to Congress's directive that the Commission*

consider sentencing enhancement for these offense characteristics. This section addresses the Department of Justice's and the Department of Labor's concern regarding prior administrative and civil adjudications.

This proposed amendment also addresses that portion of section 112 of the Act that amends chapter 77 of title 18, United States Code, to provide mandatory restitution for peonage and involuntary servitude offenses. The proposed amendment amends §5E1.1 (Restitution) to include a reference to 18 U.S.C. § 1593 in the guideline provision regarding mandatory restitution.

**Proposed Amendment:**

**§2G1.1. Promoting Prostitution or Prohibited Sexual Conduct**

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

[(2) If the offense involved a victim who had (A) not attained the age of 12 years, increase by ~~4~~[6][9] levels; or (B) attained the age of 12 years but not attained the age of ~~16~~14 years, increase by ~~2~~[4][6] levels; or (C) attained the age of 14 years but had not attained the age of 16 years, increase by [2][3] levels.]

\* \* \*

(d) Special Instruction

\* \* \*

(2) If the defendant was convicted of an attempt to commit an offense under 18 U.S.C. § 1591, do not apply §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)).

\* \* \*

Commentary

Statutory Provisions: 8 U.S.C. § 1328; 18 U.S.C. §§ 1591, 2421, 2422, 2423(a), 2425.

Application Notes:

\* \* \*

2. Subsection (b)(1) provides an enhancement for physical force, or coercion, that occurs as part of a prostitution offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. *See* Chapter Five, Part K (Departures). For purposes of subsection (b)(1)(B), "coercion" includes any form of conduct that negates the voluntariness

of the behavior of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of an adult victim, rather than a victim less than 18 years of age, this characteristic generally will not apply if the drug or alcohol was voluntarily taken.

\* \* \*

[12. Upward Departure.—If the offense involved substantially more than [6][10][25] victims, an upward departure may be warranted.]

Background:

\* \* \*

This guideline also covers offenses under section 1591 of title 18, United States Code. These offenses involve recruiting or transporting a person in interstate commerce knowing either that (A) force, fraud, or coercion will be used to cause the person to engage in a commercial sex act; or (B) the person (i) had not attained the age of 18 years; and (ii) will be caused to engage in a commercial sex act.

§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**

\* \* \*

(b) Specific Offense Characteristics

[(1) If the offense involved a victim who had (A) not attained the age of 12 years, increase by 4[6][9] levels; or (B) attained the age of 12 years but not attained the age of 14 years, increase by 2[[4][6] levels; or (C) attained the age of 14 years but had not attained the age of 16 years, increase by [2][3] levels.]

\* \* \*

(c) Special Instructions

\* \* \*

(2) If the defendant was convicted of an attempt to commit an offense under 18 U.S.C. § 1591, do not apply §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)).

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ 1591, 2251(a), (b), (c)(1)(B), 2260.

Application Notes:

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- [6. Upward Departure.—If the offense involved significantly more than [6][10][25] victims, an upward departure may be warranted.]

\* \* \*

**§2H4.1. Peonage, Involuntary Servitude, and Slave Trade; Attempt or Conspiracy**

- (a) Base Offense Level: ~~22~~
- (1) **22**; or
- (2) [15][18], if the defendant was convicted only of an offense under 18 U.S.C. § 1592.
- (b) Specific Offense Characteristics
- (1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by 4 levels; or (B) if any victim sustained serious bodily injury, increase by 2 levels.
- [(2) If (i) a dangerous weapon was used, increase by ~~24~~ levels; or (ii) a dangerous weapon was brandished or its use was threatened, increase by 2 levels.]
- [(3) If the offense involved more than [6][10][25] victims, increase by [2][4] levels.]
- ~~(3)~~(4) \* \* \*
- ~~(4)~~(5) \* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 1581-~~1588~~1590, 1592.

\* \* \*

3. ~~If the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude, an upward departure may be warranted.~~ Upward Departure.—If the offense involved substantially more than [6][10][25] victims, an upward departure may be warranted.

**§2X1.1. Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)**

Commentary

Application Notes:

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1. *Offense guidelines that expressly cover attempts include:*

\* \* \*

*§2G1.1 (if the defendant was convicted of an attempt to commit an offense under 18 U.S.C. § 1591 (See 18 U.S.C. § 1594(a));  
§2H4.1;  
§2N1.1;  
§2Q1.4.*

*Offense guidelines that expressly cover conspiracies include:*

\* \* \*

*§2H1.1, §2H4.1;  
§2T1.9.*

\* \* \*

**APPENDIX A - STATUTORY INDEX**

\* \* \*

18 U.S.C. § 1588	2H4.1
18 U.S.C. § 1589	2H4.1
18 U.S.C. § 1590	2H4.1
18 U.S.C. § 1591	2G1.1, 2G2.1
18 U.S.C. § 1592	2H4.1
18 U.S.C. § 1621	2J1.3

\* \* \*

**§2H4.2. Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act**

- (a) Base Offense Level: [4][6]
- (b) Specific Offense Characteristics
  - (1) If the offense involved (i) serious bodily injury, increase by [4] levels; or (ii) bodily injury, increase by [2] levels.
  - (2) If the defendant committed any part of the instant offense subsequent to sustaining a civil or administrative adjudication for similar misconduct, increase by [2] levels.

Commentary

Statutory Provision: 29 U.S.C. § 1851.

Application Notes:

1. Definitions.—For purposes of subsection (b)(1), "bodily injury" and "serious bodily injury" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).
2. Application of Subsection (b)(2).—Section 1851 of title 29, United States Code, covers a wide range of conduct. Accordingly, the enhancement in subsection (b)(2) applies only if the instant offense is similar to previous misconduct that resulted in a civil or administrative adjudication under the provisions of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. § 1801 et. seq.).

**APPENDIX A - STATUTORY INDEX**

29 U.S.C. § 1141	2B3.2, 2F1.1	* * *
29 U.S.C. § 1851	2H4.2	

\* \* \*

**§5E1.1. Restitution**

- (a) In the case of an identifiable victim, the court shall --
  - (1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 1593, § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A; or

\* \* \*

Commentary

\* \* \*

Background: Section 3553(a)(7) of Title 18, United States Code, requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Orders of restitution are authorized under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327, 3663, and 3663A. For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation or supervised release.

**Part (B): Proposed Non-Emergency Amendments**

**Proposed Amendment: Sexual Predators**



**5. Synopsis of Proposed Amendment:** *This is a three-part amendment that includes:*

- (A) *Amendments to implement the "pattern of activity" directive in the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314 (the "Act"), and related amendments.*
- (B) *Amendments related to grouping certain child pornography counts of conviction.*
- (C) *Amendments to implement the directive in the Act to provide an enhancement for transportation offenses under chapter 117 of title 18, United States Code, and other related amendments.*

**Part (A): Enhancement for Pattern of Activity**

**Synopsis:** *Part A proposes several options, including a possible combination of approaches to satisfy the Congressional directive in the Act that requires the Commission to increase the penalties in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. There are many types of conduct that may indicate that a defendant is a high risk sex offender engaging in a pattern of prohibited sexual conduct. Each of these components considers various aspects of sex offenders and the types of activity involved in a pattern of behavior. There are four options presented by this amendment that could be used either in combination or alone to implement the directive. In addition to these four options, the proposal amends the guideline covering terms of supervised release, §5D1.2, to provide that the term of supervised release for a defendant convicted of a sex crime shall be the maximum term authorized by statute.*

*The first option would create a new Chapter Four guideline, §4B1.5, that aims to incapacitate high risk sex offenders who have an instant offense of conviction of sexual abuse and a prior felony conviction for sexual abuse. Two options are contained within this option. Option 1A sanctions defendants whose instant offense of conviction and prior conviction involve prohibited sexual conduct.*

*In contrast to option 1B, option 1A increases the defendant's criminal history to not less than category IV or V, as opposed to criminal history category VI. Option 1A also includes a wider range of offenses involving prohibited sexual conduct. Under Option 1A, chapter 109A offenses are bracketed for either (1) possible exclusion from the scope of instant offenses of conviction that would trigger the guideline, or (2) limiting those offenses to those that are perpetrated against a minor. Excluding chapter 109A offenses focuses application of the guideline to those defendants who use the internet or other interstate means to prey on minors.*

*Option 1B tracks legislation from the 106<sup>th</sup> Congress that proposed a mandatory minimum life sentence for defendants whose instant offense of conviction and prior conviction involved direct sexual contact. This option provides for sentences at or near the statutory maximum for these types of defendants.*

*The second option would create a Chapter Four guideline, §4B1.6, that provides a five-level increase (and a minimum offense level of level 32) for defendants who engage in a pattern of activity involving prohibited sexual conduct. This guideline requires that (1) the defendant's instant offense of conviction is a sex crime; and (2) the defendant previously has engaged in two or more instances of*

prohibited sexual conduct, whether or not that conduct resulted in a conviction.

The third option would provide a Chapter Two specific offense characteristic in the sexual abuse guidelines. This specific offense characteristic mirrors the current pattern of activity adjustment in §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor). A defendant who abuses or exploits a minor on two or more occasions will receive a two-level increase in offense level pursuant to this enhancement.

The fourth option provides language encouraging an upward departure for a defendant who commits repeated acts of sexual abuse of the same minor. This component would allow courts to sanction a defendant for a pattern of multiple acts of abuse of the same victim over a period of time.

**Proposed Amendment:**

**(1) Option One:**

Chapter Four, Part B, is amended by adding at the end the following:

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

- (a) A defendant is a repeat and dangerous sex offender if—
  - (1) the instant offense of conviction is a sex crime; and
  - (2) the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction.
- (b) If (1) a repeat and dangerous sex offender is not a career offender pursuant to §4B1.1 (Career Offender); and (2) the offense level for that repeat and dangerous sex offender from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply.

	<u>Offense Statutory Maximum</u>	<u>Offense Level</u>
(A)	Life	[37]
(B)	25 years or more	[34]
(C)	20 years or more, but less than 25 years	[32]
(D)	15 years or more, but less than 20 years	[29]
(E)	10 years or more, but less than 15 years	[24]
(F)	5 years or more, but less than 10 years	[17]
(G)	More than 1 year, but less than 5 years	[12].

- (c) If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the applicable offense level in subsection (b) by the number of levels corresponding to that adjustment.

- (d) A repeat and dangerous sex offender's criminal history category in every case shall be [Option 1A: not less than Category [IV][V]] [Option 1B: Category VI].

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

"Offense Statutory Maximum" means the maximum term of imprisonment authorized for the instant offense of conviction that is a sex crime, including any increase in that maximum term under a sentencing enhancement provision that applies to that sex crime because of the defendant's prior criminal record (such as the sentencing enhancement provisions contained in 18 U.S.C. §§ 2247(a) and 2426(a)).

[Option 1A:

"Sex offense conviction" has the meaning given that term in 18 U.S.C. § 2426, but such term does not include trafficking in, receipt of, or possession of, child pornography.

2. Requirement of Sex Crime as Instant Offense of Conviction.—For purposes of subsection (a)(1), the instant offense of conviction must be an instant offense of conviction under [chapter 109A,] [Chapter 109A perpetrated against a minor,] chapter 110 (not including trafficking in, receipt of, or possession of, child pornography, or recordkeeping offenses), or chapter 117 (not including transmitting information about a minor or filing a factual statement about alien individual), of title 18, United States Code, or an attempt or a conspiracy to commit such an offense.]

[Option 1B:

"Sex offense conviction" means a prior conviction for (A) any sex crime referred to in Application Note 2; or (B) any offense under State law consisting of conduct that would have been such a sex crime if the conduct had occurred within the special maritime and territorial jurisdiction of the United States. The term "State" has the meaning given that term in 18 U.S.C. § 2426(b)(2).

2. Requirement of Sex Crime as Instant Offense of Conviction.—For purposes of subsection (a)(1), the instant offense of conviction must be an instant offense of conviction under 18 U.S.C. § 2241, § 2242, § 2243, § 2244, § 2245, § 2251A, or § 2423, including an attempt or conspiracy to commit such an offense.]
3. Determination of Prior Sex Offense Convictions Under Subsection (a)(2).—For purposes of subsection (a)(2) the date that a defendant sustained a conviction shall be the date that the guilt of the defendant was established, whether by guilty plea, trial, or plea of nolo contendere.
4. Determination of Offense Statutory Maximum in the Case of Multiple Counts of Conviction.—In a case in which more than one count of the instant offense of conviction is a

*felony that is a sex crime, the court shall use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (b).*

- [5. Departure Provision.—*There may be cases in which reliable information indicates that the guideline sentence resulting from application of this guideline either understates or overstates the likelihood that the defendant will commit another sexual offense, or the seriousness of the defendant’s criminal history. In such cases, an upward or a downward departure, respectively, may be warranted. Such reliable information may include, for example, risk assessments and other expert testimony regarding the likelihood of recidivism.]*

**(2) Option Two:**

Chapter Four, Part B, [as amended by this amendment], is amended by adding at the end the following:

**§4B1.6. Sexual Predator**

If—

- (a) the defendant is not a career offender pursuant to §4B1.1 (Career Offender) and is not a repeat and dangerous sex offender pursuant to §4B1.5 (Repeat and Dangerous Sex Offender); and
- (b) (1) the instant offense of conviction is a sex offense that the defendant committed as part of a pattern of activity involving prohibited sexual conduct [with a minor]; [[and][or] (2) the instant offense of conviction is a sex offense and the defendant is a sexual predator],

increase by [5] levels; but if the resulting offense level is less than [32][30], increase to level [32][30].

Commentary

Application Notes:

- (1) Definitions.—*For purposes of this guideline:*

*“Sex offense” means an offense under [chapter 109A,] [chapter 109A perpetrated against a minor,] chapter 110 (not including trafficking, receipt, or possession of, child pornography), or chapter 117 of title 18, United States Code, or an attempt or a conspiracy to commit any such offense.*

*“Pattern of activity” means any combination of two or more prior separate instances of prohibited sexual conduct by the defendant with a minor victim, other than a victim of the*

instant offense of conviction, whether or not the conduct resulted in a conviction for such conduct.

“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; (C) includes trafficking in child pornography if the defendant has a prior felony conviction for trafficking in child pornography; and (D) does not include possession of child pornography. “Child pornography” has the meaning given that term in 18 U.S.C. § 2256(8).

- [2. Sexual Predator Determination.—For purposes of this guideline, the defendant is a sexual predator if the court determines, under the totality of the circumstances, that the defendant is likely to continue to engage in prohibited sexual conduct with minors in the future. [In making this determination, the court may rely on information such as expert psychosexual evaluations and other reliable evidence.]]

Background: This guideline is intended to provide lengthy incarceration for offenders who present a continuing danger to the public. It applies to any offender whose instant offense of conviction is a sex offense, regardless of the specific sex offense of conviction or Chapter Two guideline under which the offender is sentenced. The relevant criminal provisions provide for increased statutory maximum penalties for repeat sex offenders and make those increased statutory maximum penalties available if the defendant was convicted of any of several federal and state sex offenses (see 18 U.S.C. §§ 2247, 2426). In addition, section 632 of Pub. L. 102–141 and section 505 of Pub. L. 105–314 directed the Commission to ensure lengthy incarceration for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.

[The guideline is intended to target those dangerous offenders for whom future sex offending is likely. Research has shown that recidivism rates vary depending on characteristics of the offender that may be determined at the time of sentencing, such as a proven sexual preference for minors or other psychopathy. Psychosexual evaluations by certified professionals using empirically-validated risk assessment instruments may be useful to identify those offenders who are most likely to reoffend.]

The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline. In addition, treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of the term of supervised release that is imposed.]

**(3) Option Three:**

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

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**(b) Specific Offense Characteristics**

- (7) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by [2] levels.**

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Commentary

Application Notes:

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8. Pattern of Activity Enhancement.—

"Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.

"Sexual abuse or exploitation" means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor (including trafficking in material relating to the sexual abuse or exploitation of a minor), abusive sexual contact of a minor, any similar offense under state law, any offense involving the promotion or enticement of minors to engage in sexual activity, or an attempt or a conspiracy to commit any of the above offenses.

If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(7) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(7) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved or the likelihood of recidivism.

Prior convictions taken into account under subsection (b)(7) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

\* \* \*

(b) Specific Offense Characteristics

- (5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by [2] levels.

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Commentary

Application Notes:

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9. Pattern of Activity Enhancement.—

"Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.

"Sexual abuse or exploitation" means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor (including trafficking in material relating to the sexual abuse or exploitation of a minor), abusive sexual contact of a minor, any similar offense under state law, any offense involving the promotion or enticement of minors to engage in sexual activity, or an attempt or a conspiracy to commit any of the above offenses.

If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved or the likelihood of recidivism.

Prior convictions taken into account under subsection (b)(5) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

\* \* \*

(b) Specific Offense Characteristics

- (3) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by [2] levels.

\* \* \*

Commentary

Application Notes:

\* \* \*

5. Pattern of Activity Enhancement.—

"Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.

*"Sexual abuse or exploitation" means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor (including trafficking in material relating to the sexual abuse or exploitation of a minor), abusive sexual contact of a minor, any similar offense under state law, any offense involving the promotion or enticement of minors to engage in sexual activity, or an attempt or a conspiracy to commit any of the above offenses.*

*If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(3) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(3) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved or the likelihood of recidivism.*

*Prior convictions taken into account under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

**§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact**

\* \* \*

(b) Specific Offense Characteristics

- (6) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by [2] levels.

\* \* \*

Commentary

Application Notes:

\* \* \*

9. Pattern of Activity Enhancement.—

*"Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.*

*"Sexual abuse or exploitation" means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor (including trafficking in material relating to the sexual abuse or exploitation of a minor), abusive sexual contact of a minor, any similar offense under state law, any offense involving the promotion or enticement of minors to engage in sexual activity, or an attempt or a conspiracy to commit any of the above offenses.*

*If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether*



or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(6) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(6) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved or the likelihood of recidivism.

Prior convictions taken into account under subsection (b)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

**(4) Option Four:**

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

\* \* \*

Commentary

Application Notes:

\* \* \*

8. Upward Departure Provision.—If the defendant committed repeated acts of sexual abuse of the same minor over a period of time and the court determines that the guideline has not adequately taken these repeated acts into account, an upward departure may be warranted.

**§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts**

\* \* \*

Commentary

Application Notes:

\* \* \*

9. Upward Departure Provision.—If the defendant committed repeated acts of sexual abuse of the same minor over a period of time and the court determines that the guideline has not adequately taken these repeated acts into account, an upward departure may be warranted.

**§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts**

\* \* \*

Commentary

Application Notes:

\* \* \*

5. Upward Departure Provision.—If the defendant committed repeated acts of sexual abuse of the same minor over a period of time and the court determines that the guideline has not adequately taken these repeated acts into account, an upward departure may be warranted.

**§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact**

\* \* \*

Commentary

Application Notes:

\* \* \*

5. Upward Departure Provision.—If the defendant committed repeated acts of sexual abuse of the same minor over a period of time and the court determines that the guideline has not adequately taken these repeated acts into account, an upward departure may be warranted.

**(5) Conforming Amendments for all four options:**

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

Application Notes:

\* \* \*

- ~~5. If the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2 (Groups of Closely Related Counts), or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same victim or different victims, an upward departure would be warranted.~~

\* \* \*

65. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.

- ~~7. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.~~

**§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts**

\* \* \*

Application Notes:

\* \* \*

~~8. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.~~

**§2A3.3                    Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts**

\* \* \*

Application Notes:

\* \* \*

~~4. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.~~

**§2A3.4.                Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact**

\* \* \*

Application Notes:

\* \* \*

~~8. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.~~

**(6)    Supervised Release Provision**

**§5D1.2.                Term of Supervised Release**

\* \* \*

- (b) Except as otherwise provided;—
  - (1) the term of supervised release imposed shall not be less than any statutorily required term of supervised release; and
  - (2) if the instant offense of conviction is a sex offense, the term of supervised release shall be the maximum term of supervised release authorized by statute.

Commentary

Application Notes:

1. Definition.—For purposes of this guideline, the term “sex offense” means an offense under [chapter 109A,] [chapter 109A perpetrated against a minor,] chapter 110 (not including

trafficking, receipt, or possession of, child pornography), or chapter 117 of title 18, United States Code, or an attempt or a conspiracy to commit any such offense.

22. Safety Valve Cases.—A defendant who qualifies under §5C1.2 (Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. See 18 U.S.C. § 3553(f). In such a case, the term of supervised release shall be determined under subsection (a).
23. Supervised Release Cases.—Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. See 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).

\* \* \*

**Issue for Comment:** Option Two proposes a new guideline at §4B1.6 that would provide a five-level increase and a minimum offense level of level [32] if the defendant is a sexual predator. As highlighted by the bracketed language "[and][or]" in §4B1.6(b)(2), the Commission invites comment regarding whether the court must find both that the defendant is a sexual predator and that the defendant engaged in a pattern of activity involving sexual abuse or exploitation, or whether a finding of one of these factors would be sufficient in order for the five-level increase to apply.

## (B) GROUPING

**Synopsis:** Part B of the proposed amendment resolves a circuit conflict regarding who the "victim" is in child pornography cases for purposes of grouping of multiple counts. The amendment proposes two options for resolving the circuit conflict on the grouping of multiple counts of child pornography trafficking, receipt, and possession. Option One would allow grouping of child pornography trafficking and possession counts pursuant to §3D1.2(d). This grouping provision does not require a determination of whether counts involve the same victim in order to calculate a combined adjusted offense level for multiple counts of conviction. Option Two would not permit the grouping of multiple counts of child pornography trafficking and possession pursuant to §3D1.2. This option is based on the premise that multiple acts of possession or trafficking represent separate instances of fear and risk of harm, and would require the assignment of units pursuant to §3D1.4.

### Proposed Amendment:

Option 1:

#### §3D1.2. Groups of Closely Related Counts

\* \* \*

- (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

\* \* \*  
§§2F1.1, 2F1.2;  
§§2G2.2, 2G2.4;  
§2K2.1;  
\* \* \*

Option Two:

§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**

\* \* \*  
*Commentary*

\* \* \*

*Application Notes:*

\* \* \*

2. *For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate victim. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.*

*Similarly, [multiple counts involving the exploitation of the same minor are not to be grouped under §3D1.2 and] counts involving the production of material involving the exploitation of a minor are not to be grouped under §3D1.2 with counts involving the trafficking of material involving the exploitation of a minor, even in cases in which the production count and the trafficking count involve the same minor (i.e., cases that involve both a count of producing material involving the exploitation of a minor and a count of trafficking in the same material). In such cases, the harm involved in producing the material is separate and distinct from the harm involved in trafficking in that material.*

\* \* \*

§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**

Commentary

\* \* \*

Application Notes:

\* \* \*

4. For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving trafficking in, receiving, transporting, shipping, advertising, or possessing with the intent to distribute, material involving the exploitation of a minor are not to be grouped under §3D1.2 (Groups of Closely Related Counts). Such counts do not involve "substantially the same harm" for purposes of §3D1.2.

Similarly, such counts are not to be grouped under §3D1.2 with counts involving the production of material involving the exploitation of a minor, even in cases in which the production count and the trafficking count involve the same minor (i.e., cases that involve both a count of producing material involving the exploitation of a minor and a count of trafficking in the same material). In such cases, the harm involved in producing the material is separate and distinct from the harm involved in trafficking in that material.

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

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

3. For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving the possession of material involving the exploitation of a minor are not to be grouped under §3D1.2 (Groups of Closely Related Counts). Such counts do not involve "substantially the same harm" for purposes of §3D1.2.

**§3D1.2. Groups of Closely Related Counts**

\* \* \*

- (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

\* \* \*

Specifically excluded from the operation of this subsection are:

\* \* \*

§§2G1.1, 2G2.1, 2G2.2, 2G2.4;

\* \* \*

### (C) ENHANCEMENT FOR TRANSPORTATION OFFENSES AND OTHER AMENDMENTS

**Synopsis:** *Part C of the proposed amendment responds to the directive in the Act to provide an enhancement for offenses under chapter 117 of title 18, United States Code, involving the transportation of minors for prostitution or prohibited sexual conduct. Pursuant to the authority in the Act and pursuant to the Commission's general authority under 28 U.S.C. § 994 to promulgate guideline amendments, the amendment proposes a number of offense level increases in §2A3.2, the "statutory rape" guideline, and in §2A3.4, the abusive sexual contact guideline. Specifically, the amendment proposes to do the following:*

- (1) *Distinguish between chapter 117 violations that involve the commission of an underlying sexual act and those violations (e.g., sting cases) that do not, by providing in an alternative base offense level in §2A3.2 three additional levels for chapter 117 violations that also involve an underlying sexual act.*
- (2) *Provide an across-the-board three-level increase in the base offense level for offenses sentenced under §2A3.2, such that the base offense level (A) for statutory rape in its most basic form unaccompanied by aggravating conduct is increased from level 15 to level 18; (B) for a chapter 117 violation (unaccompanied by a sexual act) is increased from level 18 to level 21; and (C) a chapter 117 violation (accompanied by a sexual act) results in a base offense level of level 24. This increase also maintains the proportionality between §§2A3.2 and 2G2.2.*
- (3) *Provide an enhancement of 2 levels if the offense involved incest as an additional enhancement to the two-level enhancement for custody, care, or supervisory control, and provide in the Commentary a definition of "incest" that tracks that found in the Model Penal Code. A review of the 228 case files from FY 99 that involved sex crimes against children revealed that 26% of the offenders were parents or relatives of the victim. Additionally, 45 other offenders were either the boyfriend/girlfriend of the parent, or a step-parent or step grandparent of the victim.*
- (4) *Amend the Statutory Index to include a reference to the statutory rape guideline, §2A3.2, for chapter 117 offenses. Often in "sting" cases, the defendant travels across*

state lines in order to meet a minor for what the defendant believes will be an encounter involving consensual sexual activity.

- (5) Make conforming changes to the existing three-level decrease for chapter 117 violations that do not include aggravating conduct so that such violations receive the offense level applicable to statutory rape in its basic form.
- (6) Make technical changes (such as the addition of headings and the reordering of applications notes) not intended to have substantive effect.

In addition, the amendment proposes to amend the guideline covering the production of child pornography, §2G2.1, to provide additional enhancements to account for aggravating conduct that may be present in such cases, specifically, the production of sadistic or masochistic material, serious bodily injury, or the trafficking of produced materials. Note that the addition of the enhancement in §2G2.1 for the production of sadistic or masochistic material would result in the grouping of child pornography trafficking and production counts of conviction under §3D1.2(c), contrary to the proposal in Option 2 of Part B of this amendment. These amendments also are intended to restore proportionality in sentences between child pornography production offenses and child pornography trafficking offenses.

**Proposed Amendment:**

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

(b) Specific Offense Characteristics

\* \* \*

- (3) If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by 2 levels.

\* \* \*

- (7) If the offense involved incest, increase by 2 levels.

Commentary

\* \* \*

Application Notes:

\* \* \*

- 1. Definitions.—For purposes of this guideline—

"Incest" means any sexual act between the defendant and the victim in any case in which the



defendant-victim relationship is that of (A) ancestor-descendant (e.g., parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.

\* \* \*

"Sexual act" has the meaning given that term in 18 U.S.C. § 2246(2).

2. Custody, Care, and Supervisory Control Enhancement.—Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

\* \* \*

**§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts**

(a) Base Offense Level:

- (1) [24], if the offense involved a violation of chapter 117 of title 18, United States Code, and the commission, or attempted commission, of a sexual act;
- (+2) ~~18~~[21], if the offense involved a violation of chapter 117 of title 18, United States Code, but not the commission, or not the attempted commission, of a sexual act; or
- (~~2~~3) [~~15~~][18], otherwise.

(b) Specific Offense Characteristics

- (1) If the victim was in the custody, care, or supervisory control of the defendant, increase by 2 levels.

\* \* \*

- ~~(4) If (A) subsection (a)(1) applies; and (B) none of subsections (b)(1) through (b)(3) applies, decrease by [3] levels.~~

- (4) If the offense involved incest, increase by 2 levels.
- (5) If (A) none of subsections (b)(1) through (b)(3) applies; and (B) subsection (a)(1) applies, decrease by 6 levels.

\* \* \*

Commentary

\* \* \*

Application Notes:

- 1. Definitions.—For purposes of this guideline:

"Incest" means any sexual act between the defendant and the victim in any case in which the defendant-victim relationship is that of (A) ancestor-descendant (e.g. parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.

\* \* \*

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"Sexual act" has the meaning given that term in 18 U.S.C. § 2246(2).

\* \* \*

- ~~2. If the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography, an upward departure may be warranted. See Chapter Five, Part K (Departures).~~

- 32. Custody, Care, and Supervisory Control Enhancement.—Subsection (b)(1) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

- ~~3. Abuse of Position of Trust.~~—If the enhancement in subsection (b)(1) applies, do not apply

subsection (b)(2) or §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

54. Misrepresentation of Identity.—

\* \* \*

65. Use of Computer or Internet-Access Device.—

\* \* \*

76. Cross Reference.—

\* \* \*

87. Upward Departure Considerations.—*There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:*

(A) ~~If the~~The defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, ~~an upward departure may be warranted.~~

(B) The defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.

\* \* \*

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

(6) If the offense involved incest, increase by 2 levels.

(7) If the offense involved a violation of chapter 117 of title 18, United States Code, increase by 3 levels.

\* \* \*

Commentary

\* \* \*

Application Notes:

1. Definitions.—*For purposes of this guideline:*

*"Incest" means any sexual act between the defendant and the victim in any case in which the*

*defendant-victim relationship is that of (A) ancestor-descendant (e.g., parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.*

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

\* \* \*

*"Sexual act" has the meaning given that term in 18 U.S.C. § 2246(2).*

\* \* \*

#### APPENDIX A - STATUTORY INDEX

\* \* \*

18 U.S.C. § 2423(b)      2A3.1, 2A3.2, 2A3.3, 2A3.4

\* \* \*

§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**

\* \* \*

(b)      Specific Offense Characteristics

\* \* \*

- (4)      If (A) the offense involved the production of sexually explicit material that portrays sadistic or masochistic conduct or other depictions of violence; or (B) the victim sustained serious bodily injury, increase by [2][4] levels.
- (5)      If the offense involved any distribution of the sexually explicit material, increase by [2] levels.

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

1. ~~For purposes of this guideline, "minor" means an individual who had not attained the age of 18 years.~~ Definitions.—For purposes of this guideline:

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

*"Distribution" has the meaning given that term in Application Note 1 of §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic).*

**Issues for Comment:**

1. *The Commission invites comment on whether and, if so, to what extent, the guidelines covering sexual abuse, §§2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), 2A3.3 (Criminal Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact), should be amended to provide an enhancement if the offense involved the transportation, persuasion, inducement, enticement, or coercion of a child to engage in prohibited sexual conduct. Do enhancements added to these guidelines (that became effective November 1, 2000) for use of a computer and/or misrepresentation of a criminal participant's identity sufficiently provide an appropriate enhancement, or is an additional enhancement in these guidelines for other aggravating conduct needed?*
2. *The Commission invites comment on whether and, if so, to what extent, the guidelines covering sexual abuse, §§2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), 2A3.3 (Criminal Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact), should be amended to provide an enhancement in order to maintain proportionality between these guidelines and the guidelines covering pornography offenses, particularly, 2G2.2 (Trafficking In Material Involving the Sexual Exploitation of a Minor).*

**Proposed Amendment: Stalking and Domestic Violence**

6. **Synopsis of Proposed Amendment:***This proposed amendment addresses section 1107 of the Victims of Trafficking and Violence Protection Act of 2000 (the "Act"), Pub. L 106-386. That section amends 18 U.S.C. §§ 2261, 2261A, and 2262 to broaden the reach of these statutes to include international travel to stalk, commit domestic violence, or violate a protective order. Section 2261A also is amended to broaden the category of persons protected by this statute to include intimate partners of the person. The Act also amends section 2261A to provide a new offense at section 2262A(2) which prohibits the use of the mail or any facility of interstate or foreign commerce to commit a stalking offense. Several technical changes were also made to these statutes.*

*The Act also includes a directive to the Commission to amend the federal sentencing guidelines to reflect the changes made to 18 U.S.C. § 2261 with specific consideration to be given to the following factors:*

*(i) whether the Federal Sentencing Guidelines relating to stalking offences should be modified in light of the amendment made by this subsection; and*

*(ii) whether any changes the Commission may make to the Federal Sentencing Guidelines pursuant to clause (i) should also be made with respect to offenses under chapter 110A of title 18, United States Code (stalking and domestic violence offenses).*

*This proposed amendment increases the base offense level in §2A6.2 (Stalking or Domestic Violence) and adds a cross reference to §1B1.5 (Interpretation of References to Other Offense Guidelines).*

*For several reasons, the proposed amendment treats the new stalking by mail offense the same under the guidelines as other stalking offenses and covers it under §2A6.2 (Stalking or Domestic Violence). First, the statutory penalties for stalking by mail are the same as the statutory penalties for other stalking offenses. Second, although there was some consideration to referring this new offense to §2A6.1 (Threatening or Harassing Communications), stalking by mail offenses differ significantly from threatening communications in that stalking by mail offenses require the defendant's intent to kill, or injure a person, or place a person in reasonable fear of death or serious bodily injury. Third, referencing stalking by mail offenses to §2A6.1, could possibly result in these offenses receiving higher penalties than other stalking offenses. For example, a defendant who writes a threatening letter, violates a protective order and engages in some conduct evidencing an intent to carry out such threat, receives an offense level of level 20 under §2A6.1. A defendant who commits a stalking offense, violates a protective order, and actually commits bodily injury on the person who is the subject of the protection order, receives an offense level of level 18 under §2A6.2. Arguably, the second defendant should receive punishment, equal to, or perhaps greater than that received by the first defendant.*

*Because of the concern with regard to the proportionality in sentencing stalking and domestic violence offenses vis-a-vis other crimes, such as threatening or harassing communications, this amendment proposes to increase the base offense level in §2A6.2 from level 14 to level [16][18]. Setting the base offense level at level [16] [18] for stalking and domestic violence crimes ensures that these offenses are sentenced at or above the offense levels for offenses involving threatening and harassing communications.*

*This amendment also amends Application Note 3 to §1B1.5 (Interpretation of References to Other Offense Guidelines) to clarify generally the operation of cross references. A review of the 16 cases sentenced under this guideline in fiscal years 1998 and 1999 indicated that there is some confusion as to whether a cross reference can and should be applied to conduct that is not within federal jurisdiction (e.g., conduct in violation of state or local law) as is often the case in stalking and domestic violence offenses. This new application note makes clear that, unless otherwise specified, cross references in Chapter Two are to be determined consistent with the provisions of §1B1.3 (Relevant Conduct). Therefore, in a case in which the guideline includes a reference to use another guideline if the conduct involved another offense, the other offense includes conduct that may be a state or local offense or conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place*

within the territorial or maritime jurisdiction of the United States.

## Proposed Amendment

### §2A6.2. Stalking or Domestic Violence

(a) Base Offense Level: [~~14~~][16][18]

\* \* \*

#### Commentary

\* \* \*

#### Application Notes:

1. For purposes of this guideline—

\* \* \*

"Stalking" means (A) traveling with the intent to kill, injure, ~~or~~ harass or intimidate another person and, in the course of, or as a result of, such travel, placing the person in reasonable fear of death or serious bodily injury to ~~that~~ that person, ~~or~~ the person's immediate family, including that person's spouse or intimate partner; or (B) using the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, any of the persons described in subdivision (A) of this note. See 18 U.S.C. § 2261A. "Immediate family" has the meaning set forth in 18 U.S.C. § 115(c)(2). "Course of conduct" and "spouse or intimate partner" have the meaning given those terms in 18 U.S.C. § 2266(2) and (7), respectively.

#### Conforming Amendment to §1B1.5:

### §1B1.5. Interpretation of References to Other Offense Guidelines

\* \* \*

#### Commentary

\* \* \*

#### Application Notes:

\* \* \*

3. A reference may direct that, if the conduct involved another offense, the offense guideline for such other offense is to be applied. Consistent with the provisions of §1B1.3 (Relevant Conduct), such other offense includes conduct that may be a state or local offense or conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States. Where there is more than one such other offense, the most serious such offense (or group of closely related offenses in the case of offenses that would be grouped together under

*§3D1.2(d)) is to be used. For example, if a defendant convicted of possession of a firearm by a felon, to which §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) applies, is found to have possessed that firearm during commission of a series of offenses, the cross reference at §2K2.1(c) is applied to the offense resulting in the greatest offense level.*

**Proposed Amendment: Re-promulgation of Emergency Amendment Regarding Enhanced Penalties for Amphetamine or Methamphetamine Laboratory Operators as Permanent Amendment**

7. **Synopsis of Proposed Amendment:** *This proposed amendment addresses the "substantial risk" directive in the Methamphetamine and Club Drug Anti-Proliferation Act of 2000 (the "Act"), section 102 of Pub. L. 106–310.*

*The Act requires the Commission to promulgate amendments under emergency amendment authority. Although the Act generally provides that the Commission shall promulgate various amendments "as soon as practicable," the substantial risk directive specifically requires that the amendment implementing the directive shall apply "to any offense occurring on or after the date that is 60 days after the date of the enactment" of the Act. Because of ex post facto concerns raised by this 60-day clause, the Commission promulgated an amendment in November 2000 that*

*implemented the substantial risk directive. The amendment became effective December 16, 2000.*

*The directive instructs the Commission to amend the federal sentencing guidelines with respect to any offense relating to the manufacture, attempt to manufacture, or conspiracy to manufacture amphetamine or methamphetamine in (A) the Controlled Substances Act (21 U.S.C. § 801 et seq.); (B) the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.); or (C) the Maritime Drug Law Enforcement Act (46 U.S.C. App. § 1901 et seq.).*

*In carrying out this directive, the Act requires the Commission to provide the following enhancements—*

*(A) if the offense created a substantial risk of harm to human life (other than a life described in subparagraph (B)) or the environment, increase the base offense level for the offense—*

*(i) by not less than 3 offense levels above the applicable level in effect on the date of the enactment of this Act; or*

*(ii) if the resulting base offense level after an increase under clause (i) would be less than level 27, to not less than level 27; or*

*(B) if the offense created a substantial risk of harm to the life of a minor or*



*incompetent, increase the base offense level for the offense—*

*(i) by not less than 6 offense levels above the applicable level in effect on the date of the enactment of this Act; or*

*(ii) if the resulting base offense level after an increase under clause (i) would be less than level 30, to not less than level 30.*

*Three options are now presented to implement the directive on a permanent basis.*

*Option 1.—Option 1 proposes to re-promulgate the emergency amendment without any changes. The pertinent parts of Option 1 are as follows:*

*(1) Guidelines Amended.—The amendment provides new enhancements in §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) and 2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance) that also apply in the case of an attempt or a conspiracy to manufacture amphetamine or methamphetamine. The amendment does not amend §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) or §2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation or Prohibited Flask or Equipment). Although offenses that involve the manufacture of amphetamine or methamphetamine also are referenced in Appendix (A) (Statutory Index) to §§2D1.11 and 2D1.12, the cross reference in these guidelines, which applies if the offense involved the manufacture of a controlled substance, will result in application of §2D1.1 and accordingly, the new enhancements.*

*(2) Structure.—The basic structure of the amendment to §§2D1.1 and 2D1.10 tracks the structure of the directive. Accordingly, in §2D1.1, the amendment provides a three-level increase and a minimum offense level of level 27 if the offense (A) involved the manufacture of amphetamine or methamphetamine; and (B) created a substantial risk of either harm to human life or the environment. For offenses that created a substantial risk of harm to the life of a minor or an incompetent, the amendment provides a six-level increase and a minimum offense level of 30.*

*However, the structure of the amendment in §2D1.10 differs from that in §2D1.1 with respect to the first prong of the enhancement (regarding substantial risk of harm to human life or to the environment). Specifically, the amendment provides a three-level increase and a minimum offense level of level 27 if the offense involved the manufacture of amphetamine or methamphetamine without making application of the enhancement dependent upon whether the offense also involved a substantial risk of either harm to human life or the environment. Consideration of whether the offense involved a substantial risk of harm to human life is unnecessary because §2D1.10 applies only to convictions under 21 U.S.C. § 858, and the creation of a substantial risk of harm to human life is an element of a § 858 offense. Therefore, the base offense level already takes into account the substantial risk of harm to*

*human life. Consideration of whether the offense involved a substantial risk of harm to the environment is unnecessary because the directive predicated application of the enhancement on substantial risk of harm either to human life or to the environment, and the creation of a substantial risk of harm to human life is necessarily present because it is an element of the offense.*

*(3) Determining "Substantial Risk of Harm".—Neither the directive nor any statutory provision defines "substantial risk of harm". Based on an analysis of relevant case law that interpreted "substantial risk of harm", the amendment provides commentary setting forth factors that may be relevant in determining whether a particular offense created a substantial risk of harm.*

*(4) Definitions.—The definition of "incompetent" is modeled after several state statutes, which proved useful for purposes of this amendment.*

*The definition of "minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).*

*Option 2.—Option 2 proposes to expand the emergency amendment, as set forth in Option 1, to apply to the manufacture of all controlled substances rather than only amphetamine or methamphetamine. Although the directive specifically instructs the Commission to provide increased penalties for the manufacture of amphetamine and methamphetamine, the Commission may, under its general promulgation authority, expand the scope of an emergency amendment when it re-promulgates the amendment as a permanent amendment. The reason for the proposed expansion is that if the manufacture of any controlled substance creates a substantial risk of harm to human life or the environment, there is a strong argument that the increased penalties should apply regardless of the type of controlled substances involved in the offense. The pertinent parts of Option 2 are as follows:*

*(1) §2D1.1.—The enhancement in subsection (b)(6) is proposed to apply to the manufacture of any controlled substance, not just to the manufacture of amphetamine or methamphetamine. The expansion to all controlled substances in §2D1.1 is rather straightforward. Conforming changes are made to the Commentary, but the amendment to §2D1.1 otherwise remains the same as the emergency amendment.*

*(2) §2D1.10.—Option 2's proposed expansion to all controlled substances in §2D1.10 requires a restructuring of the guideline (as it was amended by the emergency amendment).*

*First, Option 2 proposes to increase the alternative base offense level in subsection (a)(1) from "3 plus" to "6 plus the offense level from the Drug Quantity Table in §2D1.1". This proposed increase corresponds to the proposed deletion of subsection (b)(1)(A) of the emergency amendment. As explained above in the description of Option 1 under "Structure," subsection (b)(1)(A) provides a three-level increase "if the offense involved the manufacture of amphetamine or*

*methamphetamine," without making application of the enhancement dependent upon whether the offense also involved a substantial risk of either harm to human life or the environment. However, if the emergency amendment is to be expanded to apply to the manufacture of all controlled substances, this enhancement no longer is appropriate. In order not to lose the three-level increase that was provided by this enhancement, the three levels from this enhancement are built into the alternative base offense level in subsection (a)(1).*

*Second, Option 2 proposes two alternatives for addressing the minimum offense level of level 27 that also was provided by the enhancement in subsection (b)(1)(A). Option 2(a) increases the current alternative base offense level in subsection (a)(2) from level 20 to level 27. Although this option is consistent with expanding the entire emergency amendment to all controlled substances, the impact of this change is likely to be significant for lower level drug offenders. Option 2(b) proposes to add an additional alternative base offense level of level 27 if the offense involved the manufacture of amphetamine or methamphetamine, but maintains the alternative base offense level 20 for all other controlled substances. Although this option has less of an impact on lower level drug offenders than Option 2(a), it is not consistent with the approach otherwise taken in Option 2 of expanding the emergency amendment to cover all controlled substances.*

*Finally, Option 2 makes the enhancement that applies if the offense created a substantial risk of harm to the life of a minor or an incompetent applicable to all controlled substances. Conforming amendments are made to the Commentary.*

*Option 3.—This option assumes that the manufacture of amphetamine or methamphetamine is inherently dangerous and poses a substantial risk of harm to human life or the environment. Thus, the statutorily directed minimum enhancement and minimum offense level is automatic for the manufacture of amphetamine or methamphetamine. For all other controlled substances, it must be proved that the manufacturing process created the substantial risk of harm.*

*This option also combines the substantial risk enhancement with the environmental damage enhancement in §2D1.1(b)(5).*

**Proposed Amendment:**

**Option 1:**

**§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

(5) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(6) (Apply the greater):

(A) If the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (i) human life other than a life described in (b)(6)(B); or (ii) the environment, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(B) If the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

20. Hazardous or Toxic Substances.—Subsection (b)(5) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(5) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to individuals or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).

21. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—In determining, for purposes of subsection (b)(6), whether the offense created a substantial risk of harm to human life or the environment, the court may consider factors such as the following:

- (A) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.
- (B) The manner in which hazardous or toxic substances were disposed or the likelihood of release into the environment of hazardous or toxic substances.
- (C) The duration of the offense or extent of the manufacturing operation.
- (D) The location of the amphetamine or methamphetamine laboratory (e.g., in a residential neighborhood or a remote area) and the number of individuals placed at risk of bodily injury.

For purposes of subsection (b)(6):

"Incompetent" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.

"Minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

Background:

\* \* \*

Subsection (b)(5) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsection (b)(6) implements the instruction to the Commission in section 102 of Public Law 106–878310.

**§2D1.10. Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy**

- (a) Base Offense Level (Apply the greater):
  - (1) 3 plus the offense level from the Drug Quantity Table in §2D1.1; or
  - (2) 20.

(b) Specific Offense Characteristic

(1) (Apply the greater):

(A) If the offense involved the manufacture of amphetamine or methamphetamine, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

(B) If the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

Commentary

Statutory Provision: 21 U.S.C. § 858.

Application Notes:

1. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—In determining, for purposes of subsection (b)(1)(B), whether the offense created a substantial risk of harm to the life of a minor or an incompetent, the court may consider factors such as the following:

- (A) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.
- (B) The manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances.
- (C) The duration of the offense or extent of the manufacturing operation.
- (D) The location of the amphetamine or methamphetamine laboratory (e.g., in a residential neighborhood or a remote area) and the number of individuals placed at risk of bodily injury.

For purposes of subsection (b)(1):

"Incompetent" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.

"Minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

*Background:* Subsection (b)(1) implements the instruction to the Commission in section 102 of Public Law 106-878310.

**Option 2:**

**§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

(6) (Apply the greater):

(A) If the offense (i) involved the manufacture of ~~amphetamine or methamphetamine~~ a controlled substance; and (ii) created a substantial risk of harm to (I) human life other than a life described in (b)(6)(B); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

(B) If the offense (i) involved the manufacture of ~~amphetamine or methamphetamine~~ a controlled substance; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

20. Hazardous or Toxic Substances.—Subsection (b)(5) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(5) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to individuals or property should be considered by the

court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).

21. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine Controlled Substances.—

(A) Factors to Consider.—In determining, for purposes of subsection (b)(6), whether the offense created a substantial risk of harm to the environment or human life, the court may consider factors such as the following:

- (i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.
- (ii) The manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances.
- (iii) The duration of the offense or extent of the manufacturing operation.
- (iv) The location of the ~~amphetamine or methamphetamine~~illicit laboratory (e.g., in a residential neighborhood or a remote area) and the number of human lives placed at substantial risk of harm.

(B) Definitions.—For purposes of subsection (b)(6):

"Incompetent" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.

"Minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

Background:

\* \* \*

Subsections (b)(5) implements the instruction to the Commission in section 303 of Public Law 103-237.

Subsections (b)(6) implements, in a broader form, the instruction to the Commission in section 102 of Public Law 106-878310.

§2D1.10. Endangering Human Life While Illegally Manufacturing a Controlled Substance;



**Attempt or Conspiracy**

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

- (1) ~~36~~ plus the offense level from the Drug Quantity Table in §2D1.1; or
- [Option 2(a): (2) ~~20~~27.]
- [Option 2(b): (2) 27, if the offense involved the manufacture of amphetamine or methamphetamine; or
- ~~(2)~~(3) 20, otherwise.]

(b) Specific Offense Characteristic

- (1) ~~(Apply the greater):~~
  - ~~(A) If the offense involved the manufacture of amphetamine or methamphetamine, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.~~
  - ~~(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine, and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 63 levels. If the resulting offense level is less than level 30, increase to level 30.~~

Commentary

Statutory Provision: 21 U.S.C. § 858.

Application Note:

1. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine. —

- (A) Factors to Consider.—In determining, for purposes of subsections (b)(1), whether the offense created a substantial risk of harm to the life of a minor or an incompetent, the court may consider factors such as the following:
  - (i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.
  - (ii) The manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances.

- (iii) *The duration of the offense or extent of the manufacturing operation.*
- (iv) *The location of the ~~amphetamine or methamphetamine laboratory~~ illicit (e.g., in a residential neighborhood or a remote area) and the number of human lives placed at substantial risk of harm.*

(B) Definitions.—*For purposes of subsection (b)(1):*

*"Incompetent" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.*

*"Minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).*

Background: *Subsections (a)(2) and (b)(1) implements, in a broader form, the instruction to the Commission in section 102 of Public Law 106–878310.*

### Option 3: Amphetamine and Methamphetamine as Inherently Dangerous

#### §2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

\_\_\_\_\_ (5) ~~If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.~~

\_\_\_\_\_ (6) ~~(Apply the greater):~~

\_\_\_\_\_ (A) ~~If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subsection (b)(6)(B); or (H) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.~~

~~(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine, and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.~~

(5) (Apply the greater):

- (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.
- (B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; or (ii)(I) involved the manufacture of a controlled substance other than amphetamine or methamphetamine; and (II) created a substantial risk of harm to human life or the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.
- (C) If the offense (i) involved the manufacture of a controlled substance; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

~~(7)(6)~~

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

20. Hazardous or Toxic Substances.—Subsection (b)(5)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(5) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to individuals or property should be considered by the

court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).

21. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine Controlled Substances.—

(A) Factors to Consider.—In determining, for purposes of subsections ~~(b)(6)~~(b)(5)(B) and (b)(5)(C), whether the offense created a substantial risk of harm to the environment or human life, the court may consider factors such as the following:

- (i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.
- (ii) The manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances.
- (iii) The duration of the offense or extent of the manufacturing operation.
- (iv) The location of the ~~amphetamine or methamphetamine~~illicit laboratory (e.g. in a residential neighborhood or a remote area) and the number of individuals placed at risk of bodily injury.

(B) Definitions.—For purposes of subsection ~~(b)(6)~~(b)(5):

"Incompetent" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.

"Minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

Background:

\* \* \*

Subsections (b)(5)(A) implements the instruction to the Commission in section 303 of Public Law 103-237.

Subsections ~~(b)(6)~~(b)(5)(B) and (b)(5)(C) implements, in a broader form, the instruction to the Commission in section 102 of Public Law 106-878310.

**§2D1.10. Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy**

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

- (1) 3 plus the offense level from the Drug Quantity Table in §2D1.1; or
  - (2) ~~2027~~.
- (b) Specific Offense Characteristic
- (1) ~~(Apply the greater):~~
    - (A) ~~If the offense involved the manufacture of amphetamine or methamphetamine, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.~~
    - (B) If the offense (i) involved the manufacture of amphetamine or methamphetamine, and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 63 levels. If the resulting offense level is less than level 30, increase to level 30.

Commentary

Statutory Provision: 21 U.S.C. § 858.

Application Note:

1. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine. —

(A) Factors to Consider.—In determining, for purposes of subsections (b)(1), whether the offense created a substantial risk of harm to the life of a minor or an incompetent, the court may consider factors such as the following:

- (i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.
- (ii) The manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances.
- (iii) The duration of the offense or extent of the manufacturing operation.
- (iv) The location of the ~~amphetamine or methamphetamine~~ illicit laboratory (*e.g.*, in a residential neighborhood or a remote area) and the number of human lives placed at substantial risk of harm.

(B) Definitions.—For purposes of subsection (b)(1):

"Incompetent" means an individual who is incapable of taking care of the individual's

*self or property because of a mental or physical illness or disability, mental retardation, or senility.*

*"Minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).*

*Background: Subsections (a)(2) and (b)(1) implements, in a broader form, the instruction to the Commission in section 102 of Public Law 106–878310.*

**Issue for Comment:** *The Commission invites comment regarding whether it should provide, for controlled substances other than amphetamine or methamphetamine, an upward departure rather than an enhancement provision if the manufacture of the controlled substance created a substantial risk of harm to human life or the environment.*

**Proposed Amendment: Mandatory Restitution for Amphetamine and Methamphetamine Offenses**

**8. Synopsis of Proposed Amendment:** *This proposed amendment implements the provision in the Methamphetamine Anti-Proliferation Act of 2000, section 3613 of Pub. L. 106–310, that amends 21 U.S.C. § 853(q) to provide mandatory restitution for offenses that involve the manufacture of methamphetamine. The proposed amendment amends §5E1.1 (Restitution) to include a reference to 21 U.S.C. § 853(q) in the guideline provision regarding mandatory restitution.*

**Proposed Amendment:**

**§5E1.1. Restitution**

- (a) In the case of an identifiable victim, the court shall --
  - (1) enter a restitution order for the full amount of the victim’s loss, if such order is authorized under 18 U.S.C. § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A, or 21 U.S.C. § 853(q); or

\* \* \*

Commentary

\* \* \*

*Background: Section 3553(a)(7) of Title 18, United States Code, requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Orders of restitution are authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, and 3663A, and 21 U.S.C. § 853(q). For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation or supervised release.*

**Proposed Amendment: Safety Valve**

9. **Synopsis of Proposed Amendment:** *This amendment proposes to delete the language in §2D1.1(b)(6) that limits application of the safety valve to defendants at offense levels 26 and greater. The proposed amendment also deletes commentary that is outdated because of the operation of §5C1.2 (Limitation on Applicability on Statutory Minimum Sentences in Certain Cases). Conforming changes are made to §5C1.2.*

**Proposed Amendment**

**§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

\* \* \*

- (b) Specific Offense Characteristics

\* \* \*

- (6) If the defendant meets the criteria set forth in subdivisions subsections (a)(1)-(5) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level ~~26~~ or greater, decrease by 2 levels.

\* \* \*

Commentary

Application Notes:

\* \* \*

~~14. Where (A) the amount of the controlled substance for which the defendant is accountable under §1B1.3 (Relevant Conduct) results in a base offense level greater than 36, (B) the court finds that this offense level overrepresents the defendant's culpability in the criminal activity, and (C) the defendant qualifies for a mitigating role adjustment under §3B1.2 (Mitigating Role), a downward departure may be warranted. The court may depart to a sentence no lower than the guideline range that would have resulted if the defendant's Chapter Two offense level had been offense level 36. Provided, that a defendant is not eligible for a downward departure under this provision if the defendant:~~

~~(a) has one or more prior felony convictions for a crime of violence or a controlled substance offense as defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1);~~

~~(b) qualifies for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill);~~

~~(c) possessed or induced another participant to use or possess a firearm in the offense;~~

~~(d) had decision-making authority;~~

~~(e) owned the controlled substance or financed any part of the offense; or~~

~~(f) sold the controlled substance or played a substantial part in negotiating the terms of the sale.~~

~~*Example:* A defendant, who the court finds meets the criteria for a downward departure under this provision, has a Chapter Two offense level of 38, a 2-level reduction for a minor role from §3B1.2, and a 3-level reduction for acceptance of responsibility from §3E1.1. His final offense level is 33. If the defendant's Chapter Two offense level had been 36, the 2-level reduction for a minor role and 3-level reduction for acceptance of responsibility would have resulted in a final offense level of 31. Therefore, under this provision, a downward departure not to exceed 2 levels (from level 33 to level 31) would be authorized.~~

The Commentary to §2D1.1 captioned "Application Notes" is amended by redesignating Notes 15 through 20 as Notes 14 through 19, respectively.

**§5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases**

- (a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth verbatim below:
- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
  - (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
  - (3) the offense did not result in death or serious bodily injury to any person;
  - (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
  - (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has



no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

- (b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17.

Commentary

Application Notes:

\* \* \*

2. "Dangerous weapon" and "firearm," as used in ~~subdivision (2)~~subsection (a)(2), and "serious bodily injury," as used in ~~subdivisions~~subsection (a)(3), are defined in the Commentary to §1B1.1 (Application Instructions).
3. "Offense," as used in ~~subdivisions~~subsection (a)(2)-(4), and "offense or offenses that were part of the same course of conduct or of a common scheme or plan," as used in ~~subdivisions~~subsection (a)(5), mean the offense of conviction and all relevant conduct.
4. Consistent with §1B1.3 (Relevant Conduct), the term "defendant," as used in ~~subdivisions~~subsection (a)(2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.
5. "Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines," as used in ~~subdivision~~subsection (a)(4), means a defendant who receives an adjustment for an aggravating role under §3B1.1 (Aggravating Role).
6. "Engaged in a continuing criminal enterprise," as used in ~~subdivision~~subsection (a)(4), is defined in 21 U.S.C. § 848(c). As a practical matter, it should not be necessary to apply this prong of ~~subdivisions~~subsection(a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who "engaged in a continuing criminal enterprise" but is convicted of an offense to which this section applies will be an "organizer, leader, manager, or supervisor of others in the offense."
7. Information disclosed by the defendant with respect to ~~subdivisions~~subsection (a)(5) may be considered in determining the applicable guideline range, except where the use of such information is restricted under the provisions of §1B1.8 (Use of Certain Information). That is, ~~subdivisions~~subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant.

\* \* \*

**Proposed Amendment: Anhydrous Ammonia**

10. **Synopsis of Proposed Amendment:** *This proposed amendment addresses the new offense, at section 423 of the Controlled Substances Act (21 U.S.C. § 864), of stealing or transporting across state lines anhydrous ammonia knowing, intending, or having reasonable cause to believe that such anhydrous ammonia will be used to manufacture a controlled substance. This new offense, created by the Methamphetamine Anti-Proliferation Act of 2000, section 3653 of Pub. L. 106-310, carries the statutory penalties contained in section 403 of the Controlled Substances Act (21 U.S.C. § 843), i.e., not more than four years' imprisonment (or not more than eight years' imprisonment in the case of certain prior convictions) or not more than 10 years' imprisonment (or not more than 20 years' imprisonment in the case of certain prior convictions) if the offense involved the manufacture of methamphetamine.*

*The proposed amendment references the new offense to §2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy). Reference to this guideline is appropriate because the new offense is similar to other offenses already referenced to the guideline and having the same penalty structure, such as 21 U.S.C. § 843(a)(6), which among other things makes it unlawful to possess any chemical, product, or material which may be used to manufacture a controlled substance. The proposed amendment*

*also makes minor, non-substantive changes to the guideline in order to fully reference the new and existing offenses into the guideline.*

**Proposed Amendment:**

**§2D1.12. Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask or, Equipment, Chemical, Product, or Material; Attempt or Conspiracy**

- (a) Base Offense Level (Apply the greater):
- (1) 12, if the defendant intended to manufacture a controlled substance or knew or believed the prohibited flask, equipment, chemical, product, or material was to be used to manufacture a controlled substance; or
  - (2) 9, if the defendant had reasonable cause to believe the prohibited flask, equipment, chemical, product, or material was to be used to manufacture a controlled substance.
- (b) Specific Offense Characteristics
- (1) If the defendant (A) intended to manufacture methamphetamine, or (B) knew, believed, or had reasonable cause to believe that prohibited flask,

equipment, chemical, product, or material was to be used to manufacture methamphetamine, increase by 2 levels.

\* \* \*

Commentary

Statutory Provisions: 21 U.S.C. §§ 843(a)(6), (7), 864.

Application Notes:

1. *If the offense involved the large-scale [(A) ] manufacture, distribution, transportation, exportation, or importation of prohibited flasks, or equipment, chemicals, products, or material[; or (B) theft of anhydrous ammonia,] an upward departure may be warranted.*

\* \* \*

APPENDIX A - STATUTORY INDEX

\* \* \*

21 U.S.C. § 863	2D1.7
21 U.S.C. § 864	2D1.12

**Issue for Comment:** *The Commission invites comment regarding whether the enhancement at §2D1.12(b)(1) is sufficient to account for the seriousness of attempting or intending to manufacture methamphetamine through the use of anhydrous ammonia. Should, for example, subsection (b)(1) of §2D1.12 provide for an enhancement of up to [10] levels, or should an alternative method be provided to account for the seriousness of using anhydrous ammonia, such as a cross reference to §2D1.11 using a conversion to methamphetamine if anhydrous ammonia is involved? Generally, what is the most appropriate penalty structure for offenses involving anhydrous ammonia?*

**Proposed Amendment: GHB**

11. **Synopsis of Proposed Amendment:** *This proposed amendment implements the Hillary J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. 106-172 (the "Act"), which provides the emergency scheduling of gamma hydroxybutyric acid ("GHB") as a Schedule I controlled substance under the Controlled Substances Act when the drug is used illicitly. (There are approved applications of GHB under the Federal Food, Drug, and Cosmetic Act, for which the drug is scheduled in Schedule III.) The Act also amended section 401(b)(1)(C) of the Controlled Substances Act (21 U.S.C. § 841(b)(1)(C)) and section 1010(b)(3) of the Controlled Substances Import and Export Act (21 U.S.C. § 960(b)(3)) to provide penalties of not more than 20 years for an offense that involves GHB. Additionally, the Act added gamma butyrolactone ("GBL") to the list of List I chemicals in section 401(b)(1)(C) of the Controlled Substances Act (21 U.S.C. § 841(b)(1)(C)).*

*Under the current structure of the Drug Quantity Table in §2D1.1, GHB and other Schedule*

*I and II depressants, with statutory maximum terms of imprisonment of 20 years, are sentenced identically to Schedule III substances, which have a five-year statutory maximum. The guidelines provide a maximum offense level of level 20 for these substances, which equates to a sentencing range of 33 to 44 months for offenders with minimal or no criminal history (Criminal History Category I). The lack of penalty distinctions between offenses with such divergent statutory maxima raises proportionality concerns. Recognizing the need to provide higher penalties for the more serious offenses involving Schedule I and II depressants, the proposed amendment eliminates the maximum base offense level of level 20 in the Drug Quantity Table of §2D1.1 for Schedule I and II depressants (including GHB). The same change is made with respect to flunitrazepam, which, for sentencing purposes, is tied to Schedule I and II depressants.*

*The proposed amendment also amends the Chemical Quantity Table in §2D1.11 to include GBL, a precursor for GHB, as a List I chemical. Offense levels for GBL were established in the same fashion as other list I chemicals. The offense level for a specific quantity of GHB that can be produced from a given quantity of GBL, assuming a 50 percent yield, was determined using the Drug Quantity Table in §2D1.1. From this offense level, six levels were subtracted. This result identifies the corresponding offense level in the Chemical Quantity Table in §2D1.11.*

*The proposed amendment also adds Iodine to the Chemical Quantity Table in response to a recent classification of iodine as a List II chemical. Iodine is used to produce hydrogen iodide which, in the presence of water, becomes hydriodic acid, a list I chemical that is a reagent used in the production of amphetamine and methamphetamine. The penalties for Iodine were established based upon its conversion to hydriodic acid.*

**Proposed Amendment:**

**Part I: Uncap Schedule I and II Depressants**

**§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

\* \* \*

**(c) DRUG QUANTITY TABLE**

<b>Controlled Substances and Quantity*</b>	<b>Base Offense Level</b>
(1) * * *	<b>Level 38</b>
M 600 KG or more of Hashish Oil-;	
M 30,000,000 units or more of Schedule I or II Depressants;	
M 1,875,000 units or more of Flunitrazepam.	

- (2) \* \* \* **Level 36**  
M At least 200 KG but less than 600 KG of Hashish Oil-;  
M At least 10,000,000 but less than 30,000,000 units of Schedule I or II  
Depressants;  
M At least 625,000 but less than 1,875,000 units of Flunitrazepam.
- (3) \* \* \* **Level 34**  
M At least 60 KG but less than 200 KG of Hashish Oil-;  
M At least 3,000,000 but less than 10,000,000 units of Schedule I or II  
Depressants;  
M At least 187,500 but less than 625,000 units of Flunitrazepam.
- (4) \* \* \* **Level 32**  
M At least 20 KG but less than 60 KG of Hashish Oil-;  
M At least 1,000,000 but less than 3,000,000 units of Schedule I or II  
Depressants;  
M At least 62,500 but less than 187,500 units of Flunitrazepam.
- (5) \* \* \* **Level 30**  
M At least 14 KG but less than 20 KG of Hashish Oil-;  
M At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;  
M At least 43,750 but less than 62,500 units of Flunitrazepam.
- (6) \* \* \* **Level 28**  
M At least 8 KG but less than 14 KG of Hashish Oil-;  
M At least 400,000 but less than 700,000 units of Schedule I or II Depressants;  
M At least 25,000 but less than 43,750 units of Flunitrazepam.
- (7) \* \* \* **Level 26**  
M At least 2 KG but less than 8 KG of Hashish Oil-;  
M At least 100,000 but less than 400,000 units of Schedule I or II Depressants;  
M At least 6,250 but less than 25,000 units of Flunitrazepam.
- (8) \* \* \* **Level 24**  
M At least 1.6 KG but less than 2 KG of Hashish Oil-;  
M At least 80,000 but less than 100,000 units of Schedule I or II Depressants;  
M At least 5,000 but less than 6,250 units of Flunitrazepam.
- (9) \* \* \* **Level 22**  
M At least 1.2 KG but less than 1.6 KG of Hashish Oil-;  
M At least 60,000 but less than 80,000 units of Schedule I or II Depressants;  
M At least 3,750 but less than 5,000 units of Flunitrazepam.
- (10) \* \* \* **Level 20**  
M At least 800 G but less than 1.2 KG of Hashish Oil;

~~M 40,000 or more~~ At least 40,000 but less than 60,000 units of Schedule I or II  
Depressants or Schedule III substances;  
~~M 2,500 or more~~ At least 2,500 but less than 3,750 units of Flunitrazepam.

\* \* \*

Commentary

Application Notes:

\* \* \*

10.

\* \* \*

DRUG EQUIVALENCY TABLES

\* \* \*

Flunitrazepam \*\*

1 unit of Flunitrazepam = 16 gm of marihuana

~~\*\* Provided, that the combined equivalent weight of flunitrazepam, all Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances shall not exceed 99.99 kilograms of marihuana.~~

The minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

Schedule I or II Depressants\*\*\*

1 unit of a Schedule I or II Depressant = 1 gm of marihuana

~~\*\*\* Provided, that the combined equivalent weight of all Schedule I or II depressants, Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.~~

(2) Adding GBL and Iodine to the Chemical Quantity Table in §2D1.11.

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

\* \* \*

(d) CHEMICAL QUANTITY TABLE\*

Listed Chemicals and Quantity	Base Offense Level
(1) <u>List I Chemicals</u> * * * 10,000 KG or more of Gamma-butyrolactone;	Level 30
(2) <u>List I Chemicals</u> * * * At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone; At least 3,000 KG but less than 10,000 KG of Gamma-butyrolactone;	Level 28
<u>List II Chemicals</u> * * * 1300 KG or more of Toluene-; 7.52 KG or more of Iodine.	
(3) <u>List I Chemicals</u> * * * At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone; At least 1,000 KG but less than 3,000 KG of Gamma-butyrolactone;	Level 26
<u>List II Chemicals</u> * * * At least 390 KG but less than 1300 KG of Toluene-; At least 2.51 KG but less than 7.52 KG of Iodine.	
(4) <u>List I Chemicals</u> * * * At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone; At least 700 KG but less than 1,000 KG of Gamma-butyrolactone;	Level 24
<u>List II Chemicals</u> At least 1.1 KG but less than 3.3 KG of Acetic Anhydride; At least 117.5 KG but less than 352.5 KG of Acetone; At least 2 KG but less than 6 KG of Benzyl Chloride; At least 107.5 KG but less than 322.5 KG of Ethyl Ether; At least 120 KG but less than 360 KG of Methyl Ethyl Ketone; At least 1 KG but less than 3 KG of Potassium Permanganate; At least 130 KG but less than 390 KG of Toluene-; At least 1.76 KG but less than 2.51 KG of Iodine.	
(5) <u>List I Chemicals</u>	Level 22

\* \* \*

At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 400 KG but less than 700 KG of Gamma-butyrolactone;

List II Chemicals

At least 726 G but less than 1.1 KG of Acetic Anhydride;  
At least 82.25 KG but less than 117.5 KG of Acetone;  
At least 1.4 KG but less than 2 KG of Benzyl Chloride;  
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;  
At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;  
At least 700 G but less than 1 KG of Potassium Permanganate;  
At least 91 KG but less than 130 KG of Toluene-;  
At least 1 KG but less than 1.76 KG of Iodine.

(6) List I Chemicals **Level 20**

\* \* \*

At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 100 KG but less than 400 KG of Gamma-butyrolactone;

List II Chemicals

\* \* \*

At least 52 KG but less than 91 KG of Toluene-;  
At least 250.8 G but less than 1 KG of Iodine.

(7) List I Chemicals **Level 18**

\* \* \*

At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 80 KG but less than 100 KG of Gamma-butyrolactone;

List II Chemicals

At least 110 G but less than 440 G of Acetic Anhydride;  
At least 11.75 KG but less than 47 KG of Acetone;  
At least 200 G but less than 800 G of Benzyl Chloride;  
At least 10.75 KG but less than 43 KG of Ethyl Ether;  
At least 12 KG but less than 48 KG of Methyl Ethyl Ketone;  
At least 100 G but less than 400 G of Potassium Permanganate;  
At least 13 KG but less than 52 KG of Toluene-;  
At least 200.64 G but less than 250.8 G of Iodine.

(8) List I Chemicals **Level 16**

\* \* \*

At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 60 KG but less than 80 KG of Gamma-butyrolactone;



List II Chemicals

\* \* \*

At least 10.4 KG but less than 13 KG of Toluene;  
At least 150.48 G but less than 200.64 KG of Iodine.

(9) List I Chemicals

**Level 14**

\* \* \*

At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 40 KG but less than 60 KG of Gamma-butyrolactone;

List II Chemicals

\* \* \*

At least 7.8 KG but less than 10.4 KG of Toluene;  
At least 100.32 G but less than 150.48 G of Iodine.

(10) List I Chemicals

**Level 12**

\* \* \*

Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
Less than 40 KG of Gamma-butyrolactone;

List II Chemicals

\* \* \*

Less than 7.8 KG of Toluene;  
Less than 100.32 G of Iodine.

\* \* \*

**Proposed Amendment: Economic Crime Package**

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

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

guideline pursuant to §1B1.2.

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

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

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

**More than Minimal Planning:** *Section 2F1.1(b)(2) currently provides a two-level increase if the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim. The proposal deletes this enhancement from the consolidated guideline. The more than minimal planning enhancement is deleted due to the potential overlap between this enhancement and the sophisticated means enhancement. The scheme to defraud more than one victim enhancement is deleted for two reasons: (1) If the adjustment were retained unmodified in a consolidated guideline, it would apply to cases currently sentenced under §2B1.1 where it is not currently applicable; and (2) in its current form it might be hard to justify providing a two-level increase in every case in which there is more-than-one victim, particularly in the face of the new Chapter Three adjustment in the vulnerable victim guideline (§3A1.1) that provides (only) a two-level increase if the offense involved "a large number of vulnerable victims."*

*As an alternative to the scheme to defraud more than one victim enhancement, this amendment provides an enhancement based on the number of victims, to provide additional punishment for offenses involving multiple victims. The victim table proposes building in the current "mass-marketing" enhancement as an alternative way of triggering the two-level increase provided if there were more than 4 and less than 50 victims. The amendment proposes that if*

*the proposed victim table is adopted, and a victim enhancement is applicable in a given case, then the enhancement under 3A1.1(b)(2) for "a large number of vulnerable victims" could not also apply in that case.*

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

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

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

*The fence test involves making an ultimate determination of whether (1) the stolen property was bought and sold, and (2) the stolen property transactions encouraged others to commit property crimes. In making this determination, the court considers factors such as the regularity of the defendant's operation, the volume of the business, the quick turnover of the stolen items, the value of the stolen items, the sophistication of the defendant's operation, any use of a legitimate business to facilitate the turnover of the stolen items, the defendant's connections with thieves and purchasers of the stolen items, and the use of technology and communications.*

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

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

### ***College Scholarship Fraud***