

~~or Use of Special Skill).~~

2. Custody, Care, or Supervisory Control Enhancement.—Subsection (b)(5) is intended to have broad application and includes offenses involving a victim less than 18 years of age 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. Inapplicability of Enhancement.—If the enhancement in subsection (b)(5) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill)
4. Application of Subsection (b)(6).—

- (A) Misrepresentation of Participant's Identity.—The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(6)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

~~Subsection (b)(6)(B) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.~~

- (B) Use of a Computer or Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if a computer or an interactive computer service was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct;

or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

5. Upward Departure Provision.—If a victim was sexually abused by more than one participant, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).

[Option 2:

6. Application of Subsection (b)(7).—Subsection (b)(7) is intended to apply in cases in which the offense involved the production of child pornography. For purposes of this subsection, "child pornography" has the meaning given that term in 18 U.S.C. § 2256.]

* * *

§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: 18

(1) ~~24, if the offense involved (A) a violation of chapter 117 of title 18, United States Code; and (B)(i) the commission of a sexual act; or (ii) sexual contact;~~

(2) ~~21, if the offense (A) involved a violation of chapter 117 of title 18, United States Code; but (B) did not involve (i) the commission of a sexual act; or (ii) sexual contact; or~~

(3) ~~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.

(2) ~~If subsection (b)(1) does not apply; and~~

(A) ~~the offense involved the knowing misrepresentation of a participant's identity to (i) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (ii) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct; or~~

~~(B) a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct,~~

~~increase by 2 levels.~~

~~(3) If a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct, increase by 2 levels.~~

~~(4) If (A) subsection (a)(1) applies; and (B) none of subsections (b)(1) through (b)(3) applies, decrease by 6 levels:~~

(2) If (A) subsection (b)(1) does not apply; and (B)(i) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct or a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct; or (ii) a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct, increase by 2 levels.

(3) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct, increase by 2 levels.

* * *

Commentary

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Application Notes:

1. Definitions.—For purposes of this guideline:

"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"Participant" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).

"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).~~

~~"Sexual contact" has the meaning given that term in 18 U.S.C. § 2246(3).~~

~~"Victim" means (A) an individual who, except as provided in subdivision (B), had not attained the age of 16 years; or (B) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.~~

"Victim" means (A) an individual who had not attained the age of 16 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 16 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.

2. Custody, Care, and or Supervisory Control Enhancement.—

(A) In General.—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.

(B) Inapplicability of Enhancement.—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).

~~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).~~

~~4. Misrepresentation of Identity.—The enhancement in subsection (b)(2)(A) applies in cases involving the misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct. Subsection (b)(2)(A) is intended to apply only to misrepresentations made directly to the victim or to a person who exercises custody, care, or supervisory control of the victim. Accordingly, the enhancement in subsection (b)(2)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the victim.~~

~~The misrepresentation to which the enhancement in subsection (b)(2)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.~~

~~In determining whether subsection (b)(2)(B)(ii) applies, the court should closely consider the~~

facts of the case to determine whether a participant's influence over the victim compromised the voluntariness of the victim's behavior.

In a case in which a participant is at least 10 years older than the victim, there shall be a rebuttable presumption, for purposes of subsection (b)(2)(B)(ii), that such participant unduly influenced the victim to engage in prohibited sexual conduct. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the victim.

~~*If the victim was threatened or placed in fear, the cross reference in subsection (c)(1) will apply.*~~

54. ~~*Use of Computer or Internet-Access Device.— Subsection (b)(3) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce the victim to engage in prohibited sexual conduct, or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct. Subsection (b)(3) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with the victim or with a person who exercises custody, care, or supervisory control of the victim. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the victim from an airline's Internet site.*~~

Use of Computer or an Interactive Computer Service.— Subsection (b)(3) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct. Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with the victim or with a person who exercises custody, care, or supervisory control of the victim. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the victim from an airline's Internet site.

65. * * *

76. * * *

Background: *This section applies to offenses involving the criminal sexual abuse of an individual who had not attained the age of 16 years. While this section applies to consensual sexual acts prosecuted under 18 U.S.C. § 2243(a) that would be lawful but for the age of the victim, it also applies to cases, prosecuted under 18 U.S.C. § 2243(a) or chapter 117 of title 18, United States Code, in which a participant took active measure(s) to unduly influence the victim to engage in prohibited sexual conduct and, thus, the voluntariness of the victim's behavior was compromised. A two-level enhancement is provided in subsection (b)(2) for such cases. It is assumed that at least a four-year age difference exists between the victim and the defendant, as specified in 18 U.S.C. § 2243(a). A two-level enhancement is provided in subsection (b)(1) for a defendant who victimizes a minor under his supervision or care. However, if the victim had not attained the age of 12 years, §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) will apply, regardless of the "consent" of the victim.*

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

- (a) Base Offense Level: 9[10][12]
- (b) Specific Offense Characteristics
 - (1) If the offense involved the knowing misrepresentation of a participant's identity to ~~(A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct,~~ increase by 2 levels.
 - (2) If a computer or an ~~Internet-access device~~ interactive computer service was used to ~~(A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct,~~ increase by 2 levels.

Commentary

Statutory Provision: 18 U.S.C. § 2243(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

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

"Participant" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

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

"Ward" means a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.

~~2. The enhancement in subsection (b)(1) applies in cases involving the misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to~~

~~engage in prohibited sexual conduct. Subsection (b)(1) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(1) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.~~

~~The misrepresentation to which the enhancement in subsection (b)(1) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.~~

- ~~3. Subsection (b)(2) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(2) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises~~

~~custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.~~

2. Misrepresentation of a Participant's Identity.—The enhancement in subsection (b)(1) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(1) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor.

The misrepresentation to which the enhancement in subsection (b)(1) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

3. Use of a Computer or an Interactive Computer Service.—Subsection (b)(2) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(2) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.

* * *

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

- (a) Base Offense Level:
- (1) **16**, if the offense ~~was committed by the means set forth~~ involved conduct described in 18 U.S.C. § 2241(a) or (b);
 - (2) **12**, if the offense ~~was committed by the means set forth~~ involved conduct described in 18 U.S.C. § 2242;
 - (3) **10**, otherwise.
- (b) Specific Offense Characteristics
- (1) If the victim had not attained the age of twelve years, increase by **4** levels; but if the resulting offense level is less than **16**, increase to level **16**.
 - (2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.
 - (3) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.
 - ~~(4) If the offense involved the knowing misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, increase by 2 levels.~~
 - ~~(5) If a computer or an Internet access device was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, increase by 2 levels.~~
 - ~~(6) If the offense involved a violation of chapter 117 of title 18, United States Code, increase by 3 levels.~~
 - (4) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.
 - (5) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.

* * *

Commentary

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Application Notes:

~~1. For purposes of this guideline—~~

~~—“Minor” means an individual who had not attained the age of 18 years.~~

1. Definitions.—For purposes of this guideline:

“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

“Participant” has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

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

2. Application of Subsection (a)(1).—~~The means set forth~~ Conduct described in 18 U.S.C. § 2241(a) or (b) ~~are:~~ ~~by~~ using force against the victim; ~~by~~ threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; ~~by~~ rendering the victim unconscious; or ~~by~~ administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.

3. Application of Subsection (a)(2).—~~The means set forth~~ Conduct described in 18 U.S.C. § 2242 ~~are:~~ ~~by~~ threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or ~~by~~ victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.

4. Custody, Care, or Supervisory Control.—

(A) In General.— Subsection (b)(3) 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.

(B) Inapplicability of Enhancement.—If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

~~5. If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).~~

65. Misrepresentation of a Participant's Identity.—The enhancement in subsection (b)(4) applies in cases involving the misrepresentation of a participant's identity to ~~(A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct.~~ Subsection (b)(4) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(4) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(4) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to ~~(A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct.~~ Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

~~76. Subsection (b)(5) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(5) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.~~

Use of a Computer or an Interactive Computer Service.—Subsection (b)(5) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(5) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years. ~~For cases involving consensual sexual contact involving victims that have achieved the age of 12 but are under age 16, the offense level assumes a substantial difference~~

~~in sexual experience between the defendant and the victim. If the defendant and the victim are similar in sexual experience, a downward departure may be warranted. For such cases, the Commission recommends a downward departure to the equivalent of an offense level of level 6.~~

Issues for Comment:

1. *The PROTECT Act contains substantial increases in penalties for defendants sentenced under a number of the sexual abuse and pornography guidelines, including new mandatory minimum penalties. Do the increased penalties provided in the PROTECT Act necessitate amending the base offense levels and specific offense characteristics in these guidelines to target more accurately the specific conduct of the defendant, thereby reserving the most severe penalties for the most serious offenders? Guidelines 2G2.1, 2G2.2, and 2G2.4 contain numerous specific offense characteristics addressing a wide variety of conduct involved in the production of, trafficking in, or possession of, child pornography. Currently, the application of these specific offense characteristics is based on either (A) the actions of only the defendant (e.g., §2G2.4(b)(3) provides a two-level increase "if the defendant's possession of the material resulted from the defendant's use of a computer"), or (B) all the conduct within the scope of relevant conduct (e.g., §2G2.1(b)(3) provides, in part, a two-level increase if the "offense involved" the use of a computer or Internet-access device). Specifically, the Commission requests comment on whether the specific offense characteristics in these guidelines should be based on all conduct within the scope of relevant conduct, or based on only the actions of the defendant; i.e., should the enhancement apply if the defendant used or directed the use of a computer, rather than if others within the defendant's jointly undertaken criminal activity used a computer?*
2. *Sections 401(i)(1)(B) and (C) of the PROTECT Act added new subsections in §§2G2.2 and 2G2.4 which provide a two- to five-level enhancement based on the number of child pornography "images" involved in the offense. See §§2G2.2(b)(6) and 2G2.4(b)(5). The PROTECT Act did not, however, define what constitutes an "image" for purposes of applying these new "image tables." The Commission seeks comment regarding whether a definition of "image," or instructions for counting images, for purposes of applying these subsections, is necessary. If the Commission provides instructions, how should the Commission decide how to count images? For example, is a photograph of two minors engaged in sexually explicit conduct to be considered one image, or two images? How should videos, films, or AVI files be considered? For example, if a video includes numerous scenes, each of which portrays the same minor engaging in sexually explicit conduct with a different adult, is each scene with a different adult to be considered a separate image?*
3. *The Commission seeks comment regarding whether it should address a circuit conflict involving the application of the specific offense characteristics in §§2G2.2 and 2G2.4 (effective April 30, 2003) for material portraying sadistic or masochistic conduct or other depictions of violence. Currently, the circuit courts are split on this issue, with three circuits finding that application of the enhancement requires proof that the defendant intended to possess or traffic material portraying sadistic or masochistic conduct, or other depictions of violence (see United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995); United States v.*

Burnette, 234 F.3d 1270 (6th Cir. 2000)(unpub.); *United States v. Tucker*, 136 F.3d 763 (11th Cir. 1998)), while the Seventh Circuit requires a strict liability standard (see *United States v. Richardson*, 238 F.3d 837 (7th Cir. 2001)). The Commission requests comment on whether it should resolve this circuit conflict. If so, how should the Commission handle this issue?

Further, the Commission seeks comment regarding whether it should provide a definition of sadistic or masochistic conduct or other depictions of violence for purposes of application of the specific offense characteristic. Circuit courts have struggled with whether material portraying sexual penetration of prepubescent minors is *per se* sadistic or violent; whether the enhancement requires that depictions contain material portraying bondage or restraints; whether sadistic or masochistic conduct requires purposefully degrading or humiliating conduct that causes mental, psychological, or emotional injury; or whether the conduct depicted must be painful, coercive, degrading, and abusive. See *United States v. Delmarle*, 99 F.3d 80 (2d Cir. 1996); *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995); *United States v. Turchen*, 187 F.3d 735 (7th Cir. 1999); *United States v. Parker*, 267 F.3d 839 (8th Cir. 2001); *United States v. Hall*, 312 F.3d 1250 (11th Cir. 2002). If the Commission provides a definition of these terms, what should that definition be?

Finally, some argue that material that depicts bestiality or excretory functions is just as harmful as material that depicts sadistic or masochistic conduct or other depictions of violence and should be treated accordingly. The Commission seeks comment regarding whether the enhancement for material portraying sadistic or masochistic conduct or other depictions of violence in §§2G2.2, 2G2.4, and 2G3.1 (as well as the proposed enhancement in §2G2.1) should be expanded to include material portraying bestiality or excretory functions.

4. The Commission seeks comment regarding which guideline is the most appropriate for violations of 18 U.S.C. § 2425, relating to use of interstate facilities to transport information about a minor. Section 2425 prohibits the use of interstate facilities to transmit the name, address, telephone number, social security number, or e-mail address of a minor, with the intent to encourage, entice, offer, or solicit any person to engage in prohibited sexual conduct with that minor. Violations of this section carry a statutory maximum term of imprisonment of five years and are currently covered by §2G1.1 (proposed §2G1.3). Other offenses covered by §2G1.1 carry a five year mandatory minimum term of imprisonment and substantially higher statutory maximums. Some practitioners claim that section 2425 offenses might be more like harassment or threatening communications offenses covered by §2A6.1 (Threatening or Harassing Communications). Is §2G1.1 (proposed §2G1.3) or §2A6.1 the more appropriate guideline for section 2425 offenses? If §2G1.1 (proposed §2G1.3) is not the most appropriate guideline, what guideline should be used to sentence violators of section 2425? Is there conduct specific to section 2425 offenses that necessitates the addition of any specific offense characteristic (e.g. age, intent to encourage, entice, offer, or solicit any person to engage in prohibited sexual conduct with a minor)?
5. The Commission seeks comment regarding whether the offense levels in Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse), specifically, §§2A3.1, 2A3.2, and 2A3.3, 2A3.4, should be increased to maintain proportionality with increases proposed for the Chapter Two, Part G guidelines, in response to statutory penalty changes provided by the PROTECT Act. If so

increased, what should be the appropriate offense levels? Are there additional specific offense characteristics, cross references, or departure considerations that should be added to these guidelines? Additionally, how should the Commission address the interaction between the pattern of activity enhancement at §4B1.5 (Repeat and Dangerous Sex Offender Against Minor) and offenses sentenced under §2A3.2. The PROTECT Act changed the definition of pattern of activity so that, instead of requiring the abuse of two minors on two separate occasions, a pattern of activity now requires two separate occasions of prohibited sexual conduct with only one minor. Therefore, under the new definition, repeat acts against one minor will lead to a five-level increase under §4B1.5. Preliminary data suggest this enhancement will apply to the majority of defendants sentenced at §2A3.2. Thus, should the Commission consider this enhancement when deciding whether to increase the base offense level at §2A3.2?

6. *The Commission requests comment regarding whether the guidelines in Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse) and Chapter Two, Part G (Offenses Involving Commercial Sexual Acts, Sexual Exploitation of Minors, and Obscenity) should provide an enhancement if the offense involved incest. Some commentators have argued that offenses involving incest result in a violation of trust, making these offenses more egregious than offenses in which a defendant has care, custody, or control of the victim but is not a family member. If the Commission added this enhancement to the Chapter Two, Part A, Subpart 3 offenses, should the enhancement apply as an alternative or as an additional enhancement to the current two-level enhancement that applies "if the victim was in the custody, care, or supervisory control of the defendant"? Furthermore, if the Commission added this enhancement, what relationships should be covered under the definition of incest?*

PROPOSED AMENDMENT 2: EFFECTIVE COMPLIANCE PROGRAMS IN CHAPTER EIGHT

Synopsis of Proposed Amendment: *The proposed amendment is intended to provide greater guidance to organizations and courts regarding the criteria for an effective program to prevent and detect violations of the law ("compliance programs"). The proposed amendment adds to Chapter Eight, Part B, a new guideline, §8B2.1 (Effective Program to Prevent and Detect Violations of Law), that identifies the purposes of an effective compliance program, sets forth seven minimum steps for such a program, and provides guidance for their implementation. This proposed amendment was developed by the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines empaneled by the Commission for the purpose of reviewing the general effectiveness of the guidelines for organizations, with particular emphasis on examining the criteria for an effective compliance program. The Advisory Group's review and analysis can be found in its report of October 7, 2003, to the Commission at www.ussc.gov.*

Under subsection (g) of §8C2.5 (Culpability Score), the existence of an effective compliance program is a mitigating factor that reduces an organization's culpability score and ultimately its fine range. Also, the implementation of a compliance program may be a condition of probation for organizations under §8D1.4(c) (Recommended Conditions of Probation-Organizations).

The proposed amendment incorporates the seven minimum steps for a compliance program, currently located in the commentary to §8A1.2 (Application Instructions-Organizations) at Application Note 3(k), into a new guideline at §8B2.1 in order to emphasize the importance of compliance programs and provide more prominent guidance on the attributes of such programs. The proposed amendment defines the obligations and purposes of such programs, adds more detail to the seven minimum requirements, and provides definitions throughout the associated commentary.

The proposed amendment expands the scope of the objective of a compliance program by defining the term "violation of law" more broadly than in the current guidelines, which refer only to violations of criminal law and prevention of criminal conduct. The proposed amendment expands the objective of a compliance program more broadly to include prevention and detection of "violations of any law, whether criminal or noncriminal (including a regulation), for which the organization is, or would be, liable." This language also replaces the prior reference to "employees and agents", relying instead on the legal standard of vicarious liability.

The proposed amendment retains the requirement that an organization exercise due diligence to prevent and detect violations of law, and adds at subsection (a) the requirement that an organization shall also "otherwise promote an organizational culture that encourages a commitment to compliance with the law." This proposed addition is intended to reflect the emphasis on ethics and values incorporated into recent legislative and regulatory reforms, as well as the proposition that compliance with all laws is the expected behavior within organizations.

The proposed amendment retains the existing seven minimum steps of an effective compliance program but provides greater guidance regarding some of the requirements by adding definitions and clarifying terms at subsection (b). First, for the requirement of the "establishment of compliance standards and procedures that are reasonably capable of reducing the prospect of criminal conduct", Application Note 1 defines "compliance standards and procedures" as "standards of conduct and

internal control systems that are reasonably capable of reducing the likelihood of violations of law."

Second, for the requirement that "specific individuals within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance", subsection (b)(2) defines the specific roles and reporting relationships of particular categories of high-level personnel with respect to compliance programs. In particular, the proposed amendment provides that the "organizational leadership shall be knowledgeable about the content and operation of the program to prevent and detect violations of law." The accompanying commentary at Application Note 1 defines "organizational leadership" as "(A) high-level personnel of the organization; (B) high-level personnel of a unit of the organization; and (C) substantial authority personnel" and retains existing definitions for the terms "high-level personnel of the organization" and "substantial authority personnel".

The proposed amendment also provides at subsection (b)(2) that the "organization's governing authority shall be knowledgeable about the content and operation of the program to prevent and detect violations of the law and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of law." Application Note 1 defines "governing authority" as "(A) Board of Directors, or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization." Subsection (b)(2) retains the existing requirement that "specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility for the program," and specifies that their responsibility is to "ensure the implementation and effectiveness of the program." The proposed amendment also requires that the individual responsible for compliance be given adequate resources and authority to carry out such responsibility, and provides that such individual shall report directly to the governing authority.

Third, the proposed amendment at subsection (b)(3) replaces the current requirement that substantial authority personnel be screened for their "propensity to engage in violations of law" with a requirement that the organization "use reasonable efforts and due diligence not to include within the substantial authority personnel any individual whom the organization knew, or should have known, has a history of engaging in violations of law or other conduct inconsistent with an effective program". For purposes of this subsection only, the proposed amendment defines the term "violations of law" as "any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation)." This is meant to ensure that an individual is screened on the basis of his or her culpability and not on the basis of an organization's vicarious liability. The corresponding commentary enumerates factors to be considered in this determination, among them, the recency of the individual's violations of law and other misconduct, the relatedness of the individual's violations of law and other misconduct to his or her responsibilities, and whether the individual has engaged in a pattern of such violations of law and other misconduct.

Fourth, the proposed amendment at subsection (b)(4) makes compliance training a requirement, and specifically extends the training requirement to the upper levels of an organization as well as to the organization's employees and agents, as appropriate.

Fifth, the proposed amendment at subsection (b)(5) expands the existing criterion for using auditing and monitoring systems by expressly providing that such systems are to be designed to detect violations of law. The proposed amendment adds the specific requirement that there be periodic evaluation of the effectiveness of its compliance program. The proposed amendment replaces the

existing reference to "reporting systems without fear of retribution" with the more specific requirement for the implementation of "mechanisms to allow for anonymous reporting." The proposed amendment expands the stated focus of internal reporting from "the criminal conduct . . . of others" to using internal systems for both "seeking guidance and reporting potential or actual violations of law."

Sixth, the proposed amendment at subsection (b)(6) broadens the existing criterion that the compliance standards be enforced through disciplinary measures by adding that such standards also be encouraged through "appropriate incentives to perform in accordance with a [compliance] program." Finally, at subsection (b)(7) the amendment retains the existing requirement that an organization take reasonable steps to respond to and prevent further similar violations of law.

In addition to the seven criteria for a compliance program, the proposed amendment expressly provides at subsection (c) that ongoing risk assessment is an essential component of the design, implementation, and modification of an effective program. The proposed amendment includes at Application Note 5(A) certain requirements in conjunction with the performance of risk assessments, namely, that organizations assess the nature and seriousness of potential violations of law, the likelihood that certain violations of law may occur because of the nature of the organization's business, and the prior history of the organization. Corresponding commentary specifies that organizations must prioritize the actions taken to implement an effective compliance program and modify such actions in light of the risks identified in the risk assessment.

The proposed amendment also provides additional guidance with respect to the implementation of compliance programs by small organizations by making more frequent references to small organizations throughout the commentary and providing illustrations (e.g., §8B2.1, Application Note 2(B)(ii)).

This proposed amendment also makes two changes to the factors that affect the culpability score of an organization under §8C2.5 (Culpability Score). First, rather than precluding an organization from obtaining the compliance program credit if certain categories of high-level personnel are involved in the offense of conviction, the proposed subsection (f) establishes that "an offense by an individual within high-level personnel of the organization results in a rebuttable presumption" that effective prevention and detections program did not exist.

Under the existing guidelines, an organization cannot receive the three-point reduction in its culpability score under §8C2.5(f) if any one of three categories of individuals participated in, condoned, or was willfully ignorant of the offense: (1) an individual within high-level personnel of the organization; (2) a person within high-level personnel of a unit having more than 200 employees and within which the offense was committed; or (3) an individual responsible for the administration or enforcement of a compliance program. The existing guidelines also provide for a rebuttable presumption that an organization did not have an effective compliance program if an individual within substantial authority personnel participated in an offense. The proposed amendment provides for a rebuttable presumption that the organization did not have an effective compliance program where high-level personnel of the organization participated in, condoned, or were wilfully ignorant of the offense. This modification is intended to assist smaller organizations that currently may be automatically precluded, because of their size, from arguing for a culpability score reduction for their compliance efforts under §8C2.5(f).

Second, the proposed amendment addresses concerns about the relationship between obtaining credit under subsection (g) of §8C2.5 and waiving the attorney-client privilege and the work product protection doctrine. Pursuant to §8C2.5(g)(1) and (2), an organization's culpability score will be reduced if it "fully cooperated in the investigation" of its wrongdoing, among other factors. The Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines studied the relationship between waivers and §8C2.5(g) by obtaining testimony and conducting its own research, including a survey of United States Attorney's Offices (all of which are described at Part V of the Advisory Group Report of October 17, 2003, located at www.ussc.gov). The commentary in the proposed amendment addresses some of these concerns by providing that waiver of the attorney-client privilege and of work product protections "is not a prerequisite to a reduction in culpability score under subsection (g)" but in some circumstances "may be required in order to satisfy the requirements of cooperation."

Proposed Amendment:

CHAPTER EIGHT - SENTENCING OF ORGANIZATIONS

Introductory Commentary

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting ~~criminal-conduct~~ violations of law.

This chapter reflects the following general principles: First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused. Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets. Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the highest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by the steps taken by the organization prior to the offense to prevent and detect ~~criminal-conduct~~ violations of law, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed. Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future ~~criminal conduct~~ violations of law.

PART A - GENERAL APPLICATION PRINCIPLES

* * *

§8A1.2. Application Instructions - Organizations

- (a) Determine from Part B, Subpart 1 (Remedying Harm from Criminal Conduct) the sentencing requirements and options relating to restitution, remedial orders, community service, and notice to victims.
- (b) Determine from Part C (Fines) the sentencing requirements and options relating to fines:

* * *

- (2) Otherwise, apply §8C2.1 (Applicability of Fine Guidelines) to identify the counts for which the provisions of §§8C2.2 through 8C2.9 apply. For such counts:

* * *

- (D) Apply §8C2.5 (Culpability Score) to determine the culpability score. To determine whether the organization had an effective program to prevent and detect violations of law for purposes of §8C2.5(f), apply §8B2.1 (Effective Program to Prevent and Detect Violations of Law).

* * *

Commentary

Application Notes:

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- 3. *The following are definitions of terms used frequently in this chapter:*

* * *

- (c) *"Substantial authority personnel" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel of the organization, individuals who exercise substantial supervisory authority (e.g., a plant manager, a sales manager), and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a*

case-by-case basis.

* * *

- ~~(k) — An "effective program to prevent and detect violations of law" means a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. Due diligence requires at a minimum that the organization must have taken the following types of steps:~~
- ~~(1) — The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.~~
 - ~~(2) — Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.~~
 - ~~(3) — The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.~~
 - ~~(4) — The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.~~
 - ~~(5) — The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.~~
 - ~~(6) — The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.~~
 - ~~(7) — After an offense has been detected, the organization must have taken all~~

~~reasonable steps to respond appropriately to the offense and to prevent further similar offenses -- including any necessary modifications to its program to prevent and detect violations of law.~~

~~The precise actions necessary for an effective program to prevent and detect violations of law will depend upon a number of factors. Among the relevant factors are:~~

- ~~(i) Size of the organization -- The requisite degree of formality of a program to prevent and detect violations of law will vary with the size of the organization: the larger the organization, the more formal the program typically should be. A larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and other agents.~~
- ~~(ii) Likelihood that certain offenses may occur because of the nature of its business -- If because of the nature of an organization's business there is a substantial risk that certain types of offenses may occur, management must have taken steps to prevent and detect those types of offenses. For example, if an organization handles toxic substances, it must have established standards and procedures designed to ensure that those substances are properly handled at all times. If an organization employs sales personnel who have flexibility in setting prices, it must have established standards and procedures designed to prevent and detect price-fixing. If an organization employs sales personnel who have flexibility to represent the material characteristics of a product, it must have established standards and procedures designed to prevent fraud.~~
- ~~(iii) Prior history of the organization -- An organization's prior history may indicate types of offenses that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct. An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective program to prevent and detect violations of law.~~

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**PART B - REMEDYING HARM FROM CRIMINAL CONDUCT,
AND PREVENTING AND DETECTING VIOLATIONS OF LAW**

1. REMEDYING HARM FROM CRIMINAL CONDUCT

~~* * *~~

2. PREVENTING AND DETECTING VIOLATIONS OF LAW

§8B2.1.

Effective Program to Prevent and Detect Violations of Law

(a) To have an effective program to prevent and detect violations of law, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—

- (1) exercise due diligence to prevent and detect violations of law; and
- (2) otherwise promote an organizational culture that encourages a commitment to compliance with the law.

Such program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations of law. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting violations of law.

(b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with the law within the meaning of subsection (a) minimally require the following steps:

- (1) The organization shall establish compliance standards and procedures to prevent and detect violations of law.
- (2) The organizational leadership shall be knowledgeable about the content and operation of the program to prevent and detect violations of law.

The organization's governing authority shall be knowledgeable about the content and operation of the program to prevent and detect violations of law and shall exercise reasonable oversight with respect to the implementation and effectiveness of the program to prevent and detect violations of law.

Specific individual(s) within high-level personnel of the organization shall be assigned direct, overall responsibility to ensure the implementation and effectiveness of the program to prevent and detect violations of law. Such individual(s) shall be given adequate resources and authority to carry out such responsibility and shall report directly to the governing authority or an appropriate subgroup of the governing authority regarding the implementation and effectiveness of the program to prevent and detect violations of law.

- (3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has a history of engaging in violations of law or other conduct inconsistent with an effective program to prevent and detect violations of law.

- (4) (A) The organization shall take reasonable steps to communicate in a practical manner its compliance standards and procedures, and other aspects of the program to prevent and detect violations of law, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individual's respective roles and responsibilities.
 - (B) The individuals referred to in subdivision (A) are the members of the governing authority, the organizational leadership, the organization's employees, and, as appropriate, the organization's agents.
 - (5) The organization shall take reasonable steps—
 - (A) to ensure that the organization's program to prevent and detect violations of law is followed, including using monitoring and auditing systems that are designed to detect violations of law;
 - (B) to evaluate periodically the effectiveness of the organization's program to prevent and detect violations of law; and
 - (C) to have a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations of law without fear of retaliation, including mechanisms that allow for anonymous reporting.
 - (6) The organization's program to prevent and detect violations of law shall be promoted and enforced consistently through appropriate incentives to perform in accordance with such program and disciplinary measures for engaging in violations of law and for failing to take reasonable steps to prevent or detect violations of law.
 - (7) After a violation of law has been detected, the organization shall take reasonable steps to respond appropriately to the violation of law and to prevent further similar violations of law, including making any necessary modifications to the organization's program to prevent and detect violations of law.
- (c) In implementing subsection (b), the organization shall conduct ongoing risk assessment and take appropriate steps to design, implement, or modify each step set forth in subsection (b) to reduce the risk of violations of law identified by the risk assessment.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

"Compliance standards and procedures" means standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law.

"Governing authority" means the (A) the Board of Directors, or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.

"Organizational leadership" means (A) high-level personnel of the organization; (B) high-level personnel of a unit of the organization; and (C) substantial authority personnel. The terms "high-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations). The term "high-level personnel of a unit of the organization" has the meaning given that term in the Commentary to §8C2.5 (Culpability Score).

"Violations of law" means violations of any law, whether criminal or noncriminal (including a regulation), for which the organization is, or would be, liable, or in the case of Application Note 4(A), for which the individual would be liable.

2. Factors to Consider in Meeting Requirements of Subsections (a) and (b).—

(A) In General.—Each of the requirements set forth in subsections (a) and (b) shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that shall be considered include (i) the size of the organization, (ii) applicable government regulations, and (iii) any compliance practices and procedures that are generally accepted as standard or model practices for businesses similar to the organization.

(B) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of subsections (a) and (b), including the necessary features of the organization's compliance standards and procedures, depend on the size of the organization. A larger organization generally shall devote more formal operations and greater resources in meeting such requirements than shall a smaller organization.

(ii) Small Organizations.—In meeting the requirements set forth in subsections (a) and (b), small organizations shall demonstrate the same degree of commitment to compliance with the law as larger organizations, although generally with less formality and fewer resources than would be expected of larger organizations. While each of the requirements set forth in subsections (a) and (b) shall be substantially satisfied by all organizations, small organizations may be able to establish an effective program to prevent and detect violations of

law through relatively informal means. For example, in a small business, the manager or proprietor, as opposed to independent compliance personnel, might perform routine audits with a simple checklist, train employees through informal staff meetings, and perform compliance monitoring through daily "walk-arounds" or continuous observation while managing the business. In appropriate circumstances, such reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a much larger organization, would only be demonstrated through more formally planned and implemented systems.

- (C) Applicable Government Regulations.—The failure of an organization to incorporate within its program to prevent and detect violations of law any standard required by an applicable government regulation weighs against a finding that the program was an "effective program to prevent and detect violations of law" within the meaning of this guideline.

3. Application of Subsection (b)(2).—

- (A) Governing Authority.—The responsibility of the governing authority under subsection (b)(2) is to exercise reasonable oversight of the organization's efforts to ensure compliance with the law. In large organizations, the governing authority likely will discharge this responsibility through oversight, whereas in some organizations, particularly small ones, it may be more appropriate for the governing authority to discharge this responsibility by directly managing the organization's compliance efforts.
- (B) High-Level Personnel.—The organization has discretion to delineate the activities and roles of the specific individual(s) within high-level personnel of the organization who are assigned overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law; however, the individual(s) must be able to carry out their overall and direct responsibility consistent with subsection (b)(2), including the ability to report to the governing authority, or to an appropriate subgroup of the governing authority, the effectiveness and operation of the program to detect and prevent violations of law.

In addition to receiving reports from the foregoing individual(s), individual(s) with day-to-day operational responsibility for the program should periodically provide to the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the program to detect and prevent violations of law.

- (C) Organizational Leadership.—Although the overall and direct responsibility to ensure the effectiveness and operation of the program to detect and prevent violations of law is assigned to specific individuals within high-level personnel of the organization, it is incumbent upon all individuals within the organizational leadership to be knowledgeable about the content and operation of the program to detect and prevent

violations of law pursuant to subsection (b)(2); to perform their assigned duties consistent with the exercise of due diligence; and to promote an organizational culture that encourages a commitment to compliance with the law, under subsection (a).

4. Application of Subsection (b)(3).—

- (A) Violations of Law.—Notwithstanding Application Note 1, "violations of law," for purposes of subsection (b)(3), means any official determination of a violation or violations of any law, whether criminal or noncriminal (including a regulation).
- (B) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.
- (C) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals consistent with Application Note 3, subdivision (C) so as to ensure that all individuals within the organizational leadership will perform their assigned duties with the exercise of due diligence, and the promotion of an organizational culture that encourages a commitment to compliance with the law, under subsection (a). With respect to the hiring or promotion of any specific individual within the substantial authority personnel of the organization, an organization shall consider factors such as: (i) the recency of the individual's violations of law and other misconduct (i.e., other conduct inconsistent with an effective program to prevent and detect violations of law); (ii) the relatedness of the individual's violations of law and other misconduct to the specific responsibilities the individual is anticipated to be assigned as part of the substantial authority personnel of the organization; and (iii) whether the individual has engaged in a pattern of such violations of law and other misconduct.

5. Risk Assessments under Subsection (c).—Risk assessment(s) required under subsection (c) shall include the following:

- (A) Assessing periodically the risk that violations of law will occur, including an assessment of the following:
 - (i) The nature and seriousness of such violations of law.
 - (ii) The likelihood that certain violations of law may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of violations of law may occur, the organization shall take reasonable steps to prevent and detect those types of violations of law. For example, an organization that, due to the nature of its business, handles toxic substances shall establish compliance standards and procedures designed to ensure that those substances are always handled properly. An organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish compliance

standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish compliance standards and procedures designed to prevent fraud.

(iii) The prior history of the organization. The prior history of an organization may indicate types of violations of law that it shall take actions to prevent and detect. Recurrence of similar violations of law creates doubt regarding whether the organization took reasonable steps to prevent and detect those violations of law.

(B) Periodically, prioritizing as most likely to occur and most serious, the actions taken under each step set forth in subsection (b), in order to focus on preventing and detecting the violations of law identified under subdivision (A).

(C) Modifying, as appropriate, the actions taken under any step set forth in subsection (b) to reduce the risk of violations of law identified in the risk assessment.

Background: This section sets forth the requirements for an effective program to prevent and detect violations of law. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107-204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this Chapter "are sufficient to deter and punish organizational criminal misconduct."

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of violations of law, both criminal and noncriminal, for which the organization would be vicariously liable. The prior diligence of an organization in seeking to detect and prevent violations of law has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.

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§8C2.4. Base Fine

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Commentary

Application Notes:

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2. Under 18 U.S.C. § 3571(d), the court is not required to calculate pecuniary loss or pecuniary gain to the extent that determination of loss or gain would unduly complicate or prolong the sentencing process. Nevertheless, the court may need to approximate loss in order to calculate offense levels under Chapter Two. See Commentary to §2B1.1 (~~Larceny, Embezzlement, and Other Forms of Theft~~)(Theft, Property Destruction, and Fraud). If loss is approximated for

purposes of determining the applicable offense level, the court should use that approximation as the starting point for calculating pecuniary loss under this section.

* * *

*Background: Under this section, the base fine is determined in one of three ways: (1) by the amount, based on the offense level, from the table in subsection (d); (2) by the pecuniary gain to the organization from the offense; and (3) by the pecuniary loss caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly. In certain cases, special instructions for determining the loss or offense level amount apply. As a general rule, the base fine measures the seriousness of the offense. The determinants of the base fine are selected so that, in conjunction with the multipliers derived from the culpability score in §8C2.5 (Culpability Score), they will result in guideline fine ranges appropriate to deter organizational ~~criminal conduct~~ violations of law and to provide incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting ~~criminal conduct~~ violations of law. In order to deter organizations from seeking to obtain financial reward through criminal conduct, this section provides that, when greatest, pecuniary gain to the organization is used to determine the base fine. In order to ensure that organizations will seek to prevent losses intentionally, knowingly, or recklessly caused by their agents, this section provides that, when greatest, pecuniary loss is used to determine the base fine in such circumstances. Chapter Two provides special instructions for fines that include specific rules for determining the base fine in connection with certain types of offenses in which the calculation of loss or gain is difficult, *e.g.*, price-fixing. For these offenses, the special instructions tailor the base fine to circumstances that occur in connection with such offenses and that generally relate to the magnitude of loss or gain resulting from such offenses.*

§8C2.5. Culpability Score

* * *

(f) Effective Program to Prevent and Detect Violations of Law

- (1) If the offense occurred ~~despite~~ even though the organization had in place, at the time of the offense, an effective program to prevent and detect violations of law, as provided in §8B2.1 (Effective Program to Prevent and Detect Violations of Law), subtract 3 points.

~~*Provided,* that this subsection does not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual responsible for the administration or enforcement of a program to prevent and detect violations of participated in, condoned, or was willfully ignorant of the offense. Participation of an individual within substantial authority personnel in an offense results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law.~~

~~*Provided, further,* that this subsection does not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.~~

- (2) This section does not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.
- (3) Participation in, condoning of, or willful ignorance of, an offense by an individual within high-level personnel of the organization results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law.

* * *

Commentary

Application Notes:

~~1. "Substantial authority personnel," "condoned," "willfully ignorant of the offense," "similar misconduct," "prior criminal adjudication," and "effective program to prevent and detect violations of law," are defined in the Commentary to §8A1.2 (Application Instructions - Organizations).~~

1. Definitions.—For purposes of this guideline, "condoned," "prior criminal adjudication," "similar misconduct," "substantial authority personnel," and "willfully ignorant of the offense" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations).

* * *

3. "High-level personnel of the organization" is defined in the Commentary to §8A1.2 (Application Instructions - Organizations). With respect to a unit with 200 or more employees, "high-level personnel of a unit of the organization" means agents within the unit who set the policy for or control that unit. For example, if the managing agent of a unit with 200 employees participated in an offense, three points would be added under subsection (b)(3); if that organization had 1,000 employees and the managing agent of the unit with 200 employees were also within high-level personnel of the ~~entire~~ organization in its entirety, four points (rather than three) would be added under subsection (b)(2).

* * *

~~10. The second proviso in subsection (f) Subsection (f)(2) contemplates that the organization will be allowed a reasonable period of time to conduct an internal investigation. In addition, no reporting is required by this proviso subsection (f)(2) if the organization reasonably concluded, based on the information then available, that no offense had been committed.~~

* * *

12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the

organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. If the defendant has satisfied the requirements for cooperation set forth in this note, waiver of the attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subsection (g). However, in some circumstances, waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation.

* * *

§8C2.8. Determining the Fine Within the Range (Policy Statement)

- (a) In determining the amount of the fine within the applicable guideline range, the court should consider:

* * *

- (9) partial but incomplete satisfaction of the conditions for one or more of the mitigating or aggravating factors set forth in §8C2.5 (Culpability Score); and
- (10) any factor listed in 18 U.S.C. § 3572(a): and
- (11) whether the organization failed to have, at the time of the instant offense, an effective program to prevent and detect violations of law within the meaning of §8B2.1 (Effective Program to Prevent and Detect Violations of Law).

Commentary

Application Notes:

* * *

4. Subsection (a)(6) provides that the court, in setting the fine within the guideline fine range, should consider any prior criminal record of an individual within high-level personnel of the organization or within high-level personnel of a unit of the organization. Since an individual within high-level personnel either exercises substantial control over the organization or a unit of the organization or has a substantial role in the making of policy within the organization or a unit of the organization, any prior criminal misconduct of such an individual may be relevant to the determination of the appropriate fine for the organization.

* * *

4. DEPARTURES FROM THE GUIDELINE FINE RANGE

* * *

§8C4.1. Substantial Assistance to Authorities - Organizations (Policy Statement)

* * *

Commentary

Application Notes:

1. Intent of Provision.—Departure under this section is intended for cases in which substantial assistance is provided in the investigation or prosecution of crimes committed by individuals not directly affiliated with the organization or by other organizations. It is not intended for assistance in the investigation or prosecution of the agents of the organization responsible for the offense for which the organization is being sentenced.
- [2. Waiver of Certain Privileges and Protections.—If the defendant has satisfied the requirements for substantial assistance set forth in subsection (b)(2), waiver of the attorney-client privilege and of work product protections is not a prerequisite to a motion for a downward departure by the government under this section. However, the government may determine that waiver of the attorney-client privilege and of work product protections is necessary to ensure substantial assistance sufficient to warrant a motion for departure.]

* * *

§8C4.10. Mandatory Programs to Prevent and Detect Violations of Law (Policy Statement)

If the organization’s culpability score is reduced under §8C2.5(f) (Effective Program to Prevent and Detect Violations of Law) and the organization had implemented its program in response to a court order or administrative order specifically directed at the organization, an upward departure may be warranted to offset, in part or in whole, such reduction.

Similarly, if, at the time of the instant offense, the organization was required by law to have an effective program to prevent and detect violations of law, but the organization did not have such a program, an upward departure may be warranted.

* * *

§8D1.1. Imposition of Probation - Organizations

- (a) The court shall order a term of probation:

* * *

- (3) if, at the time of sentencing, ~~an organization having 50 or more employees does not have an effective program to prevent and detect violations of law~~ (A) the organization (i) has 50 or more employees, or (ii) was otherwise required under law to have an effective program to prevent and detect violations of law; and (B) the organization does not have such a program;

* * *

§8D1.4. Recommended Conditions of Probation - Organizations (Policy Statement)

* * *

- (b) If probation is imposed under §8D1.1(a)(2), the following conditions may be appropriate to the extent they appear necessary to safeguard the organization's ability to pay any deferred portion of an order of restitution, fine, or assessment:

* * *

- (4) The organization shall be required to make periodic payments, as specified by the court, in the following priority: ~~(A)~~ restitution; ~~(B)~~ fine; and ~~(C)~~ any other monetary sanction.
- (c) If probation is ordered under §8D1.1(a)(3), (4), (5), or (6), the following conditions may be appropriate:
- (1) The organization shall develop and submit to the court ~~an~~ effective program to prevent and detect violations of law, consistent with §8B2.1 (Effective Program to Prevent and Detect Violations of Law). The organization shall include in its submission ~~including~~ a schedule for implementation of the program.
- (2) Upon approval by the court of a program referred to in subdivision (1) ~~to prevent and detect violations of law~~, the organization shall notify its employees and shareholders of its criminal behavior and its program ~~to prevent and detect violations of law~~ referred to in subdivision (1). Such notice shall be in a form prescribed by the court.
- (3) The organization shall make periodic reports to the court or probation officer, at intervals and in a form specified by the court, regarding the organization's progress in implementing the program referred to in subdivision (1) ~~to prevent and detect violations of law~~. Among other things, such reports shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the

organization learned since its last report.

- (4) In order to monitor whether the organization is following the program referred to in subdivision (1) ~~to prevent and detect violations of law~~, the organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

Commentary

Application Notes:

1. *In determining the conditions to be imposed when probation is ordered under §8D1.1(a)(3) through (6), the court should consider the views of any governmental regulatory body that oversees conduct of the organization relating to the instant offense. To assess the efficacy of a program to prevent and detect violations of law submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program. The court should approve any program that appears reasonably calculated to prevent and detect violations of law, ~~provided~~ as long as it is consistent with §8B2.1 (Effective Program to Prevent and Detect Violations of Law), and any applicable statutory and ~~or~~ regulatory requirements.*

* * *

~~§8D1.5. Violations of Conditions of Probation - Organizations (Policy Statement)~~

~~Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.~~

Commentary

~~Application Note:~~

- ~~1. *In the event of repeated, serious violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.*~~

* * *

PART F - VIOLATIONS OF PROBATION - ORGANIZATIONS

~~§8F1.1. Violations of Conditions of Probation - Organizations (Policy Statement)~~

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.

Commentary

Application Notes:

1. Appointment of Master or Trustee.—In the event of repeated, serious violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.
2. Conditions of Probation.—Mandatory and recommended conditions of probation are specified in §§8D1.3 (Conditions of Probation - Organizations) and 8D1.4 (Recommended Conditions of Probation - Organizations).

ISSUES FOR COMMENT:

1. Subsection (f) of §8C2.5 (Culpability Score) currently prohibits receipt of the three-point reduction in the culpability score for an effective program to prevent and detect violations of law if the organization unreasonably delayed reporting an offense to appropriate governmental authorities after becoming aware of the offense. The proposed amendment retains that prohibition. The Commission requests comment regarding whether the prohibition should be eliminated so that an organization could be considered for the reduction under §8C2.5(f) regardless of whether the organization unreasonably delayed reporting the offense after its detection. Elimination of this prohibition may be appropriate in light of the fact that §8C2.5(g) provides for a five-point decrease for cooperation with authorities, including reporting the offense to authorities within a reasonable time.
2. Subsection (f) of §8C2.5 also currently precludes receipt of the three-point reduction for an effective program to prevent and detect violations of law if certain high-level individuals within the organization participated in, condoned, or were willfully ignorant of the offense. The proposed amendment changes this automatic preclusion to a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law under such circumstances. The Commission requests comment regarding whether the automatic preclusion should continue to apply in the context of large organizations. Moreover, should the rebuttable presumption apply in the context of small organizations, in which high-level individuals within the organization almost necessarily will have been involved in the offense?
3. The reduction in the culpability score under §8C2.5(f) for an effective program to prevent and detect violations of law currently is a three-point reduction. Should the extent of that reduction be increased to four points given the heightened requirements for an effective program to prevent and detect violations of law under the proposed amendment?
4. Generally, are there factors or considerations that could be incorporated into Chapter Eight

(Sentencing of Organizations), particularly §8C1.2, to encourage small and mid-size organizations to develop and maintain compliance programs?

PROPOSED AMENDMENT 3: BODY ARMOR

Synopsis of Proposed Amendment: *This proposed amendment implements the new offense at 18 U.S.C. § 931, which was created by section 11009 of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273. Section 931 of title 18, United States Code, prohibits individuals with a prior state or federal felony conviction for a crime of violence from purchasing, owning, or possessing body armor. The statutory maximum term of imprisonment for 18 U.S.C. § 931 is three years.*

The proposed amendment provides a new guideline at §2K2.6 (Possessing, Purchasing, or Owning Body Armor by Violent Felons) because there is no other guideline that covers conduct sufficiently analogous to a violation of 18 U.S.C. § 931. Although §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) covers felons in possession of a firearm, the alternative base offense levels and specific offense characteristics of that guideline address offenses involving the more serious conduct of weapon possession or trafficking. The proposed new guideline provides a base offense level of [8][10][12].

The proposed amendment also (A) provides a specific offense characteristic for cases in which the body armor was possessed in connection with [a "crime of violence" or "drug trafficking crime"] [another offense]; and (B) adds an application note to §3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence) that addresses the interaction between the two guidelines.

§2K2.6 Possessing, Purchasing, or Owning Body Armor by Violent Felons

- (a) Base Offense Level: [8][10][12]
- (b) Specific Offense Characteristic
 - (1) If the defendant used the body armor in connection with [a crime of violence or drug trafficking crime] [another offense], increase by [4] levels.

Commentary

Statutory Provision: 18 U.S.C. 931.

Application Notes:

1. Definitions.—For purposes of this guideline:

["Crime of violence" has the meaning given that term in 18 U.S.C. § 16.

"Drug trafficking crime" has the meaning given that term in 18 U.S.C. § 924(c)(2).]

"Offense" has the meaning given that term in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. *Application of Subsection (b)(1).—Consistent with §1B1.3 (Relevant Conduct), the term "defendant", for purposes of subdivision (b)(1), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.*

§3B1.5. Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence

* * *

Commentary

Application Notes:

* * *

3. *If the defendant is convicted of 18 U.S.C. § 931, do not apply this enhancement with respect to that offense of conviction. However, if, in addition to the count of conviction under 18 U.S.C. § 931, the defendant is convicted of a crime of violence or a drug trafficking crime and the body armor was used in connection with that offense, this enhancement may be applied with respect to that crime of violence or drug trafficking crime.*

PROPOSED AMENDMENT 4: PUBLIC CORRUPTION

Synopsis of Proposed Amendment: *This proposed amendment addresses offenses involving public corruption. The proposed amendment consolidates §§2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) and 2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions). Also, the proposed amendment consolidates §§2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) and 2C1.6 (Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper). This proposed amendment aims at moving away from a guideline structure that relies heavily on monetary harm to determine the severity of the offense. While the proposed amendment generally provides increased punishment for all bribery and gratuity offenses, it also provides enhancements in both consolidated guidelines to address some of the aggravating factors that are involved in public corruption cases.*

Base Offense Level Increases

The proposed amendment increases the base offense level for all bribery and gratuity cases. Currently, bribery offenses sentenced under §2C1.1 or §2C1.7 begin with a base offense level of level 10. The proposed consolidated guideline at §2C1.1 would increase the base offense level for bribery cases to level [12]. With respect to gratuity offenses, §2C1.2 and §2C1.6 currently have a base offense level of level 7. The proposed consolidated guideline at §2C1.2 increases the base offense level to level [9]. The proposed increases in the base offense levels for bribery and gratuity cases will ensure continued proportionality between these cases and those sentenced under §§2B1.1 (Theft, Fraud, and Property Destruction) and 2J1.2 (Obstruction of Justice).

18 U.S.C. §§ 1341-1343 Offenses

Under a consolidated §2C1.1, 18 U.S.C. §§ 1341-1343 offenses, which are currently sentenced under §2C1.7, would be referenced in Appendix A (Statutory Index) to §2C1.1 provided that the offense was a fraud involving the deprivation of the intangible right to honest services, as set forth in the proposed parenthetical in the Commentary captioned "Statutory Provisions". The proposed amendment also builds on Application Note 12 in §2B1.1 (Theft, Property Destruction, and Fraud) which deals with application of the cross references in §2B1.1(c). The note currently explains that in cases in which broad fraud statutes are used primarily for jurisdictional purposes, the offense may be covered more appropriately by another guideline. The proposed amendment adds fraud involving the deprivation of the intangible right to honest services as an example of an offense more aptly covered by §2C1.1. The parenthetical and the expansion of Application Note 14 address concerns expressed by the Public Integrity Section of Department of Justice that 18 U.S.C. §§ 1341-1343 offenses be sentenced under §2C1.1 and not under the fraud guideline.

"Loss" and "Public Official" Enhancements

Under the current structure of §2C1.1, an enhancement exists that provides for the application of the greater of either (A) the number of offense levels from the fraud/theft loss table corresponding to the value of the payment, the benefit received or to be received in return for the payment, and the loss to

the government from the offense, whichever is greatest; and (B) 8 levels if the offense involved a payment to influence an elected official or an official holding a high-level decision-making or sensitive position. Similar enhancements exist in §§2C1.2 and 2C1.7. The proposed amendment makes two major changes to this enhancement in both proposed consolidated guidelines. First, it makes the enhancement cumulative so that the court would apply the appropriate number of levels from the loss table and also the revised public official enhancements, if applicable. Second, the proposed amendment proposes two new enhancements that focus on public officials. The first new enhancement modifies the current "high-level or sensitive position" enhancement. This enhancement provides [two][four] levels, and in §§2C1.1 and 2C1.2, a minimum offense level of 18 and 15, respectively, if the offense involved an unlawful payment for the purpose of influencing an official act of a public official in a high position of public trust. Although the concept is the same as the current enhancement, the proposed amendment draws on case law interpreting the current enhancement and on the notion of "public trust" from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) to give more guidance with respect to the type of case to which the enhancement applies. The proposed minimum offense level of level 18 in §2C1.1 and of level 15 in §2C1.2 ensures that an offense involving bribery of a higher level public official receives at least as high a sentence as it currently receives (i.e., that the new construct does not result in lower sentences). This enhancement will apply regardless of whether the defendant was the giver or the recipient of the bribe.

The corresponding application note also explains that public officials in high positions of public trust are distinguished from other public officials by their direct authority to make decisions for, or on behalf of, a government department or government agency, and also by their substantial influence over the decision-making process. The note also includes jurors in the scope of the enhancement's application in order to be consistent with case law regarding the current enhancement and with the scope of 18 U.S.C. § 201, the primary bribery and gratuity statute.

The second new enhancement pertaining to public officials provides a [two][four]- level increase if the defendant was a public official at the time of the offense. Commission data indicate that the defendant was a public official in approximately half of all public corruption cases. This enhancement recognizes that although all bribery involving public officials corrupts the public trust in government, it is the public official who violates that public trust. Currently, application notes in §§2C1.1, 2C1.2, 2C1.6, and 2C1.7 instruct the court not to apply the abuse of position of trust enhancement in §3B1.3 (Abuse of Position of Trust or Use of Special Skill), suggesting that in all cases sentenced under these guidelines, there is some element of abuse of public trust. The proposed enhancement would distinguish among cases in which there is an abuse of a position of public trust on the part of the public official.

Enhancement for Obtaining Entry into United States and for Obtaining Certain Documents

The proposed amendment also provides a new [two][four]- level enhancement if the offense involved an unlawful payment (A) to a United States Customs Border Protection Inspector to permit a person, a vehicle, or cargo to enter the United States; (B) to obtain a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) to obtain a government issued identification document. The definition of "government issued identification document" is derived from the definition of "identification document" in 18 U.S.C. § 1028(d)(3). This enhancement addresses cases in which a small payment may be given to obtain such a document, but the harm that results from

an individual obtaining an identification or immigration document cannot be quantified by use of the loss table. It also addresses cases, as identified by the Commission, in which a third party steers an individual to the public official in order for that individual to obtain, through bribery or a gratuity, such a document. The enhancement also recognizes the increased risk of domestic terrorism from foreign nationals who illegally enter or remain in the United States through the use of illegally obtained identification documents. Similarly, the enhancement addresses concerns identified by the Department of Homeland Security regarding bribery of customs inspectors who have the discretion to permit individuals, vehicles, and cargo into the United States without inspection.

Miscellaneous Amendments

The proposed amendment provides a definition of "public official" that builds on the current definition provided in §2C1.7. It modifies this definition by explicitly incorporating the notion that public officials hold positions of public trust. This definition is derived from relevant case law and statutory provisions, as well as §3B1.3 (Abuse of Position of Trust or Use of Special Skill). One difference to note regarding the definition of "public official" in §§2C1.1 and 2C1.2 is that the definition in §2C1.2 includes former public officials in order to be consistent with the scope of the primary gratuity statute, 18 U.S.C. § 201(c)(1).

The proposed amendment also (A) clarifies that an unlawful payment may be anything of value, not necessarily a monetary payment; (B) adds to §2C1.1 an application note currently found in §2C1.2 regarding consideration of whether the public official was the instigator of the offense as an appropriate factor to determine the placement of the sentence within the applicable sentencing guideline range; and (C) updates Appendix A (Statutory Index) by deleting references to §2C1.4, which was consolidated with §2C1.3 (Conflict of Interest; Payment or Receipt of Unauthorized Compensation), effective November 1, 2001.

Several issues for comment follow the proposed amendment.

Proposed Amendment:

Part One: Consolidation of §§2C1.1 and 2C1.7

§2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials

- (a) Base Offense Level: ~~10~~[12]
- (b) Specific Offense Characteristics
 - (1) If the offense involved more than one ~~bribe or extortion~~ incident, increase by 2 levels.
 - (2) ~~(If more than one applies, use the greater):~~

~~(A) If the value of the unlawful payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest (iA) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (iiB) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.~~

~~(B) If the offense involved a payment for the purpose of influencing an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels.~~

- (3) If the offense involved an unlawful payment for the purpose of influencing an official act of a public official in a high position of public trust, increase by [2][4] levels. If the resulting offense level is less than level 18, increase to level 18.]
- (4) If the defendant was a public official at the time of the offense, increase by [2][4] levels.
- (5) If the offense involved an unlawful payment (A) to a United States Customs Border Protection Inspector to permit a person, a vehicle, or cargo to enter the United States; (B) to obtain a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) to obtain a government issued identification document, increase by [2][4] levels.

* * *

Commentary

Statutory Provisions: 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3; 18 U.S.C. §§ 201(b)(1), (2), 872, 1341 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services), 1342 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services), 1343 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services), 1951. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. ~~"Official holding a high-level decision-making or sensitive position" includes, for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility.~~

Definitions.—For purposes of this guideline:

["Bribe" means anything of value given or accepted with the corrupt intent to influence, or to

be influenced in, an official act. A bribe involves an agreed upon quid pro quo.]

"Government issued identification document" means a document made or issued by or under the authority of the United States Government, a State, or a political subdivision of a State, which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

"Official act" has the meaning given that term in 18 U.S.C. § 201(a)(3).

"Public official," means (A) an officer or employee in, or selected to be in, a position of public trust in a federal, state, or local government department or government agency; or (B) a juror. "Public official" also includes a government contractor if such contractor is in a position of public trust with respect to a government department or government agency.

"Unlawful payment" means anything of value. An "unlawful payment" need not be monetary.

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

3. Application of Subsection (b)(3).—Subsection (b)(3) applies in cases involving federal, state, or local public officials who hold high positions of public trust. Such officials are distinguished from other public officials by their direct authority to make decisions for, or on behalf of, a government department or government agency, and by their substantial influence over the decision-making process. Examples of public officials in high positions of public trust include (A) a legislator; (B) a judge or magistrate; (C) a prosecuting attorney; (D) an agency administrator; and (E) a [supervisory] law enforcement officer. Certain individuals may be considered, for purposes of subsection (b)(3), to be a public official who holds a high position of public trust because of the importance of the process over which the individual has substantial influence, as for example, a juror.

The degree of public trust involved in a high position of public trust is greater than that required for application of §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Accordingly, the fact that a particular public official has managerial discretion does not, in and of itself, determine whether the public official holds a high position of public trust.

34. Inapplicability of §3B1.3.—Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) except where the offense level is determined under §2C1.1(c)(1), (2), or (3). In such cases, an adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may

apply.

45. Upward Departure Provisions.—In some cases the monetary value of the unlawful payment may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the adjustments in §2C1.1(b)(2), and §2C1.1(c)(1), (2), and (3). However, in cases in which the seriousness of the offense is still not adequately reflected, an upward departure is warranted. See Chapter Five, Part K (Departures).

5. ~~Where~~ In a case in which the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. ~~See Chapter Five, Part K (Departures)~~ §5K2.7 (Disruption of Governmental Function).

6. Related Payments.—Subsection (b)(1) provides an adjustment for offenses involving more than one incident of ~~either bribery or~~ extortion under color of official right, or fraud involving the deprivation of the intangible right to honest services. Related payments that, in essence, constitute a single incident ~~of bribery or extortion~~ (e.g., a number of installment payments for a single action) are to be treated as a single ~~bribe or extortion~~ incident, even if charged in separate counts.

In a case involving more than one incident of bribery, extortion, or fraud involving the deprivation of the intangible right to honest services, the applicable amounts under subsection (b)(2) (i.e., the greatest of the value of the unlawful payment, the benefit received or to be received, or the loss to the government) are determined separately for each incident and then added together.

7. Application of Subsection (c).—For the purposes of determining whether to apply the cross references in this section, the "resulting offense level" means the greater final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A-D).

8. Determining Sentence Within Guideline Range.—In some cases, the public official is the instigator of the offense. In others, a private citizen may be the instigator. This factor may appropriately be considered in determining the placement of the sentence within the applicable guideline range.

Background:

* * *

Section 2C1.1 also applies to offenses under 15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3. Such offenses generally involve a payment to a foreign public official, candidate for public office, or agent or intermediary, with the intent to influence an official act or decision of a foreign government or political party. Typically, a case prosecuted under these provisions will involve an intent to influence governmental action.

Section 2C1.1 also applies to fraud involving the deprivation of the intangible right to honest services of government officials under 18 U.S.C. §§ 1341-1343. Such fraud offenses typically involve an improper use of government influence that harms the operation of government in a manner similar to bribery offenses.

Offenses involving attempted bribery are frequently not completed because the victim reports the offense to authorities or is acting in an undercover capacity. Failure to complete the offense does not lessen the defendant's culpability in attempting to use public position for personal gain. Therefore, solicitations and attempts are treated as equivalent to the underlying offense.

* * *

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

~~(a) Base Offense Level: 10~~

~~(b) Specific Offense Characteristic~~

~~(1) (If more than one applies, use the greater):~~

~~(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount:~~

~~(B) If the offense involved an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels:~~

~~(c) Cross References~~

~~(1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense if the resulting offense level is greater than that determined above:~~

~~(2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense if the resulting offense level is greater than that determined above:~~

- ~~(3) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.~~
- ~~(4) If the offense is covered more specifically under §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe, Extortion Under Color of Official Right), §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), or §2C1.3 (Conflict of Interest), apply the offense guideline that most specifically covers the offense.~~

Commentary

~~Statutory Provisions: 18 U.S.C. §§ 371, 1341-1343.~~

~~Application Notes:~~

- ~~1. This guideline applies only to offenses committed by public officials or others acting with them that involve (A) depriving others of the intangible right to honest services (such offenses may be prosecuted under 18 U.S.C. §§ 1341-1343), or (B) conspiracy to defraud the United States by interfering with governmental functions (such offenses may be prosecuted under 18 U.S.C. § 371). "Public official," as used in this guideline, includes officers and employees of federal, state, or local government.~~
- ~~2. "Official holding a high-level decision-making or sensitive position" includes, for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility.~~
- ~~3. "Loss", for purposes of subsection (b)(1)(A), shall be determined in accordance with Application Note 2 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).~~
- ~~4. Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) except where the offense level is determined under §2C1.7(c)(1), (2), or (3). In such cases, an adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.~~
- ~~5. Where the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. See Chapter Five, Part K (Departures).~~
- ~~6. For the purposes of determining whether to apply the cross references in this section, the "resulting offense level" means the greater final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A-D).~~

~~Background: The maximum term of imprisonment authorized by statute under 18 U.S.C. §§ 371 and 1341-1343 is five years.~~

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

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Commentary

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Application Notes:

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14. Cross Reference in Subsection (c)(3).—Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials).

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18 U.S.C. § 209	2C1.4 2C1.3
	* * *
18 U.S.C. § 371	2A1.5, 2C1.7 , 2T1.9, 2K2.1 (if a conspiracy to violate 18 U.S.C. 18 U.S.C. 924(c)), 2X1.1

* * *

18 U.S.C. § 1341	2B1.1, 2C1.7 2C1.1
18 U.S.C. § 1342	2B1.1, 2C1.7 2C1.1
18 U.S.C. § 1343	2B1.1, 2C1.7 2C1.1

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18 U.S.C. § 1909	2C1.3, 2C1.4
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41 U.S.C. § 423(e)	2B1.1, 2C1.1, 2C1.7
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Part Two: Consolidation of §§2C1.2 and 2C1.6

§2C1.2. Offering, Giving, Soliciting, or Receiving a Gratuity

(a) Base Offense Level: ~~7~~[9]

(b) Specific Offense Characteristics

(1) If the offense involved more than one ~~gratuity~~ incident, increase by 2 levels.

(2) ~~(If more than one applies, use the greater):~~

~~(A)——~~If the value of the ~~gratuity~~unlawful payment (iA) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (iiB) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

~~(B)——~~If the ~~gratuity was given, or to be given, to an elected official or any official holding a high-level decision-making or sensitive position,~~ increase by ~~8~~ levels.

(3) If the offense involved an unlawful payment for the purpose of influencing an official act of a public official in a high position of public trust, increase by [2][4] levels. If the resulting offense level is less than level 15, increase to level 15.

(4) If the defendant was a public official at the time of the offense, increase by [2][4] levels.

(5) If the offense involved an unlawful payment (A) to a United States Customs Border Protection Inspector to permit a person, a vehicle, or cargo

to enter the United States; (B) to obtain a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) to obtain a government issued identification document, increase by [2][4] levels.

(c) Special Instruction for Fines - Organizations

- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the value of the unlawful payment.

Commentary

Statutory Provisions: 18 U.S.C. §§ 201(c)(1), 212-214, 217. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. ~~"Official holding a high-level decision-making or sensitive position" includes, for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility.~~

Definitions.—For purposes of this guideline:

"Government issued identification document" means a document made or issued by or under the authority of the United States Government, a State, or a political subdivision of a State, which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

["Gratuity" means anything of value given, or accepted for or because of an official act performed or to be performed.]

"Official act" has the meaning given that term in 18 U.S.C. § 201(a)(3).

"Public official," means (A) an officer or employee in, formerly in, or selected to be in, a position of public trust in a federal, state, or local government department or government agency; or (B) a juror. "Public official" also includes a government contractor if such contractor is in a position of public trust with respect to a government department or government agency.

"Unlawful payment" means anything of value. An "unlawful payment" need not be monetary.

2. Application of Subsection (b)(3).—Subsection (b)(3) applies in cases involving federal, state, or local public officials who hold high positions of public trust. Such officials are distinguished from other public officials by their direct authority to make decisions for, or on behalf of, a government department or government agency, and by their substantial influence over the decision-making process. Examples of public officials in high positions of public trust

include (A) a legislator; (B) a judge or magistrate; (C) a prosecuting attorney; (D) an agency administrator; and (E) a [supervisory] law enforcement officer. Certain individuals may be considered, for purposes of subsection (b)(3), to be a public official who holds a high position of public trust because of the importance of the process over which the individual has substantial influence, as for example, a juror.

The degree of public trust involved in a high position of public trust is greater than that required for application of §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Accordingly, the fact that a particular public official has managerial discretion does not, in and of itself, determine whether the public official holds a high position of public trust.

~~2.3.~~ Inapplicability of §3B1.3.—Do not apply the adjustment in §3B1.3 (Abuse of Position or Trust or Use of Special Skill).

~~3.4.~~ Determining Sentence Within Guideline Range.—In some cases, the public official is the instigator of the offense. In others, a private citizen who is attempting to ingratiate himself or his business with the public official may be the ~~initiator~~instigator. This factor may appropriately be considered in determining the placement of the sentence within the applicable guideline range.

~~4.5.~~ Related Payments.—Subsection (b)(1) provides an adjustment for offenses involving more than one incident. Related payments that, in essence, constitute a single gratuity (e.g., separate payments for airfare and hotel for a single vacation trip) are to be treated as a single gratuity, even if charged in separate counts.

Background: This section applies to the offering, giving, soliciting, or receiving of a gratuity to a public official in respect to an official act. ~~A corrupt purpose is not an element of this offense. An adjustment is provided where the value of the gratuity exceeded \$2,000, or where the public official was an elected official or held a high-level decision-making or sensitive position.~~ It also applies in cases involving (1) the offer to, or acceptance by, a bank examiner of a loan or gratuity; (2) the offer or receipt of anything of value for procuring a loan or discount of commercial bank paper from a Federal Reserve Bank; and (3) the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt.

~~§2C1.6. Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper~~

~~(a) Base Offense Level: 7~~

~~(b) Specific Offense Characteristic~~

~~(1) If the value of the gratuity (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.~~

Commentary

~~Statutory Provisions: 18 U.S.C. §§ 212-214, 217.~~

~~Application Note:~~

~~1. Do not apply the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill).~~

~~Background: Violations of 18 U.S.C. §§ 212 and 213 involve the offer to, or acceptance by, a bank examiner of a loan or gratuity. Violations of 18 U.S.C. § 214 involve the offer or receipt of anything of value for procuring a loan or discount of commercial paper from a Federal Reserve bank. Violations of 18 U.S.C. § 217 involve the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt. These offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.~~

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18 U.S.C. § 212	2C1.6 2C1.2
18 U.S.C. § 213	2C1.6 2C1.2
18 U.S.C. § 214	2C1.6 2C1.2
	* * *
18 U.S.C. § 217	2C1.6 2C1.2

ISSUES FOR COMMENT:

1. The Commission requests public comment regarding the proposed consolidation of §§2C1.1 and 2C1.7, and §§2C1.2 and 2C1.6. Should the Commission instead consolidate all four guidelines into one comprehensive guideline that would apply to bribery, gratuity, extortion under color of official right, and fraud involving the deprivation of the intangible right to honest services? For example, such a guideline could distinguish between bribery and gratuity offenses by alternative base offense levels in a structure that would be consistent with §2E5.1 (Offering, Accepting or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Plan). Should a consolidated §2C1.1 or §2C1.2 specifically include conspiracy and attempts? Alternatively, should the Commission maintain the current structure of Chapter Two, Part C (Offenses Involving Public Officials) and not consolidate any of the guidelines in that part?
2. The Commission requests comment regarding whether it should eliminate any or all of the cross references in §2C1.1. For example, the Commission has received input that the cross reference in subsection (c)(2) is confusing and may result in circular application of multiple cross references. This cross reference instructs the court to apply §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice) if the offense was committed to conceal, or obstruct justice in respect to, another offense. If §2J1.2 is applied, for example, and the offense involved obstructing the investigation or prosecution of an offense, than the cross reference in §2J1.2(c)(1) instructs the court to apply §2X3.1. For these reasons, should the Commission