

**United States Sentencing Commission Public Meeting Minutes
April 15, 2009**

Acting Chair Ricardo H. Hinojosa called the meeting to order at 3:01 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Ricardo H. Hinojosa, Acting Chair
- William B. Carr, Jr., Vice Chair
- Judge William K. Sessions, III, Vice Chair
- Dabney L. Friedrich, Commissioner
- Beryl A. Howell, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was present via telephone:

- Judge Ruben Castillo, Vice Chair

The following Commissioner was not present:

- Edward F. Reilly, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Judith Sheon, Staff Director
- Kenneth Cohen, General Counsel

The Acting Chair called for a motion to adopt the minutes of the January 13, 2009, public meeting. Commissioner Howell made a motion to adopt the minutes, with Vice Chair Carr seconding the motion. Hearing no discussion, the Acting Chair called for a vote, and the motion was adopted by voice vote.

Acting Chair Hinojosa thanked Ms. Sheon and the staff for their work during the Commission's amendment cycle. The Acting Chair also thanked the Department of Justice, the defense bar, and all other interested groups, including the Victims Advisory Group, Practitioners Advisory Group, Probation Officers Advisory Group, and everyone who testified before the Commission. The Acting Chair stated that the Commission's work could not be done without comment from the public. The Acting Chair also thanked the other commissioners for their efforts during the amendment cycle and their work to comply with the statutory requirements of the Sentencing Reform Act.

Ms. Sheon announced that the Commission would be hosting a data symposium in Washington, D.C., on May 5-7, 2009, aimed at informing researchers and other interested members of the public on how to use the Commission's publically-available data sets. Ms. Sheon thanked the staff for its hard work during the amendment cycle. She also thanked the commissioners on behalf of the staff for their leadership during the amendment cycle.

The Acting Chair called on Mr. Cohen to advise the Commission on possible votes to amend the sentencing guidelines.

Mr. Cohen stated that the first proposed amendment, incorporated herein as Exhibit A, is a multi-part amendment that makes various technical and conforming changes to the guidelines.

Part A of the proposed amendment addresses several instances in which the guidelines refer to another guideline or to a statute or rule but the reference has become incorrect or obsolete, including §§1B1.8 (Use of Certain Information); 2J1.1 (Contempt); 4B1.2 (Definitions of Terms used in Section 4B1.1); 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases); 5D1.2 (Term of Supervised Release); and Appendix A (Statutory Index).

Part B of the proposed amendment resolves certain technical issues that have arisen in the Guidelines Manual with respect to child pornography offenses, and amends §§2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor), 2G2.3 (Selling or Buying of Children for Use in the Production of Pornography), 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), and Appendix A (Statutory Index). Mr. Cohen advised the commissioners that a motion to adopt the proposed amendment would be in order, with an effective date of November 1, 2009, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa asked if there is a motion as suggested by Mr. Cohen. Vice Chair Carr made such a motion, with Commissioner Howell seconding. The Acting Chair called for discussion on the motion and, hearing no discussion, the Acting Chair called for a vote. The motion was adopted with the Acting Chair noting that at least four commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, incorporated herein as Exhibit B, clarifies Application Note 1 in §3C1.3 (Commission of Offense While on Release). The proposed amendment clarifies that the court determines the applicable guideline range for a defendant who committed an offense while on release and is subject to the enhancement at 18 U.S.C. § 3147 as

in any other case. At that point, the court determines an appropriate “total punishment” and divides the total sentence between the underlying offense and the section 3147 enhancement as the court considers appropriate. Mr. Cohen advised the commissioners that a motion to adopt the proposed amendment would be in order, with an effective date of November 1, 2009, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa asked if there is a motion as suggested by Mr. Cohen. Vice Chair Sessions made such a motion, with Commissioner Howell seconding. The Acting Chair called for discussion on the motion and, hearing no discussion, the Acting Chair called for a vote. The motion was adopted with the Acting Chair noting that at least four commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, incorporated herein as Exhibit C, clarifies guideline application issues regarding the sentencing of counterfeiting offenses involving “bleached notes.” Courts in different circuits have resolved differently the question of whether offenses involving bleached notes should be sentenced under §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) or §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). The proposed amendment resolves this issue by providing that an offense involving bleached notes is sentenced under §2B5.1. Specifically, the proposed amendment deletes Application Note 3 and revises the definition of “counterfeit” to more closely parallel relevant counterfeiting statutes. The proposed amendment also adds a prong to the enhancement at subsection (b)(2)(B) to cover a case in which the defendant controlled or possessed genuine United States currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed. In addition, the proposed amendment amends Appendix A by striking the reference to §2B1.1 for two offenses that do not include fraud as an element. Mr. Cohen advised the commissioners that a motion to adopt the proposed amendment would be in order, with an effective date of November 1, 2009, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa asked if there is a motion as suggested by Mr. Cohen. Commissioner Friedrich made such a motion, with Vice Chair Carr seconding. The Acting Chair called for discussion on the motion and, hearing no discussion, the Acting Chair called for a vote. The motion was adopted with the Acting Chair noting that at least four commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, incorporated herein as Exhibit D, is a multi-part amendment responding to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues.

Part A of the proposed amendment amends Appendix A to include offenses created or amended by the Housing and Economic Recovery Act of 2008, Pub. L. 110–289, and other similar

offenses. The new offense at 12 U.S.C. § 4636b is referenced to §2B1.1. The similar existing offense at 12 U.S.C. § 1818(j) is also referenced to §2B1.1. The new offense at 12 U.S.C. § 4641 is referenced to §2J1.1 and §2J1.5 (Failure to Appear by Material Witness), where similar existing offenses are referenced.

Part B of the proposed amendment amends Appendix A to include offenses upgraded from misdemeanors to felonies by the Consumer Product Safety Improvement Act of 2008, Pub. L. 110–314. These offenses (15 U.S.C. §§ 1192, 1197(b), 1202(c), 1263, 2068) are referenced to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product).

Part C of the proposed amendment amends Appendix A to include an offense created by the Veterans’ Benefits Improvement Act of 2008, Pub. L. 110–389. The new offense at 50 U.S.C. App. § 527(e) is referenced to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). The amendment also references 10 U.S.C. § 987(f), a similar Class A misdemeanor, to §2X5.2.

Part D of the proposed amendment amends Appendix A to include an offense created by the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162. The new offense at 18 U.S.C. § 117 is referenced to §2A6.2 (Stalking or Domestic Violence).

Part E of the proposed amendment amends Appendix A to include an offense created by the Child Soldiers Accountability Act of 2008, Pub. L. 110–340. The offense, 18 U.S.C. § 2442, is referenced to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade). The proposed amendment also includes technical and conforming changes.

Part F of the proposed amendment makes changes throughout the Guidelines Manual to reflect amendments made to the probation and supervised release statutes (18 U.S.C. §§ 3563, 3583) by the Judicial Administration and Technical Amendments Act of 2008, Pub. L. 110–406.

Part G of the proposed amendment responds to the Let Our Veterans Rest in Peace Act of 2008, Pub. L. 110–384, which directed the Commission to review and, if appropriate, amend the guidelines to “provide adequate sentencing enhancements” for any offense involving “desecration, theft, or trafficking” in a veteran’s grave marker. The amendment expands the scope of an existing specific offense characteristic at subsection (b)(6) of §2B1.1 to cover trafficking in a veteran’s grave marker.

Part H of the proposed amendment amends the child pornography guidelines, §2G2.1 and §2G2.2, to reflect modifications to the child pornography statutes (18 U.S.C. §§ 2251 *et seq.*) made by the Effective Child Pornography Prosecution Act of 2007, Pub. L. 110–358, and the PROTECT Our Children Act of 2008, Pub. L. 110–401.

Part I of the proposed amendment amends Appendix A so that the threat guideline, §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), is included on the list of guidelines to which 18 U.S.C. § 2280 and § 2332a are referenced.

Part J of the proposed amendment addresses subsection (a)(7) of 18 U.S.C. § 2252A, a new offense created by the PROTECT Our Children Act of 2008, Pub. L. 110–401. The offense makes it unlawful to knowingly produce with intent to distribute, or to knowingly distribute, “child pornography that is an adapted or modified depiction of an identifiable minor.” This offense is referenced in Appendix A to the child pornography distribution guideline, §2G2.2, by virtue of the fact that all offenses under section 2252A(a) are referenced to that guideline. The proposed amendment provides a base offense level of 18 for the new offense.

Mr. Cohen advised the commissioners that a motion to adopt the proposed amendment would be in order, with an effective date of November 1, 2009, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa asked if there is a motion as suggested by Mr. Cohen. Commissioner Howell made such a motion, with Vice Chair Carr seconding. The Acting Chair called for discussion on the motion. Commissioner Friedrich provided her views on Part J of the proposed amendment. She stated that she would vote in favor of the multi-part proposed amendment, but with respect to Part J, she would prefer an enhancement for producing such child pornography images with the intent to distribute. She believes that a defendant who produces such child pornography images (sometimes referred to as “morphed images”) with the intent to distribute them is more culpable than a defendant who only distributes them.

Commissioner Wroblewski thanked the Acting Chair, the commissioners, and staff on behalf of the Department of Justice. Commissioner Wroblewski stated that the Department of Justice’s comments on the Commission’s proposed priorities for this amendment cycle included the following themes: (1) concerns about imprisonment levels in the guidelines and a desire to look at possible structural reforms, including alternatives to incarceration; (2) new emerging crime problems, such as submersible vessels and morphed images; and (3) circuit conflicts. He stated that the Commission adopted an ambitious agenda, including holding a series of regional hearings. He pointed out that the Attorney General recently sent a letter to the Commission commending the Commission for these hearings and affirming the Department of Justice’s commitment to work with the Commission on larger systemic issues in federal sentencing and corrections policy.

Commissioner Wroblewski stated that the Department of Justice’s view on each of the proposed amendments can be found in the public comment it submitted to the Commission, and he will speak about only three proposed amendments. The first is Part J of the proposed amendment, which relates to morphed images. Commissioner Wroblewski stated the Department of Justice’s view that the new statute involves a number of different types of offense conduct. The Commission’s proposed amendment, he argued, will treat defendants who manufacture morphed

images, who do not distribute the images, the same way as defendants who possess child pornography involving real images of children. The Department of Justice does not think that is appropriate.

The second is Part B of the proposed amendment, which relates to consumer product safety. Commissioner Wroblewski stated that the Department of Justice believes that the proposed amendment fails to take into account the range of conduct in the statutes. He stated that the Commission is proposing to refer conduct that poses a real danger to the public to a guideline that, in the absence of fraud, will treat all people who violate the consumer product safety statutes at a level 6. Commissioner Wroblewski stated that the Department of Justice thinks that decision is inappropriate.

The third is Part E of the proposed amendment, which relates to child soldiers. Commissioner Wroblewski pointed out that the Department of Justice and the Chairman and Ranking Member of the Human Rights Subcommittee of the Senate Judiciary Committee have asked the Commission to take a longer look at human rights crimes and to consider creating a human rights guideline. Such crimes are a priority for the Department of Justice, and the new administration has asked Congress for a significant amount of money to ensure enforcement of human rights crimes. The Department of Justice has asked the Commission to review them comprehensively.

Regarding the morphed images proposed amendment, Commissioner Howell stated that the Commission is treating manufacturing of morphed child pornography images the same as distribution of child pornography, in part, because the new offense only criminalizes manufacturing with the intent to distribute; there is no crime for simple manufacturing of morphed child pornography images, nor for simple possession of morphed images. Distribution or intent to distribute is the salient factor in the new offense. Commissioner Howell pointed out that additionally this is a new offense and that prior versions of this law have been challenged constitutionally. She stated that it is reasonable with a new offense for the Commission to give a substantial base offense level of 18—particularly in light of the other specific offense characteristics in the child pornography trafficking guideline that take account of varying types of actual distribution—and study over time how the offense develops by looking at statistics.

With respect to the consumer products and child soldiers proposed amendments, Commissioner Howell stated that the Department of Justice asked the Commission to defer any action on these new crimes, and not even to refer those two new statutes to any guideline this amendment cycle. With respect to the consumer product offenses, she stated deferring action in order to create a new guideline would run counter to the Commission's goals of providing prompt guidance to the courts regarding new offenses and simplifying the guidelines. With respect to the child soldiers offense, she noted the Commission has had many discussions about and interest in considering a human rights guideline. Nevertheless, the discussions have shown that there likely will be a prolonged debate over the reach of such a guideline. She stated that rather than delaying any action on the important new child soldiers offense during the duration of that debate, the Commission determined that referring the offense to an appropriate guideline would allow

guidance to be provided to the courts pending the outcome of further comprehensive consideration of a new human rights guideline.

Vice Chair Sessions stated that he appreciated the comments of Commissioners Wroblewski and Howell and the correspondence the Commission received from the Attorney General. He stated that the Attorney General has voiced similar concerns that some of the commissioners share. The Attorney General, Vice Chair Sessions pointed out, is also interested in a number of issues—like human rights—that the Commission agrees should be on the forefront. Vice Chair Sessions stated that the Commission will be addressing human rights offenses in the near future. He further stated that he is looking forward to working with the Department of Justice to try to address the really important sentencing issues of the day, and he thanked the Department of Justice for inviting the Commission to join it in its work on these issues.

Hearing no further discussion, the Acting Chair called for a vote. The motion was adopted with the Acting Chair noting that at least four commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, incorporated herein as Exhibit E, amends §2B5.3 (Criminal Infringement of Copyright or Trademark) at subsection (b)(5) to clarify that the enhancement, which applies when the offense involved the risk of serious bodily injury, also applies when the offense involved the risk of death. The proposed amendment makes the language of this enhancement parallel to the corresponding enhancement in subsection (b)(13) of §2B1.1. This proposed amendment responds to the Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. 110–403. Mr. Cohen advised the commissioners that a motion to adopt the proposed amendment would be in order, with an effective date of November 1, 2009, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa asked if there is a motion as suggested by Mr. Cohen. Vice Chair Carr made such a motion, with Commissioner Friedrich seconding. The Acting Chair called for discussion on the motion and, hearing no discussion, the Acting Chair called for a vote. The motion was adopted with the Acting Chair noting that at least four commissioners voted in favor of the motion.¹

Mr. Cohen stated that the next proposed amendment, incorporated herein as Exhibit F, addresses a circuit conflict regarding the undue influence enhancement at subsection (b)(2)(B)(ii) of §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) and subsection (b)(2)(B) of §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). Courts have expressed differing views on two issues:

¹Commissioner Howell abstained from the discussion and the vote on this proposed amendment.

first, whether the undue influence enhancement can apply in a case involving attempted sexual conduct; and second, whether the undue influence enhancement can apply in a case in which the only “minor” involved is a law enforcement officer. The proposed amendment resolves the first issue by providing that the undue influence enhancement can apply in a case involving attempted sexual conduct. The proposed amendment resolves the second issue by providing that the undue influence enhancement does not apply in a case in which the only “minor” involved in the offense is an undercover law enforcement officer. Mr. Cohen advised the commissioners that a motion to adopt the proposed amendment would be in order, with an effective date of November 1, 2009, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa asked if there is a motion as suggested by Mr. Cohen. Vice Chair Sessions made such a motion, with Vice Chair Carr seconding. The Acting Chair called for discussion on the motion. Commissioner Friedrich stated that she does not share the view that the undue influence enhancement can never apply in a case in which the only “minor” involved is an undercover law enforcement officer posing as a child. Commissioner Friedrich stated that the enhancement should be focused on the conduct of the defendant, rather than the behavior and circumstances of the “minor.” According to Commissioner Friedrich, the question should be whether the defendant did or said things that would compromise the voluntariness of the “minor’s” behavior, and that answer would depend on the words exchanged, not on the content in the “minor’s” mind. For these reasons, Commissioner Friedrich stated, she respectively disagrees with the proposed amendment.

Hearing no further discussion, the Acting Chair called for a vote. The motion was adopted with the Acting Chair noting that at least four commissioners voted in favor of the motion, and one commissioner voted against the motion.

Mr. Cohen stated that the next proposed amendment, incorporated herein as Exhibit G, responds to the Court Security Improvement Act of 2007, Pub. L. 110–177 (the “Act”), and other related issues. The proposed amendment implements the directive in section 209 of the Act by amending §2A6.1 to provide a two-level enhancement for a case in which the defendant is convicted under 18 U.S.C. § 115, made a public threatening communication, and knew or should have known that the public threatening communication created a substantial risk of inciting others to violate 18 U.S.C. § 115. The proposed amendment also expands the range of guidelines to which offenses under 18 U.S.C. § 1513 (Retaliating against a witness, victim, or an informant) are referenced. To more adequately account for the range of conduct covered by this offense, the proposed amendment amends Appendix A to add references for 18 U.S.C. § 1513 to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), and 2B1.1, in addition to §2J1.2 (Obstruction of Justice). Mr. Cohen advised the commissioners that a motion to adopt the proposed amendment would be in order, with an effective date of November 1, 2009, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa asked if there is a motion as suggested by Mr. Cohen. Commissioner Howell made such a motion, with Commissioner Friedrich seconding. The Acting Chair called for discussion on the motion. Vice Chair Castillo thanked the Commission for its prompt attention to this matter, and stated that the incitement of others is a particularly important crime that deserves a sentencing enhancement. He stated that he hoped this new amendment will help prevent tragedy like that experienced in Chicago two years ago.

Hearing no further discussion, the Acting Chair called for a vote. The motion was adopted with the Acting Chair noting that at least four commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, incorporated herein as Exhibit H, responds to the Drug Trafficking Vessel Interdiction Act of 2008, Pub. L. 110–407 (the “Act”). The Act created a new offense at 18 U.S.C. § 2285 making it unlawful to operate, attempt or conspire to operate, or embark in an unflagged submersible or semi-submersible vessel in international waters with the intent to evade detection. Section 103 of the Act directed the Commission to amend the guidelines, or promulgate new guidelines, to provide adequate penalties for persons convicted of offenses under 18 U.S.C. § 2285 and included a list of circumstances for the Commission to consider. The proposed amendment amends §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) by expanding the scope of the specific offense characteristic at subsection (b)(2) to apply if the defendant used a submersible or semi-submersible vessel in a drug importation offense. The proposed amendment also creates a new guideline at §2X7.2 (Submersible and Semi-Submersible Vessels) for the new offense at 18 U.S.C. § 2285. The new guideline provides a base offense level of 26 and includes a tiered specific offense characteristic and upward departure provisions to address certain aggravating circumstances listed in the directive. Mr. Cohen advised the commissioners that a motion to adopt the proposed amendment would be in order, with an effective date of November 1, 2009, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa asked if there is a motion as suggested by Mr. Cohen. Vice Chair Carr made such a motion, with Commissioner Friedrich seconding. The Acting Chair called for discussion on the motion. Vice Chair Castillo thanked the staff for its work on this important amendment. He stated that he is particularly concerned with submersible vessels that pose a threat to this country, and he is comfortable that the Commission has taken a balanced approach to this growing problem. According to Vice Chair Castillo, this is another example where the Department of Justice did not get the penalty levels it had asked for, but Vice Chair Castillo stated that he is comfortable that with any Chapter Three adjustments and the other applicable enhancements already present in the guidelines, penalties have been appropriately set. Vice Chair Castillo noted that he has found that it is very difficult to reduce penalties that are set too high and it is easier to increase penalties if this turns out to be a bigger problem than foreseen.

Hearing no further discussion, the Acting Chair called for a vote. The motion was adopted with the Acting Chair noting that at least four commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, incorporated herein as Exhibit I, is a multi-part amendment that responds to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 (the “Act”), which included a directive to the Commission and created two new offenses.

Part A of the proposed amendment responds to the directive by amending §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) to provide an alternative prong to the enhancement at subsection (b)(8), which covers cases in which an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment. The new alternative prong, at subsection (b)(8)(B), applies in a case in which the defendant was convicted of alien harboring, the alien harboring was for the purpose of prostitution, and the defendant receives an adjustment under §3B1.1 (Aggravating Role). In such a case, a two-level increase applies, but if the alien engaging in the prostitution had not attained the age of 18 years, a six-level increase applies.

Part B of the proposed amendment responds to a new offense created by the Act, 18 U.S.C. § 1351 (Fraud in foreign labor contracting). The proposed amendment references this new offense in Appendix A to §2B1.1.

Part C of the proposed amendment responds to another new offense created by the Act, 18 U.S.C. § 1593A (Benefitting financially from peonage, slavery, and trafficking in persons). This new offense applies when a person has knowingly benefitted financially from participating in a venture that has engaged in a violation of 18 U.S.C. §§ 1581(a), 1592, or 1595(a), knowing or in reckless disregard of the fact that the venture has engaged in such violation. The proposed amendment amends Appendix A to reference 18 U.S.C. § 1593A to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade), and amends §2H4.1 to provide that a defendant convicted of 18 U.S.C. § 1593A receives the same base offense level as if the defendant were convicted of committing the underlying violation. The proposed amendment also amends the commentary to §2H4.1 to provide that a downward departure may be warranted in a case in which the defendant is convicted under 18 U.S.C. §§ 1589(b) or 1593A if the defendant benefitted from participating in a venture described in those sections in reckless disregard of the fact that the venture had engaged in the criminal activities described in those sections. Mr. Cohen advised the commissioners that a motion to adopt the proposed amendment would be in order, with an effective date of November 1, 2009, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa asked if there is a motion as suggested by Mr. Cohen. Commissioner Howell made such a motion, with Vice Chair Sessions seconding. The Acting Chair called for a discussion on the motion and, hearing no discussion, the Acting Chair called for a vote. The motion was adopted with the Acting Chair noting that at least four commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, incorporated herein as Exhibit J, responds to the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub. L. 110–425 (the “Act”). The Act amended the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) to create two new offenses involving controlled substances, increased the statutory maximum terms of imprisonment for Schedule III, IV, and V controlled substance offenses, and added a sentencing enhancement for Schedule III controlled substance offenses where “death or serious bodily injury results from the use of such substance.”

First, the proposed amendment addresses the sentencing enhancement added by the Act, which applies when the offense involved a Schedule III controlled substance and death or serious bodily injury resulted from the use of such substance. The amendment addresses the statutory enhancement by amending §2D1.1 to provide two new alternative base offense levels at subsections (a)(3) and (a)(4) for offenses involving Schedule III controlled substances in which death or injury results, similar to the alternative base offense levels at subsections (a)(1) and (a)(2) for offenses involving Schedule I and II controlled substances in which death or injury results. The new alternative base offense levels are set at level 30 if the defendant committed the offense after one or more prior convictions for a similar offense and level 26 otherwise.

Second, the proposed amendment modifies the Drug Quantity Table in §2D1.1 to increase the maximum base offense level for offenses involving Schedule III hydrocodone from level 20 to level 30, without modifying any other offense level.

Finally, the proposed amendment the amendment addresses the two new offenses created by the Act. The proposed amendment amends Appendix A to reference the first new offense, 21 U.S.C. § 841(h), to §2D1.1. The second new offense, at 21 U.S.C. § 843(c)(2)(A), is already referenced in Appendix A to §2D3.1 (Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy). The amendment modifies the title of that guideline to indicate that it covers any scheduled controlled substance. Mr. Cohen advised the commissioners that a motion to adopt the proposed amendment would be in order, with an effective date of November 1, 2009, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa asked if there is a motion as suggested by Mr. Cohen. Vice Chair Sessions made such a motion, with Commissioner Howell seconding. The Acting Chair called for discussion on the motion and, hearing no discussion, the Acting Chair called for a vote. The motion was adopted with the Acting Chair noting that at least four commissioners voted in favor of the motion.

Mr. Cohen stated that the last proposed amendment, attached incorporated herein as Exhibit K, responds to the directive in section 209 of the Identity Theft Enforcement and Restitution Act of 2008, Title II of Pub. L. 110–326 (the “Act”), and addresses other related issues arising from case

law. Section 209(a) of the Act directed the Commission to—

review its guidelines and policy statements applicable to persons convicted of offenses under sections 1028, 1028A, 1030, 2511, and 2701 of title 18, United States Code, and any other relevant provisions of law, in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by such guidelines and policy statements.

The directive also listed several factors for the Commission to consider.

First, the proposed amendment adds a new two-level enhancement in §2B1.1. The new enhancement for offenses involving personal information applies if (1) the defendant was convicted of an offense under 18 U.S.C. § 1030 and the offense involved an intent to obtain personal information, or (2) the offense involved the unauthorized public dissemination of personal information.

Second, the proposed amendment amends the commentary to §2B1.1 to provide that, for purposes of the victims table in subsection (b)(2), an individual whose means of identification was used unlawfully or without authority is considered a “victim.”

Third, the proposed amendment makes two changes to Application Note 3(C) regarding the calculation of loss. The first change specifies that the estimate of loss may be based upon the fair market value of property that is copied. The proposed amendment also adds a new provision to Application Note 3(C) specifying that, in a case involving proprietary information (*e.g.*, trade secrets), the court may estimate loss using the cost of developing that information or the reduction in the value of that information that resulted from the offense.

Fourth, the proposed amendment clarifies that for information to be considered “personal information,” it must involve information of an identifiable individual.

Fifth, the proposed amendment amends §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) to provide that an upward departure may be warranted in a case in which the offense involved personal information or means of identification of a substantial number of individuals. As a conforming change, the amendment adds in Application Note 4 definitions of “means of identification” and “personal information” that are identical to the definitions of those terms in §2B1.1. Mr. Cohen advised the commissioners that a motion to adopt the proposed amendment would be in order, with an effective date of November 1, 2009, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa asked if there is a motion as suggested by Mr. Cohen. Vice Chair Carr made such a motion, with Commissioner Howell seconding. The Acting Chair called for discussion on the motion. Commissioner Wroblewski stated that this was a difficult and

complicated issue, and he thanked the staff for its hard work. He stated, however, that the Department of Justice does not believe that the changes made to the guidelines reflect the intent of Congress that the penalties for offenses under §§ 1028, 1028A, 1030, 2511, and 2701 be increased in comparison to those currently provided by such guidelines. Commissioner Wroblewski said that the Department of Justice and the Commission had disagreements and vigorous discussion about many issues, and time will tell whether the penalties for those crimes will be increased and reflect the will of Congress.

Hearing no further discussion, the Acting Chair called for a vote. The motion was adopted with the Acting Chair noting that at least four commissioners voted in favor of the motion.

Acting Chair Hinojosa stated that Rule 4.1 (Promulgation of Amendments) of the Commission's Rules of Practice and Procedure provides that in cases in which the Commission considers an amendment for retroactive application to previously sentenced, imprisoned defendants, it shall decide whether to make the amendment retroactive at the same meeting at which it decides to promulgate the amendment. The Acting Chair pointed out that the "influencing a minor" amendment has been identified by the staff as possibly falling under Rule 4.1. Rule 4.1 also states, however, that prior to final Commission action on the retroactive application of the amendment, the Commission shall review the retroactivity impact analysis prepared pursuant to Rule 2.2 (Voting Rules for Action by the Commission). Rule 2.2 states that the decision to instruct the staff to prepare a retroactivity analysis for a proposed amendment shall require the affirmative vote of at least three members at a public meeting. The Acting Chair stated that if there was interest in requesting such an analysis from the staff, subsection (b) of Rule 1.2 (Rules Amendment Procedure) would allow the Commission to temporarily suspend any rule by affirmative vote in a public meeting of a majority of the voting members then serving.

The Acting Chair asked if there is a motion to request the staff, pursuant to Rule 2.2, to prepare a retroactivity analysis for the "influencing a minor" amendment. Vice Chair Castillo made such a motion, with Commissioner Howell seconding. The Acting Chair called for discussion on the motion. Vice Chair Castillo stated that it is in the Commission's interest to study the analysis and properly evaluate the factors before it makes a decision regarding retroactivity. He stated that he is sympathetic to Commissioner Friedrich's position on this issue, but he is well aware that judges have had difficulty applying this enhancement. Vice Chair Castillo urged delaying the vote on retroactivity until the Commission could study the staff's analysis. Hearing no further discussion, the Acting Chair called for a vote. The motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Acting Chair Hinojosa then asked if there is a motion to suspend Rule 4.1, pursuant to Rule 1.2(b), and allow the Commission to vote at a later date on whether to give the "influencing a minor" amendment retroactive application. Commissioner Howell made such a motion, with Vice Chair Castillo seconding. The Acting Chair called for discussion on the motion. Vice Chair Sessions thanked the staff for its work on this issue, and stated that suspending Rule 4.1 would give the staff time to prepare a retroactivity analysis. Hearing no further discussion, the Acting

Chair called for a vote. The motion was adopted with the Acting Chair noting that a majority of the voting commissioners voted in favor of the motion.

The Acting Chair asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Howell made a motion to adjourn, with Vice Chair Sessions seconding. The Acting Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 3:47 p.m.

EXHIBIT A

PROPOSED AMENDMENT: TECHNICAL AMENDMENTS

Synopsis of Proposed Amendment: *This proposed amendment is a multi-part amendment that makes various technical and conforming changes to the guidelines.*

Part A of the proposed amendment addresses several cases in which the guidelines refer to another guideline, or to a statute or rule, but the reference has become incorrect or obsolete:

First, it makes technical changes in §1B1.8 (Use of Certain Information) to address the fact that provisions that had been contained in subsection (e)(6) of Rule 11 of the Federal Rules of Criminal Procedure are now contained in subsection (f) of that rule.

Second, it makes a technical change in §2J1.1 (Contempt), Application Note 3, to address the fact that the provision that had been contained in subsection (b)(7)(C) of §2B1.1 (Theft, Property Destruction, and Fraud) is now contained in subsection (b)(8)(C) of that guideline.

Third, it makes a technical change in §4B1.2 (Definitions of Terms used in Section 4B1.1), Application Note 1, fourth paragraph, to address the fact that the offense that had been contained in subsection (d)(1) of 21 U.S.C. § 841 is now contained in subsection (c)(1) of that section.

Fourth, it makes technical changes in §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), Application Note 8, to address the fact that subsections (c)(1) and (c)(3) of Rule 32 of the Federal Rules of Criminal Procedure are now contained in subsections (f) and (i) of that rule.

Fifth, it makes a technical change in §5D1.2 (Term of Supervised Release), Commentary, to address the fact that the provision that had been contained in subsection (b) of §5D1.2 is now contained in subsection (c) of that guideline.

Sixth, it makes a technical change in Appendix A (Statutory Index) to address the fact that the offense that had been contained at subsection (f) of 42 U.S.C. § 3611 is now contained in subsection (c) of that section.

Part B of the proposed amendment resolves certain technical issues that have arisen in the Guidelines Manual with respect to child pornography offenses:

First, it makes technical changes in §2G2.1, Statutory Provisions, to address the fact that only some, not all, offenses under 18 U.S.C. § 2251 are referenced to §2G2.1.

Second, it makes technical changes in §2G2.2, Statutory Provisions, to address the fact that offenses under section 2252A(g) are now covered by §2G2.6, while offenses under section 2252A(a) and (b) continue to be covered by §2G2.2.

Third, it makes similar technical changes in §2G2.2, Application Note 1, to address this fact.

Fourth, it makes a technical change in §2G2.3, Commentary, to address the fact that the statutory minimum sentence for a defendant convicted under 18 U.S.C. § 2251A is now 30 years imprisonment.

Fifth, it makes technical changes in §2G3.1, subsection (c)(1), to address the fact that §2G2.4 no longer exists, having been consolidated into §2G2.2 effective November 1, 2004.

Sixth, it makes a technical change in Appendix A (Statutory Index) to address the fact that the offenses that had been contained in subsections (c)(1)(A) and (c)(1)(B) of 18 U.S.C. § 2251 are now contained in subsections (d)(1)(A) and (d)(1)(B) of that section. As a conforming change, it also provides the appropriate reference for the offense that is now contained in subsection (c) of that section.

Seventh, it makes a technical change in Appendix A (Statutory Index) to address the fact that offenses under section 2252A(g) are now covered by §2G2.6, while offenses under section 2252A(a) and (b) continue to be covered by §2G2.2.

Proposed Amendment:

Part A (Technical Issues With Respect to References to Guidelines, Statutes, and Rules)

§1B1.8. Use of Certain Information

* * *

Commentary

Application Notes:

* * *

3. *On occasion the defendant will provide incriminating information to the government during plea negotiation sessions before a cooperation agreement has been reached. In the event no agreement is reached, use of such information in a sentencing proceeding is restricted by Rule 11~~(e)~~~~(f)~~ (*Admissibility or Inadmissibility of a Pleas, Plea Discussions, and Related Statements*) of the Federal Rules of Criminal Procedure and Rule 410 (*Inadmissibility of Pleas, Plea Discussions, and Related Statements*) of the Rules of Evidence.*

* * *

§2J1.1. Contempt

* * *

Commentary

* * *

Application Notes:

* * *

3. Violation of Judicial Order Enjoining Fraudulent Behavior.—In a case involving a violation of a judicial order enjoining fraudulent behavior, the most analogous guideline is §2B1.1. In such a case, §2B1.1(b)(78)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply.

* * *

§4B1.2. Definitions of Terms Used in Section 4B1.1

* * *

Commentary

Application Notes:

1. For purposes of this guideline—

* * *

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(~~dc~~)(1)) is a "controlled substance offense."

* * *

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

* * *

Commentary

Application Notes:

* * *

8. Under 18 U.S.C. § 3553(f), prior to its determination, the court shall afford the government an opportunity to make a recommendation. See also Fed. R. Crim. P. 32(~~c~~)(1), (~~3~~)(f), (i).

* * *

§5D1.2. Term of Supervised Release

- (a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:

- (1) At least three years but not more than five years for a defendant convicted of a Class A or B felony.
 - (2) At least two years but not more than three years for a defendant convicted of a Class C or D felony.
 - (3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor.
- (b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—
- (1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or
 - (2) a sex offense.
- (Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.
- (c) The term of supervised release imposed shall be not less than any statutorily required term of supervised release.

* * *

Commentary

* * *

Background: This section specifies the length of a term of supervised release that is to be imposed. Subsection (b)(c) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.

* * *

APPENDIX A - STATUTORY INDEX

	* * *
42 U.S.C. § 3611(f)(c)	2J1.1
	* * *

Part B (Technical Issues With Respect to Child Pornography Offenses)

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

* * *

Commentary

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

* * *

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

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A(a)-(b), 2260(b).

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"Sexual abuse or exploitation" means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)-(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). "Sexual abuse or exploitation" does not include possession, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

* * *

§2G2.3. Selling or Buying of Children for Use in the Production of Pornography

- (a) Base Offense Level: **38**

Commentary

Statutory Provision: 18 U.S.C. § 2251A.

Background: The statutory minimum sentence for a defendant convicted under 18 U.S.C. § 2251A is *twenty*~~thirty~~ years imprisonment.

* * *

§2G3.1. Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names

* * *

(c) Cross Reference

- (1) If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, **Soliciting**, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; **Possessing Material Involving the Sexual Exploitation of a Minor**) ~~or~~ §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), as appropriate.

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 2251(a),(b)	2G2.1
18 U.S.C. § 2251(c)	2G2.1
18 U.S.C. § 2251(e d)(1)(A)	2G2.2
18 U.S.C. § 2251(e d)(1)(B)	2G2.1
18 U.S.C. § 2251A	2G2.3
18 U.S.C. § 2252	2G2.2
18 U.S.C. § 2252A(a),(b)	2G2.2
18 U.S.C. § 2252A(g)	2G2.6

* * *

EXHIBIT B

PROPOSED AMENDMENT: §3C1.3 (COMMISSION OF OFFENSE WHILE ON RELEASE)

Synopsis of Proposed Amendment: *This proposed amendment clarifies Application Note 1 in §3C1.3 (Commission of Offense While on Release). Section 3C1.3 (formerly §2J1.7, (see Appendix C to the Guidelines Manual, Amendment 684) provides for a three-level adjustment if the defendant is subject to the statutory enhancement found at 18 U.S.C. § 3147—that is, if the defendant has committed the underlying offense while on release. Application Note 1 to §3C1.3 states that, in order to comply with the statute’s requirement that a consecutive sentence be imposed, the sentencing court must “divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement.”*

The Second and Seventh Circuits have held that, according to the terms of Application Note 2 to §2J1.7 (now Application Note 1 to §3C1.3), a sentencing court cannot apportion to the underlying offense more than the maximum of the guideline range absent the three-level enhancement. See United States v. Confredo, 528 F.3d 143 (2d Cir. 2008); United States v. Stevens, 66 F.3d 431 (2d Cir. 1995); United States v. Wilson, 966 F.2d 243 (7th Cir. 1992). The Second Circuit has stated that the example the Commission provides in the Application Note does not abide by their interpretation of the rule: “The commentary example begins with a total range of 30-37 months. In all criminal history categories, if the §2J1.7 three-level enhancement is deleted from the guideline level at which a 30-37 month sentence is imposed, the permissible range provided for the reduced sentence would be 21-27 months.” Stevens, at 435-36. The example states that a properly “apportioned” sentence for the underlying offense would be 30 months. This is outside the guideline range for that offense.

Under ordinary guideline application principles, however, only one guideline range applies to a defendant who committed an offense while on release and is subject to the enhancement at 18 U.S.C. § 3147. See §1B1.1 (instructing the sentencing court to, in this order: (1) determine the offense guideline applicable to the offense of conviction (the underlying offense); (2) determine the base offense level, specific offense characteristics, and follow other instructions in Chapter Two; (3) apply adjustments from Chapter Three; and, ultimately, (4) “[d]etermine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above”).

The proposed amendment clarifies that the court determines the applicable guideline range as in any other case. At that point, the court determines an appropriate “total punishment” from within that applicable guideline range, and then divides the total sentence between the underlying offense and the § 3147 enhancement as the court considers appropriate.

Proposed Amendment:

§3C1.3. Commission of Offense While on Release

If a statutory sentencing enhancement under 18 U.S.C. § 3147 applies, increase the offense level by 3 levels.

Commentary

Application Note:

1. Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the "total punishment" (i.e., the sentence for the offense committed while on release plus the statutory sentencing enhancement under 18 U.S.C. § 3147) is in accord with the guideline range for the offense committed while on release, *including, as in any other case in which a Chapter Three adjustment applies (see §1B1.1 (Application Instructions)), the adjustment provided by ~~as adjusted~~ ~~by~~ the enhancement in this section.* For example, if the applicable adjusted guideline range is 30-37 months and the court determines a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement. *Similarly, if the applicable adjusted guideline range is 30-37 months and the court determines a "total punishment" of 30 months is appropriate, a sentence of 24 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.*

Background: An enhancement under 18 U.S.C. § 3147 applies, after appropriate sentencing notice, when a defendant is sentenced for an offense committed while released in connection with another federal offense.

This guideline enables the court to determine and implement a combined "total punishment" consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement.

EXHIBIT C

PROPOSED AMENDMENT: COUNTERFEITING AND "BLEACHED NOTES"

Synopsis of Proposed Amendment: *The proposed amendment clarifies guideline application issues regarding the sentencing of counterfeiting offenses involving "bleached notes." Bleached notes are genuine United States currency stripped of its original image through the use of solvents or other chemicals and then reprinted to appear to be notes of higher denomination than intended by the Treasury. Courts in different circuits have resolved differently the question of whether offenses involving bleached notes should be sentenced under §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) or §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). Compare, United States v. Schreckengost, 384 F.3d 922 (7th Cir. 2004) (holding that bleached notes should be sentenced under §2B1.1); United States v. Inclema, 363 F.3d 1177 (11th Cir. 2004) (same); with United States v. Dison, 2008 WL 351935 (W.D. La. Feb. 8, 2008) (applying §2B5.1 in a case involving bleached notes); United States v. Vice, 2008 WL 113970 (W. D. La. Jan. 3, 2008) (same). The proposed amendment resolves this guideline application issue and responds to concerns expressed by federal judges and members of Congress concerning the guidelines pertaining to offenses involving bleached notes.*

The definition of the term "counterfeit" in Application Note 3 of §2B5.1 has been cited by courts as the basis for declining to apply §2B5.1 to offenses involving bleached notes. "Counterfeit" is defined to mean "an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety." Application Note 3 further provides that "[o]ffenses involving genuine instruments that have been altered are covered under §2B1.1 (Theft, Property Destruction, and Fraud)." Under this definition, courts have had to consider whether a bleached note should be considered falsely made or manufactured in its entirety (and therefore sentenced under §2B5.1) or an altered note (and therefore sentenced under §2B1.1).

The proposed amendment resolves this issue to provide that offenses involving bleached notes are to be sentenced under §2B5.1. Specifically, the proposed amendment deletes Application Note 3 and revises the definition of "counterfeit" to more closely parallel relevant counterfeiting statutes, for example 18 U.S.C. §§ 471 (Obligations or securities of the United States) and 472 (Uttering counterfeit obligations or securities). As a clerical change, the definition is moved from Application Note 3 to Application Note 1.

The proposed amendment also amends the enhancement at subsection (b)(2)(B) to cover a case in which the defendant controlled or possessed genuine United States currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed.

In addition, the proposed amendment amends Appendix A (Statutory Index) by striking the alternative reference to §2B1.1 for two offenses that do not involve elements of fraud. Specifically, the amendment deletes alternative reference to §2B1.1 for offenses under 18 U.S.C. §§ 474A (Deterrents to counterfeiting of obligations and securities) and 476 (Taking impressions of tools used for obligations or securities). As a result, these offenses would be referenced solely to §2B5.1. A conforming change is made to delete these offenses from the list of statutory provisions in §2B1.1.

Proposed Amendment:

§2B5.1. Offenses Involving Counterfeit Bearer Obligations of the United States

- (a) Base Offense Level: **9**
- (b) Specific Offense Characteristics
 - (1) If the face value of the counterfeit items (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
 - (2) If the defendant (A) manufactured or produced any counterfeit obligation or security of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting; or (B) controlled or possessed (i) counterfeiting paper similar to a distinctive paper; (ii) **genuine United States currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed**; or (iii) a feature or device essentially identical to a distinctive counterfeit deterrent, increase by **2** levels.
 - (3) If subsection (b)(2)(A) applies, and the offense level determined under that subsection is less than level **15**, increase to level **15**.
 - (4) If a dangerous weapon (including a firearm) was possessed in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **13**, increase to level **13**.
 - (5) If any part of the offense was committed outside the United States, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 470-474A, 476, 477, 500, 501, 1003. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Counterfeit" refers to an instrument that has been falsely made, manufactured, or altered. For example, an instrument that has been falsely made or manufactured in its entirety is "counterfeit", as is a genuine instrument that has been falsely altered (such as a genuine \$5 bill that has been altered to appear to be a genuine \$100 bill).

"Distinctive counterfeit deterrent" and "distinctive paper" have the meaning given those terms in

18 U.S.C. § 474A(c)(2) and (1), respectively.

"United States" means each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

2. Applicability to Counterfeit Bearer Obligations of the United States.— This guideline applies to counterfeiting of United States currency and coins, food stamps, postage stamps, treasury bills, bearer bonds and other items that generally could be described as bearer obligations of the United States, i.e., that are not made out to a specific payee.
- ~~3. Inapplicability to Genuine but Fraudulently Altered Instruments.—"Counterfeit," as used in this section, means an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety. Offenses involving genuine instruments that have been altered are covered under §2B1.1 (Theft, Property Destruction, and Fraud).~~
4. Inapplicability to Certain Obviously Counterfeit Items.—Subsection (b)(2)(A) does not apply to persons who produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny.

Background: Possession of counterfeiting devices to copy obligations (including securities) of the United States is treated as an aggravated form of counterfeiting because of the sophistication and planning involved in manufacturing counterfeit obligations and the public policy interest in protecting the integrity of government obligations. Similarly, an enhancement is provided for a defendant who produces, rather than merely passes, the counterfeit items.

Subsection (b)(4) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.

* * *

APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 474A	2B1.1, 2B5.1
18 U.S.C. § 476	2B1.1, 2B5.1

EXHIBIT D

PROPOSED AMENDMENT: MISCELLANEOUS AMENDMENTS

Synopsis of Proposed Amendment: *This proposed amendment is a multi-part amendment responding to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues.*

Part A of the proposed amendment amends Appendix A (Statutory Index) to include offenses created or amended by the Housing and Economic Recovery Act of 2008 (Public Law 110–289), as follows:

- (1) *The new offense at 12 U.S.C. § 4636b is referenced to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States); the similar existing offense at 12 U.S.C. § 1818(j) is also referenced to §2B1.1.*
- (2) *The new offense at 12 U.S.C. § 4641 is referenced to §2J1.1 (Contempt) and §2J1.5 (Failure to Appear by Material Witness); similar existing offenses (see 2 U.S.C. §§ 192, 390; 7 U.S.C. § 87f(e); 12 U.S.C. §§ 1818(j), 1844(f), 2273, 3108(b)(6); 15 U.S.C. §§ 78u(c), 80a-41(c), 80b-9(c), 717m(d); 16 U.S.C. § 825f(c); 26 U.S.C. § 7210; 33 U.S.C. § 1227(b); 42 U.S.C. § 3611; 47 U.S.C. § 409(m); 49 U.S.C. §§ 14909, 16104) are also referenced to §2J1.1 and §2J1.5.*

Another similar offense, 33 U.S.C. § 506, is deleted from Appendix A (Statutory Index) because it has been repealed and any future prosecution is likely to be barred by the statute of limitations.

Part B of the proposed amendment amends Appendix A (Statutory Index) to include offenses created or amended by the Consumer Product Safety Improvement Act of 2008 (Public Law 110–314). These offenses (see 15 U.S.C. §§ 1192, 1197(b), 1202(c), 1263, 2068) are referenced to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product). Technical and conforming changes are also made.

Part C of the proposed amendment amends Appendix A (Statutory Index) to include an offense created by the Veterans' Benefits Improvement Act of 2008 (Public Law 110–389). The new offense at 50 U.S.C. App. § 527(e) is referenced to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Guideline)). The similar existing offense at 10 U.S.C. § 987(f) is also referenced to §2X5.2.

Part D of the proposed amendment amends Appendix A (Statutory Index) to include an offense created by the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109–162). The new offense at 18 U.S.C. § 117 is referenced to §2A6.2 (Stalking or Domestic Violence).

Part E of the proposed amendment amends Appendix A (Statutory Index) to include an offense created by the Child Soldiers Accountability Act of 2008 (Public Law 110–340). The new offense at 18 U.S.C. § 2442 is referenced to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade). Technical and conforming changes are also made.

Part F of the proposed amendment makes changes throughout the Guidelines Manual to accurately reflect the amendments made by the Judicial Administration and Technical Amendments Act of 2008 (Public Law 110–406) to the probation and supervised release statutes (18 U.S.C. §§ 3563, 3583). The changes include a new guideline for intermittent confinement that parallels the statutory language, as well as technical and conforming changes. In this proposed amendment, the changes made by Part F have been revised, not for substance but for clarity. The approach of the revisions is to better reflect that intermittent confinement is not broadly available as a condition of supervised release, but is available in the narrow case in which a defendant has already violated a condition of supervised release.

Part G of the proposed amendment amends the enhancement relating to property from a national cemetery or veterans' memorial in subsection (b)(6) of §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) so that it also covers trafficking in such property, and makes a conforming change to the commentary. This part responds to the directive to the Commission in the Let Our Veterans Rest in Peace Act of 2008 (Public Law 110–384).

*Part H of the proposed amendment makes changes in the child pornography guidelines, §2G2.1 and §2G2.2, so that they accurately reflect the amendments made to the child pornography statutes (18 U.S.C. §§ 2251 *et seq.*) by the Effective Child Pornography Prosecution Act of 2007 (Public Law 110–358) and the PROTECT Our Children Act of 2008 (Public Law 110–401). The changes relate primarily to cases where child pornography is transmitted over the Internet. Under the proposed amendment, where the guidelines refer to the purpose of producing a visual depiction, they will also refer to the purpose of transmitting a live visual depiction; where the guidelines refer to possessing material, they will also refer to accessing with intent to view the material. As a conforming change, this part also amends the child pornography guidelines so that the term "distribution" includes "transmission", and the term "material" includes any visual depiction, as now defined by 18 U.S.C. § 2256 (*i.e.*, to include data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format).*

Part I of the proposed amendment revises Appendix A (Statutory Index) so that the threat guideline, §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), is included on the list of guidelines to which 18 U.S.C. § 2280 and § 2332a are referenced. The proposed amendment ensures that in a case in which an offense under one of those statutes is committed by threat, the court has the option of determining that §2A6.1 is the most analogous offense guideline.

Part J of this proposed amendment addresses subsection (a)(7) of 18 U.S.C. § 2252A, the new "morphed images" child pornography offense created by the PROTECT Our Children Act of 2008 (Public Law 110–401). The new offense makes it unlawful to knowingly produce with intent to distribute, or to knowingly distribute, "child pornography that is an adapted or modified depiction of an identifiable minor." A violator is subject to a fine under title 18, United States Code, and imprisonment up to 15 years.

This new offense is already referenced in Appendix A (the Statutory Index) to the child pornography distribution guideline, §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor), because all offenses under section 2252A(a) are referenced to that guideline. Part J leaves that reference intact.

Part J provides a base offense level for offenses under section 2252A(a)(7) of level 18.

As a conforming change, Part J provides a new Application Note in §2G2.2 to clarify that, if the offense involved material that is an adapted or modified depiction of an identifiable minor, the term "material involving the sexual exploitation of a minor" includes such material.

Proposed Amendment:

Part A (Housing and Economic Recovery Act of 2008)

APPENDIX A - STATUTORY INDEX

2 U.S.C. § 192	2J1.1, 2J1.5	
2 U.S.C. § 390	2J1.1, 2J1.5	
2 U.S.C. § 437g(d)	2C1.8	
		* * *
7 U.S.C. § 87b	2N2.1	
7 U.S.C. § 87f(e)	2J1.1, 2J1.5	
		* * *
12 U.S.C. § 631	2B1.1	
12 U.S.C. § 1818(j)	2B1.1	
12 U.S.C. § 1844(f)	2J1.1, 2J1.5	
12 U.S.C. § 2273	2J1.1, 2J1.5	
12 U.S.C. § 3108(b)(6)	2J1.1, 2J1.5	
12 U.S.C. § 4636b	2B1.1	
12 U.S.C. § 4641	2J1.1, 2J1.5	
		* * *
15 U.S.C. § 78ff	2B1.1, 2C1.1	
15 U.S.C. § 78u(c)	2J1.1, 2J1.5	
15 U.S.C. § 80a-41(c)	2J1.1, 2J1.5	
15 U.S.C. § 80b-6	2B1.1	
15 U.S.C. § 80b-9(c)	2J1.1, 2J1.5	
		* * *
15 U.S.C. § 714m(c)	2B1.1	
15 U.S.C. § 717m(d)	2J1.1, 2J1.5	
		* * *
16 U.S.C. § 773g	2A2.4	
16 U.S.C. § 825f(c)	2J1.1, 2J1.5	
		* * *
26 U.S.C. § 7210	2J1.1, 2J1.5	
		* * *
33 U.S.C. § 506	2J1.1	
33 U.S.C. § 1227(b)	2J1.1, 2J1.5	
		* * *
42 U.S.C. § 3611(f)	2J1.1, 2J1.5	

47 U.S.C. § 223(b)(1)(A)	2G3.2	* * *
47 U.S.C. § 409(m)	2J1.1, 2J1.5	
		* * *
49 U.S.C. § 14909	2J1.1, 2J1.5	
		* * *
49 U.S.C. § 16104	2J1.1, 2J1.5	
		* * *

Part B (Consumer Product Safety Improvement Act of 2008)

**PART N - OFFENSES INVOLVING FOOD, DRUGS,
AGRICULTURAL PRODUCTS, CONSUMER PRODUCTS, AND ODOMETER LAWS**

* * *

2. FOOD, DRUGS, AND AGRICULTURAL PRODUCTS, AND CONSUMER PRODUCTS

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

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristic
 - (1) If the defendant was convicted under 21 U.S.C. § 331 after sustaining a prior conviction under 21 U.S.C. § 331, increase by **4** levels.
- (c) Cross References
 - (1) If the offense involved fraud, apply §2B1.1 (Theft, Property Destruction, and Fraud).
 - (2) If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above.

Commentary

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

Application Notes:

1. *This guideline assumes a regulatory offense that involved knowing or reckless conduct. Where only negligence was involved, a downward departure may be warranted. See Chapter Five, Part K (Departures).*
2. *The cross reference at subsection (c)(1) addresses cases in which the offense involved fraud. The cross reference at subsection (c)(2) addresses cases in which the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline (e.g., bribery).*
3. Upward Departure Provisions.—*The following are circumstances in which an upward departure may be warranted:*
 - (A) *The offense created a substantial risk of bodily injury or death; or bodily injury, death, extreme psychological injury, property damage, or monetary loss resulted from the offense. See Chapter Five, Part K (Departures).*
 - (B) *The defendant was convicted under 7 U.S.C. § 7734.*
4. *The Commission has not promulgated a guideline for violations of 21 U.S.C. § 333(e) (offenses involving human growth hormones). Offenses involving anabolic steroids are covered by Chapter Two, Part D (Offenses Involving Drugs and Narco-Terrorism). In the case of an offense involving a substance purported to be an anabolic steroid, but not containing any active ingredient, apply §2B1.1 (Theft, Property Destruction, and Fraud) with "loss" measured by the amount paid, or to be paid, by the victim for such substance.*

* * *

APPENDIX A - STATUTORY INDEX

15 U.S.C. § 1176	2E3.1
15 U.S.C. § 1192	2N2.1
15 U.S.C. § 1197(b)	2N2.1
15 U.S.C. § 1202(c)	2N2.1
15 U.S.C. § 1263	2N2.1

* * *

15 U.S.C. § 1990(c)	2N3.1 (for offenses committed prior to July 5, 1994)
15 U.S.C. § 2068	2N2.1

* * *

Part C (Veterans' Benefits Improvement Act of 2008)

APPENDIX A - STATUTORY INDEX

		* * *
8 U.S.C. § 1375a(d)(3)(C), (d)(5)(B)	2H3.1	
10 U.S.C. § 987(f)	2X5.2	
		* * *
50 U.S.C. § 783(c)	2M3.3	
50 U.S.C. App. § 527(e)	2X5.2	
		* * *

Part D (Violence Against Women and Department of Justice Reauthorization Act of 2005)

APPENDIX A - STATUTORY INDEX

		* * *
18 U.S.C. § 115(b)(3)	2A1.1, 2A1.2, 2A2.1, 2X1.1	
18 U.S.C. § 117	2A6.2	
		* * *

Part E (Child Soldiers Accountability Act of 2008)

4. PEONAGE, INVOLUNTARY SERVITUDE, ~~AND SLAVE TRADE,~~ AND CHILD SOLDIERS

§2H4.1. Peonage, Involuntary Servitude, ~~and Slave Trade,~~ and Child Soldiers

- (a) Base Offense Level (Apply the greater):
 - (1) **22**; or
 - (2) **18**, if the defendant was convicted of an offense under 18 U.S.C. § 1592.
- (b) Specific Offense Characteristics
 - (1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by **4** levels; or (B) if any victim sustained serious bodily injury, increase by **2** levels.
 - (2) If (A) a dangerous weapon was used, increase by **4** levels; or (B) a dangerous weapon was brandished, or the use of a dangerous weapon was threatened, increase by **2** levels.

- (3) If any victim was held in a condition of peonage or involuntary servitude for (A) more than one year, increase by **3** levels; (B) between 180 days and one year, increase by **2** levels; or (C) more than 30 days but less than 180 days, increase by **1** level.
- (4) If any other felony offense was committed during the commission of, or in connection with, the peonage or involuntary servitude offense, increase to the greater of:
 - (A) **2** plus the offense level as determined above, or
 - (B) **2** plus the offense level from the offense guideline applicable to that other offense, but in no event greater than level **43**.

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 1581-1590, 1592, 2442.

Application Notes:

1. For purposes of this guideline—

"A dangerous weapon was used" means that a firearm was discharged, or that a firearm or other dangerous weapon was otherwise used. "The use of a dangerous weapon was threatened" means that the use of a dangerous weapon was threatened regardless of whether a dangerous weapon was present.

Definitions of "firearm," "dangerous weapon," "otherwise used," "serious bodily injury," and "permanent or life-threatening bodily injury" are found in the Commentary to §1B1.1 (Application Instructions).

"Peonage or involuntary servitude" includes forced labor, slavery, and recruitment or use of a child soldier.

2. Under subsection (b)(4), "any other felony offense" means any conduct that constitutes a felony offense under federal, state, or local law (other than an offense that is itself covered by this subpart). When there is more than one such other offense, the most serious such offense (or group of closely related offenses in the case of offenses that would be grouped together under §3D1.2(d)) is to be used. See Application Note 3 of §1B1.5 (Interpretation of References to other Offense Guidelines).
3. If the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude, an upward departure may be warranted.

* * *

APPENDIX A - STATUTORY INDEX

18 U.S.C. § 2425
18 U.S.C. § 2442

2G1.3
2H4.1

* * *

* * *

Part F (Judicial Administration and Technical Amendments Act of 2008)

§5B1.3. Conditions of Probation

(a) Mandatory Conditions--

- (1) for any offense, the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3563(a));
- (2) for a felony, the defendant shall (A) make restitution, ~~(B) give notice to victims of the offense pursuant to 18 U.S.C. § 3555, or (C) reside, or refrain from residing, in a specified place or area,~~ (B) **work in community service, or (C) both, unless the court has imposed a fine, or** unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the discretionary conditions set forth under 18 U.S.C. § 3563(b) (see 18 U.S.C. § 3563(a)(2));

~~Note: Section 3563(a)(2) of Title 18, United States Code, provides that, absent unusual circumstances, a defendant convicted of a felony shall abide by at least one of the conditions set forth in 18 U.S.C. § 3563(b)(2), (b)(3), and (b)(13). Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, those conditions were a fine ((b)(2)), an order of restitution ((b)(3)), and community service ((b)(13)). Whether or not the change was intended, the Act deleted the fine condition and renumbered the restitution and community service conditions in 18 U.S.C. § 3563(b), but failed to make a corresponding change in the referenced paragraphs under 18 U.S.C. § 3563(a)(2). Accordingly, the conditions now referenced are restitution ((b)(2)), notice to victims pursuant to 18 U.S.C. § 3555 ((b)(3)), and an order that the defendant reside, or refrain from residing, in a specified place or area ((b)(13)).~~

* * *

(e) Additional Conditions (Policy Statement)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) Community Confinement

Residence in a community treatment center, halfway house or similar

facility may be imposed as a condition of probation. See §5F1.1 (Community Confinement).

* * *

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation. See §5F1.8 (Intermittent Confinement).

§5C1.1. Imposition of a Term of Imprisonment

* * *

(c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by --

* * *

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement* or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or

* * *

(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by --

* * *

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement* or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

* * *

Commentary

Application Notes:

* * *

3. *Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months), the court has three options:*

* * *

(C) *Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement* or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4-10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.*

* * *

4. *Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is eight, nine, or ten months), the court has two options:*

* * *

(B) *Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement* or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 8-14 months, a sentence of four months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.*

* * *

6. *There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement* than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases where the defendant's criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.*

* * *

~~*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty~~

~~Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.~~

~~However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.~~

§5D1.3. Conditions of Supervised Release

* * *

(e) Additional Conditions (Policy Statement)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) Community Confinement*

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. See §5F1.1 (Community Confinement).

~~*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.~~

~~However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of~~

supervised release:

* * *

(5) Curfew

* * *

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See §5F1.8 (Intermittent Confinement).

* * *

§5F1.1. Community Confinement

Community confinement may be imposed as a condition of probation or supervised release.*

~~*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.~~

~~However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.~~

* * *

§5F1.8. Intermittent Confinement

Intermittent confinement may be imposed as a condition of probation during the first year of probation. See 18 U.S.C. § 3563(b)(10). It may be imposed as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See 18 U.S.C. § 3583(d).

Commentary

Application Note:

1. *"Intermittent confinement" means remaining in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release. See 18 U.S.C. § 3563(b)(10).*

* * *

**CHAPTER SEVEN - VIOLATIONS OF PROBATION AND
SUPERVISED RELEASE**

PART A - INTRODUCTION TO CHAPTER SEVEN

* * *

2. Background

- (b) Supervised Release.

* * *

With the exception of residency in, or participation in the program of, a community corrections facility,* which is available only for a sentence of probation, the conditions of supervised release authorized by statute are the same as those for a sentence of probation, **except for intermittent confinement. (Intermittent confinement is available for a sentence of probation, but is available as a condition of supervised release only for a violation of a condition of supervised release.)** When the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release, with or without extending the term or modifying the conditions, or revoke supervised release and impose a term of imprisonment. The periods of imprisonment authorized by statute for a violation of the conditions of supervised release generally are more limited, however, than those available for a violation of the conditions of probation. 18 U.S.C. § 3583(e)(3).

~~*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.~~

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.

* * *

§7B1.3. Revocation of Probation or Supervised Release (Policy Statement)

* * *

Commentary

Application Notes:

* * *

5. *Intermittent confinement is authorized ~~only~~ as a condition of probation during the first year of the term of probation. 18 U.S.C. § 3563(b)(10). Intermittent confinement is authorized as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. §3583(e)(2) and only when facilities are available. See §5F1.8 (Intermittent Confinement).**

*~~*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.~~*

~~However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.~~

* * *

§8D1.3.

Conditions of Probation - Organizations

* * *

- (b) Pursuant to 18 U.S.C. § 3563(a)(2), if a sentence of probation is imposed for a felony, the court shall impose as a condition of probation at least one of the following: (1) restitution, (2) notice to victims of the offense pursuant to 18 U.S.C. § 3555, or (3) an order requiring the organization to reside, or refrain from residing, in a specified place or area, or (2) community service, unless the court has imposed a fine, or unless the court finds on the record that extraordinary circumstances exist that would make such condition plainly unreasonable, in which event the court shall impose one or more other conditions set forth in 18 U.S.C. § 3563(b).

~~Note: Section 3563(a)(2) of Title 18, United States Code, provides that, absent unusual circumstances, a defendant convicted of a felony shall abide by at least one of the conditions set forth in 18 U.S.C. § 3563(b)(2), (b)(3), and (b)(13). Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, those conditions were a fine ((b)(2)), an order of restitution ((b)(3)), and community service ((b)(13)). Whether or not the change was intended, the Act deleted the fine condition and renumbered the restitution and community service conditions in 18 U.S.C. § 3563(b), but failed to make a corresponding change in the referenced paragraphs under 18 U.S.C. § 3563(a)(2). Accordingly, the conditions now referenced are restitution ((b)(2)), notice to victims pursuant to 18 U.S.C. § 3555 ((b)(3)), and an order that the defendant reside, or refrain from residing, in a specified place or area ((b)(13)).~~

* * *

Part G (Let Our Veterans Rest in Peace Act of 2008)

§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

* * *

- (b) Specific Offense Characteristics

* * *

- (6) If the offense involved theft of, damage to, or destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by 2 levels.

* * *

Commentary

* * *

Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States).

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Subsection (b)(6) implements the instruction to the Commission in section 2 of Public Law 105–101 and the directive to the Commission in section 3 of Public Law 110–384.

* * *

Part H (PROTECT Our Children Act of 2008 and Effective Child Pornography Prosecution Act of 2007)

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

- (a) Base Offense Level: **32**
- (b) Specific Offense Characteristics
 - (1) If the offense involved a minor who had (A) not attained the age of twelve years, increase by **4** levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by **2** levels.
 - (2) (Apply the greater) If the offense involved—
 - (A) the commission of a sexual act or sexual contact, increase by **2** levels; or
 - (B) (i) the commission of a sexual act; and (ii) conduct described in 18 U.S.C. § 2241(a) or (b), increase by **4** levels.
 - (3) If the offense involved distribution, increase by **2** levels.
 - (4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.
 - (5) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(6) If, for the purpose of producing sexually explicit material **or for the purpose of transmitting such material live**, the offense involved (A) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage sexually explicit conduct; or (B) the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by **2** levels.

(c) Cross Reference

(1) If the victim was killed in circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

*"Distribution" means any act, including possession with intent to distribute, production, **transmission**, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.*

"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)).

"Material" includes a visual depiction, as defined in 18 U.S.C. § 2256.

"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; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).

2. Application of Subsection (b)(2).—For purposes of subsection (b)(2):

"Conduct described in 18 U.S.C. § 2241(a) or (b)" is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

"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).

3. Application of Subsection (b)(5).—

(A) In General.—Subsection (b)(5) is intended to have broad application and includes offenses involving a minor 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 adjustment, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—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 persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material **or for the purpose of transmitting such material live**. 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 persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) Use of a Computer or an Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if the offense involved the use of a computer or an interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material *or for the purpose of transmitting such material live*, or otherwise to solicit participation by a minor in such conduct for such purposes. 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. Application of Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.

6. Upward Departure Provision.—An upward departure may be warranted if the offense involved more than 10 minors.

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

(a) Base Offense Level:

(1) **18**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), or § 2252A(a)(5).

(2) **22**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant’s conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.

- (2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.
- (3) (Apply the greatest) If the offense involved:
 - (A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.
 - (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.
 - (C) Distribution to a minor, increase by **5** levels.
 - (D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.
 - (E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.
 - (F) Distribution other than distribution described in subdivisions (A) through (E), increase by **2** levels.
- (4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.
- (5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.
- (6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, **or for accessing with intent to view the material**, increase by **2** levels.
- (7) If the offense involved—
 - (A) at least 10 images, but fewer than 150, increase by **2** levels;
 - (B) at least 150 images, but fewer than 300, increase by **3** levels;
 - (C) at least 300 images, but fewer than 600, increase by **4** levels; and
 - (D) 600 or more images, increase by **5** levels.

(c) Cross Reference

- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct **or for the purpose of transmitting a live visual depiction of such conduct**, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A, 2260(b).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

"Distribution" means any act, including possession with intent to distribute, production, **transmission**, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

"Distribution for pecuniary gain" means distribution for profit.

"Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. "Thing of value" means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense.

"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)).

"Material" includes a visual depiction, as defined in 18 U.S.C. § 2256.

"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; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

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

"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).

"Sexual abuse or exploitation" means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251, § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). "Sexual abuse or exploitation" does not include possession, **accessing with intent to view**, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

2. Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, **access with intent to view**, receive, or distribute such materials.
3. Application of Subsection (b)(5).—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).
4. Application of Subsection (b)(7).—
 - (A) Definition of "Images".—"Images" means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8).
 - (B) Determining the Number of Images.—For purposes of determining the number of images under subsection (b)(7):
 - (i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.
 - (ii) Each video, video-clip, movie, or similar ~~recording~~**visual depiction** shall be considered to have 75 images. If the length of the ~~recording~~**visual depiction** is substantially more than 5 minutes, an upward departure may be warranted.

5. Application of Subsection (c)(1).—

(A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct *or for the purpose of transmitting live any visual depiction of such conduct.*

(B) Definition.—"Sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).

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

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (7), effective April 30, 2003.

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Part I (Treatment of 18 U.S.C. §§ 2280, 2332a in statutory index)

APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 2280	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2A6.1 , 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1
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18 U.S.C. § 2332a	2A6.1 , 2K1.4, 2M6.1
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Part J (Child Pornography Offenses Involving "Morphed Images")

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

- (a) Base Offense Level:
 - (1) **18**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), or § 2252A(a)(5), or § 2252A(a)(7).
 - (2) **22**, otherwise.
- (b) Specific Offense Characteristics
 - (1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.
 - (2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.
 - (3) (Apply the greatest) If the offense involved:
 - (A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.
 - (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.
 - (C) Distribution to a minor, increase by **5** levels.
 - (D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.
 - (E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.
 - (F) Distribution other than distribution described in subdivisions (A)

through (E), increase by **2** levels.

- (4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.
- (5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.
- (6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, increase by **2** levels.
- (7) If the offense involved—
 - (A) at least 10 images, but fewer than 150, increase by **2** levels;
 - (B) at least 150 images, but fewer than 300, increase by **3** levels;
 - (C) at least 300 images, but fewer than 600, increase by **4** levels; and
 - (D) 600 or more images, increase by **5** levels.

(c) Cross Reference

- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A, 2260(b).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

"Distribution" means any act, including possession with intent to distribute, production, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation

of such material by a defendant.

"Distribution for pecuniary gain" means distribution for profit.

"Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. "Thing of value" means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense.

"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 (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; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

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

"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).

"Sexual abuse or exploitation" means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251, § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). "Sexual abuse or exploitation" does not include possession, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

2. *Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, receive, or distribute such materials.*
3. *Application of Subsection (b)(5).—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*

4. Application of Subsection (b)(7).—

- (A) Definition of "Images".—"Images" means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8).
- (B) Determining the Number of Images.—For purposes of determining the number of images under subsection (b)(7):
- (i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.
- (ii) Each video, video-clip, movie, or similar recording shall be considered to have 75 images. If the length of the recording is substantially more than 5 minutes, an upward departure may be warranted.

5. Application of Subsection (c)(1).—

- (A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.
- (B) Definition.—"Sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).

6. Cases Involving Adapted or Modified Depictions.—If the offense involved material that is an adapted or modified depiction of an identifiable minor (e.g., a case in which the defendant is convicted under 18 U.S.C. § 2252A(a)(7)), the term "material involving the sexual exploitation of a minor" includes such material.

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

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (7), effective April 30, 2003.

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EXHIBIT E

PROPOSED AMENDMENT: COPYRIGHT INFRINGEMENT

Synopsis of Proposed Amendment: *This proposed amendment amends the enhancement relating to serious bodily injury in subsection (b)(5) of §2B5.3 (Criminal Infringement of Copyright or Trademark) so that it parallels the corresponding enhancement for serious bodily injury in §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). This proposed amendment responds to statutory amendments made by the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (Public Law 110–403).*

§2B5.3. Criminal Infringement of Copyright or Trademark

* * *

(b) Specific Offense Characteristics

* * *

- (5) If the offense involved (A) the conscious or reckless risk of **death or** serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level ~~13~~**14**, increase to level ~~13~~**14**.

* * *

EXHIBIT F

PROPOSED AMENDMENT: INFLUENCING A MINOR

Synopsis of Proposed Amendment: *This proposed amendment addresses a circuit conflict regarding the undue influence enhancement at §2A3.2(b)(2)(B)(ii) (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Year (Statutory Rape) or Attempt to Commit Such Acts) and at §2G1.3(b)(2)(B) (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). The undue influence enhancement provides for an increase in the defendant's offense level (four levels in §2A3.2 and two levels in §2G1.3) if "a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct." In both guidelines, commentary states that in determining whether the undue influence enhancement applies, "the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior." The commentary also provides for a rebuttable presumption of undue influence "[i]n a case in which a participant is at least 10 years older than the minor."*

In both guideline provisions, the term "minor" includes "an individual, whether fictitious or not, who a law enforcement officer represented to a participant . . . could be provided for the purposes of engaging in sexually explicit conduct" or "an undercover law enforcement officer who represented to a participant that the officer had not attained" the age of majority.

Three circuits have three different approaches regarding the application of the undue influence enhancement in cases in which the "minor" is actually an undercover law enforcement officer. The Eleventh Circuit, in United States v. Root, 296 F.3d 1222 (11th Cir. 2002), held that, according to the terms of §2A3.2, the undue influence enhancement can apply in instances of attempted sexual conduct, including a case in which the only "victim" involved in the case is an undercover law enforcement officer. In such a case, the Eleventh Circuit held, the focus is on the defendant's conduct, not on the fact that the victim's will was not actually overborne. The Eleventh Circuit is also the only circuit that has addressed this issue in the context of §2G1.3. See, e.g., United States v. Vance, 494 F.3d 985 (11th Cir. 2007) (holding that §2G1.3(b)(2)(B) applies where the minor is fictitious, and stating that "the focus is on the defendant's intent, not whether the victim is real or fictitious").

The Seventh Circuit reached a different result in United States v. Mitchell, 353 F.3d 552 (7th Cir. 2003), holding that "the plain language of [§2A3.2] cannot apply in the case of an attempt where the victim is an undercover police officer." The Seventh Circuit also stated that based on its reading of the guideline, "the enhancement cannot apply [in any case] where the offender and victim have not engaged in illicit sexual conduct." Id. at 559.

In United States v. Chriswell, 401 F.3d 459 (6th Cir. 2005), the Sixth Circuit took a third approach. The Sixth Circuit agreed in part with the Seventh Circuit, holding that "§2A3.2(b)(2)(B) is not applicable in cases where the victim is an undercover agent representing himself to be a child under the age of sixteen." Id. at 469. Unlike the Seventh Circuit, however, the Sixth Circuit left open the possibility that the enhancement can apply in other instances of attempted sexual conduct.

In short, the three circuits express differing views on two different policy questions: first, whether the undue influence enhancement can apply in a case involving attempted sexual conduct; and second, whether the undue influence enhancement can apply in a case in which the only minor involved is a law enforcement officer.

This proposed amendment resolves the first question in the affirmative: Yes, the undue influence enhancement can apply in a case involving attempted sexual conduct. (On this question, the Eleventh and Sixth Circuits answered Yes, and the Seventh Circuit answered No.)

This proposed amendment resolves the second question in the negative: No, the undue influence enhancement does not apply in a case in which the only "minor" involved is an undercover law enforcement officer. (On this question, the Eleventh Circuit answered Yes, while the Sixth and Seventh Circuits answered No.)

Proposed Amendment:

§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**
- (b) Specific Offense Characteristics
 - (1) If the minor was in the custody, care, or supervisory control of the defendant, increase by **4** 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 minor to engage in prohibited sexual conduct; or (ii) a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct, increase by **4** levels.
 - (3) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct, increase by **2** levels.
- (c) Cross Reference
 - (1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, §2A3.1 shall apply, regardless of the "consent" of the victim.

Commentary

Statutory Provision: 18 U.S.C. § 2243(a). 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 (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; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.

"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).

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

(A) In General.—Subsection (b)(1) is intended to have broad application and is to be applied whenever the minor 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 minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—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. Application of Subsection (b)(2).—

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

- (B) Undue Influence.—*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 minor compromised the voluntariness of the minor's behavior. **The voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring.***

However, subsection (b)(2)(B)(ii) does not apply in a case in which the only "minor" (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.

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

4. Application of Subsection (b)(3).—*Subsection (b)(3) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce the minor 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 minor or with a person who exercises custody, care, or supervisory control of the minor.*
5. Cross Reference.—*Subsection (c)(1) provides a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. § 2241 or § 2242. For example, the cross reference to §2A3.1 shall apply if (A) the victim had not attained the age of 12 years (see 18 U.S.C. § 2241(c)); (B) the victim had attained the age of 12 years but not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnaping (see 18 U.S.C. § 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnaping (see 18 U.S.C. § 2242(1)).*
6. Upward Departure Consideration.—*There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.*

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 minor, it also applies to cases, prosecuted under 18 U.S.C. § 2243(a), in which a participant took active measure(s) to unduly influence the minor to engage in prohibited sexual conduct and, thus, the voluntariness of the minor's behavior was compromised. A ~~two-level~~ **four-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 minor and the defendant, as specified in 18 U.S.C. § 2243(a). A ~~two-level~~ **four-level** enhancement is provided in subsection (b)(1) for a defendant who victimizes a minor under his supervision or care. However, if the minor 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 minor.

* * *

§2G1.3. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor

(a) Base Offense Level:

- (1) **34**, if the defendant was convicted under 18 U.S.C. § 1591(b)(1);
- (2) **30**, if the defendant was convicted under 18 U.S.C. § 1591(b)(2);
- (3) **28**, if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a);
or
- (4) **24**, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.
- (2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by **2** levels.
- (3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by **2** levels.

- (4) If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by **2** levels.
- (5) If (A) subsection (a)(3) or (a)(4) applies; and (B) the offense involved a minor who had not attained the age of 12 years, increase by **8** levels.

(c) Cross References

- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.
- (2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.
- (3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the "consent" of the minor.

(d) Special Instruction

- (1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a minor); 18 U.S.C. §§ 1591 (only if the offense involved a minor), 2421 (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2423, 2425.

Application Notes:

1. Definitions.—For purposes of this guideline:

"Commercial sex act" has the meaning given that term in 18 U.S.C. § 1591(c)(1).

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

"Illicit sexual conduct" has the meaning given that term in 18 U.S.C. § 2423(f).

"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 (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; or (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).

"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).

2. Application of Subsection (b)(1).—

(A) Custody, Care, or Supervisory Control.—Subsection (b)(1) 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 minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement under subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. Application of Subsection (b)(2).—

(A) Misrepresentation of Participant's Identity.—The enhancement in subsection (b)(2)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual

conduct. Subsection (b)(2)(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)(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 minor.

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 persuade, induce, entice, coerce, or facilitate the travel of, 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.

- (B) Undue Influence.—In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior. *The voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring.*

However, subsection (b)(2)(B) does not apply in a case in which the only "minor" (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.

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

4. Application of Subsection (b)(3).—Subsection (b)(3) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce the minor 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 minor or with a person who exercises custody, care, or supervisory control of the minor.
5. Cross Reference.— Subsection (c)(1) provides a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. § 2241 or § 2242. For example, the cross reference to §2A3.1 shall apply if (A) the victim had not attained the age of 12 years (see 18 U.S.C. § 2241(c)); (B) the victim had attained the age of 12 years but not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnaping (see 18 U.S.C. § 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnaping (see 18 U.S.C. § 2242(1)).
6. Upward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.

EXHIBIT G

PROPOSED AMENDMENT: COURT SECURITY IMPROVEMENT ACT OF 2007

Synopsis of Proposed Amendment: *This proposed amendment responds to the Court Security Improvement Act of 2007, Public Law 110–177 (the "Act"), and related guideline application issues.*

First, the proposed amendment amends §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens) to provide a new 2-level enhancement for a case in which the defendant (A) is convicted under 18 U.S.C. § 115, (B) made a public threatening communication, and (C) knew or should have known that the public threatening communication created a substantial risk of inciting others to violate 18 U.S.C. § 115. This responds to the directive in section 209 of the Act. Section 209 specified that the Commission should review certain threats made in violation of section 115 that occur over the Internet, taking into consideration the number of threats made, the number of intended recipients, and whether the senders of the threats were acting alone or as part of a larger group. The Commission determined that the enhancement should not be limited to Internet threats but should be neutral as to modality because publicly available threats have the potential to incite others to make additional threats against the victim, regardless of the forum (e.g., radio or television broadcast, or the Internet). Section 2A6.1 already adequately provides for offenses involving multiple threats and multiple victims, through application of the specific offense characteristic at §2A6.1(b)(2) and the departure provision at Application Note 4.

Second, the proposed amendment expands the range of guidelines to which offenses under 18 U.S.C. § 1513 (Retaliating against a witness, victim, or an informant) are referenced. Currently, all offenses under section 1513 are referenced in Appendix A (Statutory Index) to §2J1.2 (Obstruction of Justice). However, section 1513 covers a range of conduct; subsection (a) makes it unlawful to kill or attempt to kill another person with intent to retaliate against a person for attending or testifying at an official proceeding or for providing information to a law enforcement officer, and subsection (b) makes it unlawful to cause bodily injury to another person or damage the tangible property of another person (or threaten to do so) with intent to so retaliate. To more adequately account for this range of conduct, the proposed amendment amends Appendix A (Statutory Index) so that offenses under section 1513 are referenced not only to §2J1.2, but also to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), and 2B1.1 (Theft, Property Destruction, and Fraud).

Proposed Amendment:

§2A6.1. Threatening or Harassing Communications; Hoaxes; False Liens

- (a) Base Offense Level:
 - (1) **12**; or
 - (2) **6**, if the defendant is convicted of an offense under 47 U.S.C. § 223(a)(1)(C), (D), or (E) that did not involve a threat to injure a person or property.

(b) Specific Offense Characteristics

- (1) If the offense involved any conduct evidencing an intent to carry out such threat, increase by **6** levels.
- (2) If (A) the offense involved more than two threats; or (B) the defendant is convicted under 18 U.S.C. § 1521 and the offense involved more than two false liens or encumbrances, increase by **2** levels.
- (3) If the offense involved the violation of a court protection order, increase by **2** levels.
- (4) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by **4** levels.
- (5) If the defendant (A) is convicted under 18 U.S.C. § 115, (B) made a public threatening communication, and (C) knew or should have known that the public threatening communication created a substantial risk of inciting others to violate 18 U.S.C. § 115, increase by **2** levels.
- (56) If (A) subsection (a)(2) and subdivisions (1), (2), (3), ~~and (4)~~, and (5) do not apply, and (B) the offense involved a single instance evidencing little or no deliberation, decrease by **4** levels.

(c) Cross Reference

- (1) If the offense involved any conduct evidencing an intent to carry out a threat to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), apply §2M6.1 (Weapons of Mass Destruction), if the resulting offense level is greater than that determined under this guideline.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(c), 35(b), 871, 876, 877, 878(a), 879, 1038, 1521, 1992(a)(9), (a)(10), 2291(a)(8), 2291(e), 2292, 2332b(a)(2); 47 U.S.C. § 223(a)(1)(C)-(E); 49 U.S.C. § 46507. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Scope of Conduct to Be Considered.— In determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider both conduct that occurred prior to the offense and conduct that occurred during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense, under the facts of the case taken as a whole. For example, if the defendant engaged in several acts of mailing threatening letters to the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of

determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider only those prior acts of threatening the victim that have a substantial and direct connection to the offense.

2. Applicability of Chapter Three Adjustments.—If the defendant is convicted under 18 U.S.C. § 1521, apply §3A1.2 (Official Victim).
3. Grouping.—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving making a threatening or harassing communication to the same victim are grouped together under §3D1.2 (Groups of Closely Related Counts). Multiple counts involving different victims are not to be grouped under §3D1.2.
4. Departure Provisions.—
 - (A) In General.—The Commission recognizes that offenses covered by this guideline may include a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. See Chapter Five, Part K (Departures).
 - (B) Multiple Threats, False Liens or Encumbrances, or Victims; Pecuniary Harm.—If the offense involved (i) substantially more than two threatening communications to the same victim, (ii) a prolonged period of making harassing communications to the same victim, (iii) substantially more than two false liens or encumbrances against the real or personal property of the same victim, (iv) multiple victims, or (v) substantial pecuniary harm to a victim, an upward departure may be warranted.

Background: These statutes cover a wide range of conduct, the seriousness of which depends upon the defendant's intent and the likelihood that the defendant would carry out the threat. The specific offense characteristics are intended to distinguish such cases.

Subsection (b)(5) implements, in a broader form, the directive to the Commission in section 209 of the Court Security Improvement Act of 2007, Public Law 110–177.

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 1513 2A1.1, 2A1.2, 2A1.3,
 2A2.1, 2A2.2, 2A2.3,
 2B1.1, 2J1.2

EXHIBIT H

PROPOSED AMENDMENT: SUBMERSIBLE VESSELS

Synopsis of Proposed Amendment: *This proposed amendment implements the Drug Trafficking Vessel Interdiction Act of 2008, Pub. L. 110–407 (the “Act”). The Act creates a new offense at 18 U.S.C. § 2285 (Operation of Submersible Vessel or Semi-Submersible Vessel Without Nationality), which provides: “Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country’s territorial sea with an adjacent country, with the intent to evade detection, shall be fined under this title, imprisoned not more than 15 years, or both.”*

Section 103 of the Act also directs the Commission to promulgate or amend the guidelines to provide penalties for persons convicted of offenses under 18 U.S.C. § 2285. In carrying out this directive, the Commission shall—

- (1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offense described in section 2285 of title 18, United States Code, and the need for deterrence to prevent such offenses;*
- (2) account for any aggravating or mitigating circumstances that might justify exceptions, including—*
 - (A) the use of a submersible vessel or semi-submersible vessel described in section 2285 of title 18, United States Code, to facilitate other felonies;*
 - (B) the repeated use of a submersible vessel or semi-submersible vessel described in section 2285 of title 18, United States Code, to facilitate other felonies, including whether such use is part of an ongoing criminal organization or enterprise;*
 - (C) whether the use of such a vessel involves a pattern of continued and flagrant violations of section 2285 of title 18, United States Code;*
 - (D) whether the persons operating or embarking in a submersible vessel or semi-submersible vessel willfully caused, attempted to cause, or permitted the destruction or damage of such vessel or failed to heave to when directed by law enforcement officers; and*
 - (E) circumstances for which the sentencing guidelines (and policy statements) provide sentencing enhancements;*
- (3) ensure reasonable consistency with other relevant directives, other sentencing guidelines and policy statements, and statutory provisions;*
- (4) make any necessary and conforming changes to the sentencing guidelines and policy statements; and*

- (5) *ensure that the sentencing guidelines and policy statements adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code.*

The proposed amendment amends §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit these Offenses); Attempt or Conspiracy) by expanding the scope of the specific offense characteristic at subsection (b)(2) to apply if the defendant used a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285. It also makes a conforming change to a reference in Application Note 8.

The proposed amendment also provides a new guideline at §2X7.2 (Submersible and Semi-Submersible Vessels) for the new offense at 18 U.S.C. § 2285. The new guideline provides a base offense level of 26 and includes a tiered specific offense characteristic and upward departure provisions to address certain aggravating circumstances listed in the directive. The specific offense characteristic provides a two-level enhancement for failing to heave to, a four-level enhancement for attempting to sink the vessel, and an eight-level enhancement for sinking the vessel; the greatest applicable enhancement applies. The upward departure provisions provide that an upward departure may be warranted if the defendant engaged in a pattern of activity involving the use of submersible or semi-submersible vessel, or if the offense involved the use of the vessel as a part of an ongoing criminal organization or criminal enterprise.

Finally, the proposed amendment provides a reference in Appendix A (Statutory Index) to index the new offense to the new guideline.

Proposed Amendment:

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

- (a) Base Offense Level (Apply the greatest):
- (1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
 - (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
 - (3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels.

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
- (2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, **or** (B) **a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used**, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.
- (3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.
- (4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.
- (5) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.
- (6) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.
- (7) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.
- (8) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.
- (9) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.
- (10) (Apply the greatest):
 - (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(C) If—

(i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

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

(11) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is omitted.]

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

- (1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

* * *

Commentary

* * *

Application Notes:

* * *

8. *Interaction with §3B1.3.—A defendant who used special skills in the commission of the offense may be subject to an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. Additionally, an enhancement under §3B1.3 ordinarily would apply in a case in which the defendant used his or her position as a coach to influence an athlete to use an anabolic steroid.*

Note, however, that if an adjustment from subsection (b)(2)(BC) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

* * *

7. **OFFENSES INVOLVING BORDER TUNNELS AND SUBMERSIBLE AND SEMI-SUBMERSIBLE VESSELS**

* * *

§2X7.2. Submersible and Semi-Submersible Vessels

- (a) Base Offense Level: **26**
- (b) Specific Offense Characteristic
- (1) (Apply the greatest) If the offense involved—
- (A) a failure to heave to when directed by law enforcement officers, increase by **2** levels;
- (B) an attempt to sink the vessel, increase by **4** levels; or

(C) the sinking of the vessel, increase by 8 levels.

Commentary

Statutory Provision: 18 U.S.C. § 2285.

Application Note:

1. Upward Departure Provisions.—An upward departure may be warranted in any of the following cases:

(A) The defendant engaged in a pattern of activity involving use of a submersible vessel or semi-submersible vessel described in 18 U.S.C. § 2285 to facilitate other felonies.

(B) The offense involved use of the vessel as part of an ongoing criminal organization or enterprise.

Background: This guideline implements the directive to the Commission in section 103 of Public Law 110–407.

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 2284
18 U.S.C. § 2285

2M5.3, 2X2.1, 2X3.1
2X7.2

EXHIBIT I

PROPOSED AMENDMENT: WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008

Synopsis of Proposed Amendment: *This proposed amendment is a multi-part amendment responding to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110-457 (the "Act").*

Part A of the proposed amendment responds to the directive in section 222(g) of the Act, which directs the Commission to—

review and, if appropriate, amend the sentencing guidelines and policy statements applicable to persons convicted of alien harboring to ensure conformity with the sentencing guidelines applicable to persons convicted of promoting a commercial sex act if—

- (1) the harboring was committed in furtherance of prostitution; and*
- (2) the defendant to be sentenced is an organizer, leader, manager, or supervisor of the criminal activity.*

Alien harboring is an offense under 8 U.S.C. § 1324(a) (bringing in and harboring certain aliens), which makes it unlawful to (among other things) harbor an illegal alien. Offenses under section 1324(a) are referenced to §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). The guidelines applicable to promoting a commercial sex act are §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). Part A responds to the directive by amending the specific offense characteristic at §2L1.1(b)(8). Under the amendment, the existing specific offense characteristic for coercion at subsection (b)(8) would remain as subsection (b)(8)(A), and an alternative enhancement would be provided that would apply in a case in which the defendant was convicted of alien harboring, the alien harboring was for the purpose of prostitution, and the defendant receives an adjustment under §3B1.1 (Aggravating Role). This alternative enhancement would provide an enhancement of 2 levels, but if the alien engaging in the prostitution had not attained the age of 18 years, 6 levels. Because this is an alternative enhancement, it would not apply if the existing specific offense characteristic for coercion at §2L1.1(b)(8) was greater.

Part B of the proposed amendment responds to a new offense created by the Act, 18 U.S.C. § 1351 (Fraud in foreign labor contracting). Part B references the offense to §2B1.1 (Theft, Property Destruction, and Fraud).

Part C of the proposed amendment responds to another new offense created by the Act, 18 U.S.C. § 1593A (benefitting financially from peonage, slavery, and trafficking in persons). This new offense applies when a person has knowingly benefitted financially from participating in a venture that has engaged in a violation of 18 U.S.C. §§ 1581(a), 1592, or 1595(a), knowing or in reckless disregard of that fact that the venture has engaged in such violation. Part C responds to this offense by referencing it to §2H4.1 (Peonage,

Involuntary Servitude, and Slave Trade), and by amending §2H4.1 to provide an alternative base offense level for such offense. Under Part C, a defendant convicted of section 1593A receives the same base offense level as he would receive if he were convicted of committing the underlying violation. (For example, if the defendant was convicted of section 1593A under circumstances in which he benefitted financially from participating in a venture that has engaged in a violation of 18 U.S.C. § 1592, the defendant would receive the same base offense level, 18, as if he had been convicted of 18 U.S.C. § 1592.)

Part C also provides a new Application Note containing a downward departure provision to address cases under 18 U.S.C. §§ 1589(b) and 1593A in which a defendant benefits from participation in a venture that has engaged in criminal activities but does so in reckless disregard of the fact that the venture engaged in such activities.

Proposed Amendment:

Part A (Directive Regarding Alien Harboring Committed in Furtherance of Prostitution)

§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien

(a) Base Offense Level:

- (1) **25**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);
- (2) **23**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or
- (3) **12**, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant’s spouse or child (or both the defendant’s spouse and child), and (B) the base offense level is determined under subsection (a)(3), decrease by **3** levels.
- (2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

<u>Number of Unlawful Aliens Smuggled, Transported, or Harbored</u>	<u>Increase in Level</u>
(A) 6-24	add 3
(B) 25-99	add 6
(C) 100 or more	add 9 .

- (3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.
- (4) If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent, increase by **2** levels.
- (5) (Apply the Greatest):
 - (A) If a firearm was discharged, increase by **6** levels, but if the resulting offense level is less than level **22**, increase to level **22**.
 - (B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by **4** levels, but if the resulting offense level is less than level **20**, increase to level **20**.
 - (C) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.
- (6) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.
- (7) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

<u>Death or Degree of Injury</u>	<u>Increase in Level</u>
(A) Bodily Injury	add 2 levels
(B) Serious Bodily Injury	add 4 levels
(C) Permanent or Life-Threatening Bodily Injury	add 6 levels
(D) Death	add 10 levels.

~~(8) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (A) after the alien was smuggled into the United States; or (B) while the alien was transported or harbored in the United States, increase by **2** levels. If the resulting offense level is less than level **18**, increase to level **18**.~~

- (8) (Apply the greater):
 - (A) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was

smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18.

(B) If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by 2 levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by 6 levels.

(9) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by 2 levels.

(c) Cross Reference

(1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1324(a), 1327. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"The offense was committed other than for profit" means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

"Number of unlawful aliens smuggled, transported, or harbored" does not include the defendant.

"Aggravated felony" is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States).

"Child" has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

"Spouse" has the meaning set forth in 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

"Immigration and naturalization offense" means any offense covered by Chapter Two, Part L.

"Minor" means an individual who had not attained the age of 16 years.

"Parent" means (A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father.

2. Interaction with §3B1.1.—For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others. In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply.
3. Upward Departure Provisions.—An upward departure may be warranted in any of the following cases:
 - (A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.
 - (B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).
 - (C) The offense involved substantially more than 100 aliens.
4. Prior Convictions Under Subsection (b)(3).—Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).
5. Application of Subsection (b)(6).—Reckless conduct to which the adjustment from subsection (b)(6) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition). If subsection (b)(6) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)(6) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(5).
6. Inapplicability of §3A1.3.—If an enhancement under subsection (b)(8)(A) applies, do not apply §3A1.3 (Restraint of Victim).

Background: This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986.

* * *

Part B (New Offense Under 18 U.S.C. § 1351 (Fraud in Foreign Labor Contracting))

APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 1350 2B1.1

18 U.S.C. § 1351 2B1.1

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Part C (New Offense Under 18 U.S.C. § 1593A (Benefitting Financially from Peonage, Slavery, and Trafficking in Persons))

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18 U.S.C. § 1592 2H4.1

18 U.S.C. § 1593A 2H4.1

* * *

§2H4.1. Peonage, Involuntary Servitude, and Slave Trade

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

(1) **22**; or

(2) **18**, if (A) the defendant was convicted of an offense under 18 U.S.C. § 1592, or (B) the defendant was convicted of an offense under 18 U.S.C. § 1593A based on an act in violation of 18 U.S.C. § 1592.

(b) Specific Offense Characteristics

(1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by **4** levels; or (B) if any victim sustained serious bodily injury, increase by **2** levels.

(2) If (A) a dangerous weapon was used, increase by **4** levels; or (B) a dangerous weapon was brandished, or the use of a dangerous weapon was threatened, increase by **2** levels.

(3) If any victim was held in a condition of peonage or involuntary servitude for (A) more than one year, increase by **3** levels; (B) between 180 days and one year, increase by **2** levels; or (C) more than 30 days but less than 180 days, increase by **1** level.

(4) If any other felony offense was committed during the commission of, or in connection with, the peonage or involuntary servitude offense, increase to the greater of:

(A) **2** plus the offense level as determined above, or

(B) **2** plus the offense level from the offense guideline applicable to

that other offense, but in no event greater than level 43.

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 1581-1590, 1592, 1593A.

Application Notes:

1. For purposes of this guideline—

"A dangerous weapon was used" means that a firearm was discharged, or that a firearm or other dangerous weapon was otherwise used. "The use of a dangerous weapon was threatened" means that the use of a dangerous weapon was threatened regardless of whether a dangerous weapon was present.

Definitions of "firearm," "dangerous weapon," "otherwise used," "serious bodily injury," and "permanent or life-threatening bodily injury" are found in the Commentary to §1B1.1 (Application Instructions).

2. Under subsection (b)(4), "any other felony offense" means any conduct that constitutes a felony offense under federal, state, or local law (other than an offense that is itself covered by this subpart). When there is more than one such other offense, the most serious such offense (or group of closely related offenses in the case of offenses that would be grouped together under §3D1.2(d)) is to be used. See Application Note 3 of §1B1.5 (Interpretation of References to other Offense Guidelines).
3. If the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude, an upward departure may be warranted.
4. *In a case in which the defendant was convicted under 18 U.S.C. §§ 1589(b) or 1593A, a downward departure may be warranted if the defendant benefitted from participating in a venture described in those sections without knowing that (i.e., in reckless disregard of the fact that) the venture had engaged in the criminal activity described in those sections.*

EXHIBIT J

PROPOSED AMENDMENT: RYAN HAIGHT ONLINE PHARMACY CONSUMER PROTECTION ACT OF 2008

Synopsis of Proposed Amendment: *This proposed amendment addresses changes made by the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Public Law 110–465 (the “Act”).*

The Act amended the Controlled Substances Act (21 U.S.C. § 801 et seq.) (the “CSA”) to create two new offenses involving controlled substances. The first is 21 U.S.C. § 841(h) (Offenses Involving Dispensing of Controlled Substances by Means of the Internet), which prohibits the delivery, distribution, or dispensing of controlled substances over the Internet without a valid prescription. The applicable statutory maximum term of imprisonment is determined based upon the controlled substance being distributed. The second new offense is 21 U.S.C. § 843(c)(2)(A) (Prohibiting the Use of the Internet to Advertise for Sale a Controlled Substance), which prohibits the use of the Internet to advertise for sale of a controlled substance. This offense has a statutory maximum term of imprisonment of four years.

In addition to the new offenses, the Act increased the statutory maximum terms of imprisonment for all Schedule III controlled substance offenses (from 5 years to 10 years), for all Schedule IV controlled substance offenses (from 3 years to 5 years), and for Schedule V controlled substance offenses if the offense is committed after a prior drug conviction (from 2 years to 5 years). The Act added a sentencing enhancement for Schedule III controlled substance offenses where “death or serious bodily injury results from the use of such substance.” The Act also includes a directive to the Commission that states:

The United States Sentencing Commission, in determining whether to amend, or establish new, guidelines or policy statements, to conform the Federal sentencing guidelines and policy statements to this Act and the amendments made by this Act, should not construe any change in the maximum penalty for a violation involving a controlled substance in a particular schedule as being the sole reason to amend, or establish a new, guideline or policy statement.

First, the proposed amendment addresses the new penalty structure for cases involving Schedule III controlled substances where “death or serious bodily injury results from the use of such substance.” As noted above, for a case involving a Schedule III controlled substance, the default maximum term of imprisonment has been increased to 10 years; if death or serious bodily injury results, the maximum term is 15 years. However, if a case involving a Schedule III controlled substance is committed by a person with one or more prior drug convictions, the default maximum term of imprisonment is 20 years; if death or serious bodily injury results, the maximum term is 30 years. The proposed amendment provides two new alternative base offense levels at §2D1.1(a)(3) and (a)(4) for a case involving death or serious bodily injury: level 30 if the defendant committed the offense after one or more prior convictions for a similar offense, and level 26 otherwise.

Second, the proposed amendment amends the Drug Quantity Table to raise the maximum base offense level for offenses involving Schedule III hydrocodone. Currently, the maximum base offense level for Schedule III substances (except Ketamine) is level 20. The proposed amendment raises the maximum base offense level from level 20 to level 30 for offenses involving Schedule III hydrocodone.

Third, the proposed amendment revises the title of §2D3.1 (Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy) to reflect the new offense at 21 U.S.C. § 843(c)(2)(A) (Prohibiting the Use of the Internet to Advertise for Sale a Controlled Substance). The new offense is already referenced in Appendix A (Statutory Index) to §2D3.1.

Fourth, the proposed amendment amends Appendix A (Statutory Index) to refer the new offense at 21 U.S.C. § 841(h) (Offenses Involving Dispensing of Controlled Substances by Means of the Internet) to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

Proposed Amendment:

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

- (a) Base Offense Level (Apply the greatest):
- (1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
 - (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
 - (3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
 - (4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
 - (35) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels.
- (b) Specific Offense Characteristics
- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

- (2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.
- (3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.
- (4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.
- (5) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.
- (6) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.
- (7) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.
- (8) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.
- (9) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.
- (10) (Apply the greatest):
 - (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
 - (B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
 - (C) If—

- (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or
- (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

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

- (11) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.
- (2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

- (1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

- (1) ● 30 KG or more of Heroin; ● 150 KG or more of Cocaine; ● 4.5 KG or more of Cocaine Base; ● 30 KG or more of PCP, or 3 KG or more of PCP (actual); ● 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice"; ● 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual); ● 300 G or more of LSD; ● 12 KG or more of Fentanyl; ● 3 KG or more of a Fentanyl Analogue; ● 30,000 KG or more of Marihuana; ● 6,000 KG or more of Hashish; ● 600 KG or more of Hashish Oil; ● 30,000,000 units or more of Ketamine; ● 30,000,000 units or more of Schedule I or II Depressants; ● 1,875,000 units or more of Flunitrazepam. **Level 38**
- (2) ● At least 10 KG but less than 30 KG of Heroin; ● At least 50 KG but less than 150 KG of Cocaine; ● At least 1.5 KG but less than 4.5 KG of Cocaine Base; ● At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); ● At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice"; ● At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual); ● At least 100 G but less than 300 G of LSD; ● At least 4 KG but less than 12 KG of Fentanyl; ● At least 1 KG but less than 3 KG of a Fentanyl Analogue; ● At least 10,000 KG but less than 30,000 KG of Marihuana; ● At least 2,000 KG but less than 6,000 KG of Hashish; ● At least 200 KG but less than 600 KG of Hashish Oil; ● At least 10,000,000 but less than 30,000,000 units of Ketamine; ● At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants; ● At least 625,000 but less than 1,875,000 units of Flunitrazepam. **Level 36**
- (3) ● At least 3 KG but less than 10 KG of Heroin; ● At least 15 KG but less than 50 KG of Cocaine; ● At least 500 G but less than 1.5 KG of Cocaine Base; ● At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual); ● At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice"; **Level 34**

- At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
- At least 30 G but less than 100 G of LSD;
- At least 1.2 KG but less than 4 KG of Fentanyl;
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam.

- (4)
- At least 1 KG but less than 3 KG of Heroin;
 - At least 5 KG but less than 15 KG of Cocaine;
 - At least 150 G but less than 500 G of Cocaine Base;
 - At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
 - At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
 - At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
 - At least 10 G but less than 30 G of LSD;
 - At least 400 G but less than 1.2 KG of Fentanyl;
 - At least 100 G but less than 300 G of a Fentanyl Analogue;
 - At least 1,000 KG but less than 3,000 KG of Marihuana;
 - At least 200 KG but less than 600 KG of Hashish;
 - At least 20 KG but less than 60 KG of Hashish Oil;
 - At least 1,000,000 but less than 3,000,000 units of Ketamine;
 - At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
 - At least 62,500 but less than 187,500 units of Flunitrazepam.

Level 32

- (5)
- At least 700 G but less than 1 KG of Heroin;
 - At least 3.5 KG but less than 5 KG of Cocaine;
 - At least 50 G but less than 150 G of Cocaine Base;
 - At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
 - At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
 - At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
 - At least 7 G but less than 10 G of LSD;
 - At least 280 G but less than 400 G of Fentanyl;
 - At least 70 G but less than 100 G of a Fentanyl Analogue;
 - At least 700 KG but less than 1,000 KG of Marihuana;
 - At least 140 KG but less than 200 KG of Hashish;
 - At least 14 KG but less than 20 KG of Hashish Oil;
 - At least 700,000 but less than 1,000,000 units of Ketamine;
 - At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
 - 700,000 or more units of Schedule III Hydrocodone;
 - At least 43,750 but less than 62,500 units of Flunitrazepam.

Level 30

- (6) ● At least 400 G but less than 700 G of Heroin;
 ● At least 2 KG but less than 3.5 KG of Cocaine;
 ● At least 35 G but less than 50 G of Cocaine Base;
 ● At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
 ● At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";
 ● At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
 ● At least 4 G but less than 7 G of LSD;
 ● At least 160 G but less than 280 G of Fentanyl;
 ● At least 40 G but less than 70 G of a Fentanyl Analogue;
 ● At least 400 KG but less than 700 KG of Marihuana;
 ● At least 80 KG but less than 140 KG of Hashish;
 ● At least 8 KG but less than 14 KG of Hashish Oil;
 ● At least 400,000 but less than 700,000 units of Ketamine;
 ● At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
 ● At least 400,000 but less than 700,000 units of Schedule III Hydrocodone;
 ● At least 25,000 but less than 43,750 units of Flunitrazepam.

Level 28

- (7) ● At least 100 G but less than 400 G of Heroin;
 ● At least 500 G but less than 2 KG of Cocaine;
 ● At least 20 G but less than 35 G of Cocaine Base;
 ● At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
 ● At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
 ● At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
 ● At least 1 G but less than 4 G of LSD;
 ● At least 40 G but less than 160 G of Fentanyl;
 ● At least 10 G but less than 40 G of a Fentanyl Analogue;
 ● At least 100 KG but less than 400 KG of Marihuana;
 ● At least 20 KG but less than 80 KG of Hashish;
 ● At least 2 KG but less than 8 KG of Hashish Oil;
 ● At least 100,000 but less than 400,000 units of Ketamine;
 ● At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
 ● At least 100,000 but less than 400,000 units of Schedule III Hydrocodone;
 ● At least 6,250 but less than 25,000 units of Flunitrazepam.

Level 26

- (8) ● At least 80 G but less than 100 G of Heroin;
 ● At least 400 G but less than 500 G of Cocaine;
 ● At least 5 G but less than 20 G of Cocaine Base;
 ● At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
 ● At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
 ● At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than

Level 24

5 G of Amphetamine (actual);

- At least 800 MG but less than 1 G of LSD;
- At least 32 G but less than 40 G of Fentanyl;
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
- At least 80,000 but less than 100,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 6,250 units of Flunitrazepam.

- (9) ● At least 60 G but less than 80 G of Heroin;
- At least 300 G but less than 400 G of Cocaine;
- At least 4 G but less than 5 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
- At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";
- At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
- At least 600 MG but less than 800 MG of LSD;
- At least 24 G but less than 32 G of Fentanyl;
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Ketamine;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- At least 60,000 but less than 80,000 units of Schedule III Hydrocodone;
- At least 3,750 but less than 5,000 units of Flunitrazepam.

Level 22

- (10) ● At least 40 G but less than 60 G of Heroin;
- At least 200 G but less than 300 G of Cocaine;
- At least 3 G but less than 4 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
- At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
- At least 400 MG but less than 600 MG of LSD;
- At least 16 G but less than 24 G of Fentanyl;
- At least 4 G but less than 6 G of a Fentanyl Analogue;
- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Ketamine;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- At least 40,000 but less than 60,000 units of Schedule III Hydrocodone;

Level 20

- 40,000 or more units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 2,500 but less than 3,750 units of Flunitrazepam.

- (11) ● At least 20 G but less than 40 G of Heroin;
- At least 100 G but less than 200 G of Cocaine;
 - At least 2 G but less than 3 G of Cocaine Base;
 - At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
 - At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
 - At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
 - At least 200 MG but less than 400 MG of LSD;
 - At least 8 G but less than 16 G of Fentanyl;
 - At least 2 G but less than 4 G of a Fentanyl Analogue;
 - At least 20 KG but less than 40 KG of Marijuana;
 - At least 5 KG but less than 8 KG of Hashish;
 - At least 500 G but less than 800 G of Hashish Oil;
 - At least 20,000 but less than 40,000 units of Ketamine;
 - At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
 - At least 20,000 but less than 40,000 units of Schedule III Hydrocodone;
 - At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine or Hydrocodone);
 - At least 1,250 but less than 2,500 units of Flunitrazepam.

Level 18

- (12) ● At least 10 G but less than 20 G of Heroin;
- At least 50 G but less than 100 G of Cocaine;
 - At least 1 G but less than 2 G of Cocaine Base;
 - At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
 - At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";
 - At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
 - At least 100 MG but less than 200 MG of LSD;
 - At least 4 G but less than 8 G of Fentanyl;
 - At least 1 G but less than 2 G of a Fentanyl Analogue;
 - At least 10 KG but less than 20 KG of Marijuana;
 - At least 2 KG but less than 5 KG of Hashish;
 - At least 200 G but less than 500 G of Hashish Oil;
 - At least 10,000 but less than 20,000 units of Ketamine;
 - At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
 - At least 10,000 but less than 20,000 units of Schedule III Hydrocodone;
 - At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine or Hydrocodone);
 - At least 625 but less than 1,250 units of Flunitrazepam.

Level 16

- (13) ● At least 5 G but less than 10 G of Heroin;
- At least 25 G but less than 50 G of Cocaine;

Level 14

- At least 500 MG but less than 1 G of Cocaine Base;
- At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
- At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
- At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
- At least 50 MG but less than 100 MG of LSD;
- At least 2 G but less than 4 G of Fentanyl;
- At least 500 MG but less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Ketamine;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 10,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 312 but less than 625 units of Flunitrazepam.

(14) ● Less than 5 G of Heroin;

Level 12

- Less than 25 G of Cocaine;
- Less than 500 MG of Cocaine Base;
- Less than 5 G of PCP, or less than 500 MG of PCP (actual);
- Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
- Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
- Less than 50 MG of LSD;
- Less than 2 G of Fentanyl;
- Less than 500 MG of a Fentanyl Analogue;
- At least 2.5 KG but less than 5 KG of Marihuana;
- At least 500 G but less than 1 KG of Hashish;
- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Ketamine;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III Hydrocodone;
- At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 156 but less than 312 units of Flunitrazepam;
- 40,000 or more units of Schedule IV substances (except Flunitrazepam).

(15) ● At least 1 KG but less than 2.5 KG of Marihuana;

Level 10

- At least 200 G but less than 500 G of Hashish;
- At least 20 G but less than 50 G of Hashish Oil;
- At least 1,000 but less than 2,500 units of Ketamine;
- At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
- At least 1,000 but less than 2,500 units of Schedule III Hydrocodone;
- At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine or Hydrocodone);

- At least 62 but less than 156 units of Flunitrazepam;
- At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).

- (16) ● At least 250 G but less than 1 KG of Marihuana; **Level 8**
- At least 50 G but less than 200 G of Hashish;
 - At least 5 G but less than 20 G of Hashish Oil;
 - At least 250 but less than 1,000 units of Ketamine;
 - At least 250 but less than 1,000 units of Schedule I or II Depressants;
 - At least 250 but less than 1,000 units of Schedule III Hydrocodone;
 - At least 250 but less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone);
 - Less than 62 units of Flunitrazepam;
 - At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
 - 40,000 or more units of Schedule V substances.

- (17) ● Less than 250 G of Marihuana; **Level 6**
- Less than 50 G of Hashish;
 - Less than 5 G of Hashish Oil;
 - Less than 250 units of Ketamine;
 - Less than 250 units of Schedule I or II Depressants;
 - Less than 250 units of Schedule III Hydrocodone;
 - Less than 250 units of Schedule III substances (except Ketamine or Hydrocodone);
 - Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
 - Less than 40,000 units of Schedule V substances.

*Notes to Drug Quantity Table:

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

(B) The terms "PCP (actual)", "Amphetamine (actual)", and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

(C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

- (D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.
- (F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (e.g., patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of an anabolic steroid is one "unit".
- (G) In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.
- (H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabidiol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
- (I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabidiol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)-(3), (7), (g), 860a, 865, 960(a), (b); 49 U.S.C. § 46317(b).
For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.*

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

2. The statute and guideline also apply to "counterfeit" substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.
3. Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1; see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(c)(1), and 2D2.1(b)(1).
4. Distribution of "a small amount of marihuana for no remuneration", 21 U.S.C. § 841(b)(4), is treated as simple possession, to which §2D2.1 applies.
5. Analogues and Controlled Substances Not Referenced in this Guideline.—Any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. For purposes of this guideline "analogue" has the meaning given the term "controlled substance analogue" in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.

In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the marihuana equivalency of the most closely related controlled substance referenced in this guideline. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:

- (A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.
 - (B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.
 - (C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.
6. Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.

7. *Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a downward departure), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." See §5K1.1 (Substantial Assistance to Authorities). In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).*

8. *Interaction with §3B1.3.—A defendant who used special skills in the commission of the offense may be subject to an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. Additionally, an enhancement under §3B1.3 ordinarily would apply in a case in which the defendant used his or her position as a coach to influence an athlete to use an anabolic steroid.*

Note, however, that if an adjustment from subsection (b)(2)(B) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

9. *Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, methamphetamine, or oxycodone for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.*

10. *Use of Drug Equivalency Tables.—*

(A) *Controlled Substances Not Referenced in Drug Quantity Table.—The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, *i.e.*, heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:*

(i) *Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana.*

(ii) *Find the equivalent quantity of marihuana in the Drug Quantity Table.*

(iii) *Use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.*

(See also Application Note 5.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxymorphone, a Schedule I opiate, converts to an

equivalent quantity of 5 kg of marihuana. In a case involving 100 gm of oxymorphone, the equivalent quantity of marihuana would be 500 kg, which corresponds to a base offense level of 28 in the Drug Quantity Table.

- (B) Combining Differing Controlled Substances (Except Cocaine Base).—The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its marihuana equivalent, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level. To determine a single offense level in a case involving cocaine base and other controlled substances, see subdivision (D) of this note.

For certain types of controlled substances, the marihuana equivalencies in the Drug Equivalency Tables are "capped" at specified amounts (e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 999 grams of marihuana). Where there are controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies to determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts).

Note: Because of the statutory equivalences, the ratios in the Drug Equivalency Tables do not necessarily reflect dosages based on pharmacological equivalents.

- (C) Examples for Combining Differing Controlled Substances (Except Cocaine Base).—

- (i) The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 24.
- (ii) The defendant is convicted of selling 500 grams of marihuana (Level 8) and five kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 10 in the Drug Quantity Table.
- (iii) The defendant is convicted of selling 80 grams of cocaine (Level 16) and five kilograms of marihuana (Level 14). The cocaine is equivalent to 16 kilograms of marihuana. The total is therefore equivalent to 21 kilograms of marihuana, which has an offense level of 18 in the Drug Quantity Table.
- (iv) The defendant is convicted of selling 56,000 units of a Schedule III substance, 100,000 units of a Schedule IV substance, and 200,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 56 kilograms of marihuana (below the cap of 59.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 4.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 6.25 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 999 grams of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap

it would have been 1.25 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 59.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 61.99 (56 + 4.99 + .999) kilograms.

(D) Determining Base Offense Level in Offenses Involving Cocaine Base and Other Controlled Substances.—

(i) In General.—Except as provided in subdivision (ii), if the offense involves cocaine base ("crack") and one or more other controlled substance, determine the combined offense level as provided by subdivision (B) of this note, and reduce the combined offense level by 2 levels.

(ii) Exceptions to 2-level Reduction.—The 2-level reduction provided in subdivision (i) shall not apply in a case in which:

(I) the offense involved 4.5 kg or more, or less than 250 mg, of cocaine base; or

(II) the 2-level reduction results in a combined offense level that is less than the combined offense level that would apply under subdivision (B) of this note if the offense involved only the other controlled substance(s) (*i.e.*, the controlled substance(s) other than cocaine base).

(iii) Examples.—

(I) The case involves 20 gm of cocaine base, 1.5 kg of cocaine, and 10 kg of marihuana. Under the Drug Equivalency Tables in subdivision (E) of this note, 20 gm of cocaine base converts to 400 kg of marihuana (20 gm x 20 kg = 400 kg), and 1.5 kg of cocaine converts to 300 kg of marihuana (1.5 kg x 200 gm = 300 kg), which, when added to the 10 kg of marihuana results in a combined equivalent quantity of 710 kg of marihuana. Under the Drug Quantity Table, 710 kg of marihuana corresponds to a combined offense level of 30, which is reduced by two levels to level 28. For the cocaine and marihuana, their combined equivalent quantity of 310 kg of marihuana corresponds to a combined offense level of 26 under the Drug Quantity Table. Because the combined offense level for all three drug types after the 2-level reduction is not less than the combined base offense level for the cocaine and marihuana, the combined offense level for all three drug types remains level 28.

(II) The case involves 5 gm of cocaine base and 6 kg of heroin. Under the Drug Equivalency Tables in subdivision (E) of this note, 5 gm of cocaine base converts to 100 kg of marihuana (5 gm x 20 kg = 100 kg), and 6 kg of heroin converts to 6,000 kg of marihuana (6,000 gm x 1 kg = 6,000 kg), which, when added together results in a combined equivalent quantity of 6,100 kg of marihuana. Under the Drug Quantity Table, 6,100 kg of marihuana corresponds to a combined offense level of 34, which is reduced by two levels to 32. For the heroin, the 6,000 kg of marihuana corresponds to an offense level 34 under the Drug Quantity Table. Because the

combined offense level for the two drug types after the 2-level reduction is less than the offense level for the heroin, the reduction does not apply and the combined offense level for the two drugs remains level 34.

(E) Drug Equivalency Tables.—

Schedule I or II Opiates*

1 gm of Heroin =	1 kg of marihuana
1 gm of Alpha-Methylfentanyl =	10 kg of marihuana
1 gm of Dextromoramide =	670 gm of marihuana
1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/ PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] Propanamide) =	2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone =	500 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM)=	3 kg of marihuana

**Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylamine =	40 gm of marihuana
1 gm of Amphetamine =	2 kg of marihuana
1 gm of Amphetamine (Actual) =	20 kg of marihuana
1 gm of Methamphetamine =	2 kg of marihuana

1 gm of Methamphetamine (Actual) =	20 kg of marihuana
1 gm of "Ice" =	20 kg of marihuana
1 gm of Khat =	.01 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria")=	100 gm of marihuana
1 gm of Methylphenidate (Ritalin)=	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P ₂ P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P ₂ P (in any other case) =	75 gm of marihuana
1 gm Cocaine Base ('Crack') =	20 kg of marihuana
1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*

1 gm of Bufotenine =	70 gm of marihuana
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg of marihuana
1 gm of Diethyltryptamine/DET =	80 gm of marihuana
1 gm of Dimethyltryptamine/DMT =	100 gm of marihuana
1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana
1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-methylamphetamine/MDMA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA=	500 gm of marihuana
1 gm of Paramethoxymethylamphetamine/PMA =	500 gm of marihuana
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm of marihuana
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

Schedule I Marihuana

1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm of marihuana
1 gm of Hashish Oil =	50 gm of marihuana
1 gm of Cannabis Resin or Hashish =	5 gm of marihuana
1 gm of Tetrahydrocannabinol, Organic =	167 gm of marihuana
1 gm of Tetrahydrocannabinol, Synthetic =	167 gm of marihuana

Flunitrazepam **

1 unit of Flunitrazepam =	16 gm of marihuana
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***Provided*, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

Schedule I or II Depressants (except gamma-hydroxybutyric acid)

1 unit of a Schedule I or II Depressant (except gamma-hydroxybutyric acid) =	1 gm of marihuana
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Gamma-hydroxybutyric Acid

1 ml of gamma-hydroxybutyric acid =	8.8 gm of marihuana
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Schedule III Substances (except ketamine and hydrocodone)***

1 unit of a Schedule III Substance =	1 gm of marihuana
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****Provided*, that the combined equivalent weight of all Schedule III substances (except ketamine and hydrocodone), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Schedule III Hydrocodone****

1 unit of Schedule III hydrocodone =	1 gm of marihuana
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*****Provided*, that the combined equivalent weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 999.99 kilograms of marihuana.

Ketamine

1 unit of ketamine =	1 gm of marihuana
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Schedule IV Substances (except flunitrazepam)*****

1 unit of a Schedule IV Substance

(except Flunitrazepam)= 0.0625 gm of marihuana

***** *Provided*, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 4.99 kilograms of marihuana.

Schedule V Substances*****

1 unit of a Schedule V Substance = 0.00625 gm of marihuana

***** *Provided*, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.

List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)*****

1 gm of Ephedrine = 10 kg of marihuana

1 gm of Phenylpropanolamine = 10 kg of marihuana

1 gm of Pseudoephedrine = 10 kg of marihuana

***** *Provided*, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

Date Rape Drugs (except flunitrazepam, GHB, or ketamine)

1 ml of 1,4-butanediol = 8.8 gm marihuana

1 ml of gamma butyrolactone = 8.8 gm marihuana

To facilitate conversions to drug equivalencies, the following table is provided:

MEASUREMENT CONVERSION TABLE

1 oz = 28.35 gm

1 lb = 453.6 gm

1 lb = 0.4536 kg

1 gal = 3.785 liters

1 qt = 0.946 liters

1 gm = 1 ml (liquid)

1 liter = 1,000 ml

1 kg = 1,000 gm

1 gm = 1,000 mg

1 grain = 64.8 mg.

11. *If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (e.g., 100 doses of Mescaline at 500 mg per dose = 50 gms of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or*

capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

Hallucinogens

MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg

Marihuana

1 marihuana cigarette	0.5 gm
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Stimulants

Amphetamine*	10 mg
Methamphetamine*	5 mg
Phenmetrazine (Preludin)*	75 mg

*For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.

12. Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance - actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.

13. *Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13-15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13-15 is the appropriate classification.*

14. *If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.*

15. *LSD on a blotter paper carrier medium typically is marked so that the number of doses ("hits") per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.*

In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.

16. *In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.*

17. *For purposes of the guidelines, a "plant" is an organism having leaves and a readily observable root formation (e.g., a marijuana cutting having roots, a rootball, or root hairs is a marijuana plant).*

18. *If the offense involved importation of amphetamine or methamphetamine, and an adjustment from subsection (b)(2) applies, do not apply subsection (b)(4).*
19. *Hazardous or Toxic Substances.*—*Subsection (b)(10)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(10)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).*
20. *Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.*—
- (A) *Factors to Consider.*—*In determining, for purposes of subsection (b)(10)(C)(ii) or (D), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:*
- (i) *The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and the manner in which the chemicals or substances were stored.*
 - (ii) *The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.*
 - (iii) *The duration of the offense, and the extent of the manufacturing operation.*
 - (iv) *The location of the laboratory (e.g., whether the laboratory is located in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm.*
- (B) *Definitions.*—*For purposes of subsection (b)(10)(D):*
- "Incompetent" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.*
- "Minor" has the meaning given that term in Application Note 1 of the Commentary to*

§2A3.1 (Criminal Sexual Abuse).

21. Applicability of Subsection (b)(11).—The applicability of subsection (b)(11) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(11) applies.
22. Imposition of Consecutive Sentence for 21 U.S.C. § 860a or § 865.—Sections 860a and 865 of title 21, United States Code, require the imposition of a mandatory consecutive term of imprisonment of not more than 20 years and 15 years, respectively. In order to comply with the relevant statute, the court should determine the appropriate "total punishment" and divide the sentence on the judgment form between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 860a or § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 860a or § 865. For example, if the applicable adjusted guideline range is 151-188 months and the court determines a "total punishment" of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 860a or § 865 would achieve the "total punishment" in a manner that satisfies the statutory requirement of a consecutive sentence.
23. Application of Subsection (b)(6).—For purposes of subsection (b)(6), "mass-marketing by means of an interactive computer service" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(6) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "Interactive computer service", for purposes of subsection (b)(6) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).
24. Application of Subsection (e)(1).—
 - (A) Definition.—For purposes of this guideline, "sexual offense" means a "sexual act" or "sexual contact" as those terms are defined in 18 U.S.C. § 2246(2) and (3), respectively.
 - (B) Upward Departure Provision.—If the defendant committed a sexual offense against more than one individual, an upward departure would be warranted.
25. Application of Subsection (b)(7).—For purposes of subsection (b)(7), "masking agent" means a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual's body.
26. Application of Subsection (b)(8).—For purposes of subsection (b)(8), "athlete" means an individual who participates in an athletic activity conducted by (i) an intercollegiate athletic association or interscholastic athletic association; (ii) a professional athletic association; or (iii) an amateur athletic organization.

Background: Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or

serious bodily injury resulted from the offense.

The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 32 and 26 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.

The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.

For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt. Consequently, the Commission adopted the policy that each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater.

Specific Offense Characteristic (b)(2) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S.Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more

likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence (see Chapman; §5G1.1(b)).

Subsection (b)(10)(A) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsections (b)(10)(C)(ii) and (D) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.

* * *

§2D3.1. **Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to ~~Schedule I~~ Scheduled Substances; Attempt or Conspiracy**

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APPENDIX A - STATUTORY INDEX

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21 U.S.C. § 841(g)	2D1.1
21 U.S.C. § 841(h)	2D1.1

EXHIBIT K

PROPOSED AMENDMENT: IDENTITY THEFT

Synopsis of Proposed Amendment: *This proposed amendment addresses the Identity Theft Restitution and Enforcement Act of 2008 (the "Act"), Title II of Pub. L. 110–326, and other related issues arising from case law. The Act contains a directive to the Commission at section 209. Section 209(a) of the Act directs the Commission to—*

review its guidelines and policy statements applicable to persons convicted of offenses under sections 1028, 1028A, 1030, 2511, and 2701 of title 18, United States Code, and any other relevant provisions of law, in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by such guidelines and policy statements.

The offenses that are the subject of the directive in section 209 of the Act, and the guidelines to which they are referenced, are as follows:

- (1) *18 U.S.C. § 1028 (fraud and related activity in connection with identification documents, authentication features, and information) makes it unlawful to engage in fraud and related activity in connection with "identification documents" (e.g., government-issued documents such as drivers' licenses) or "authentication features" (i.e., features used on such documents to determine whether such documents are authentic, such as watermarks or holograms). A violator is subject to a fine under title 18, United States Code, and imprisonment. The statutory maximum term of imprisonment varies from 1 year to 30 years, depending on the circumstances of the offense. For example, the statute provides imprisonment up to 30 years (if terrorism is involved); 20 years (if a drug trafficking crime or a crime of violence is involved, or if the violator is a repeat offender); and 15 years, 5 years, and 1 year, in other specified circumstances.*

Offenses under 18 U.S.C. § 1028 are referenced in Appendix A of the Guidelines Manual (Statutory Index) to §§2B1.1 (Theft, Property Destruction, and Fraud), 2L2.1 (Trafficking in a Document Relating to Naturalization), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization).

- (2) *18 U.S.C. § 1028A (aggravated identity theft) makes it unlawful to transfer, possess, or use a "means of identification" (i.e., a name or number used to identify a specific individual, such as a social security number) of another person during and in relation to another felony (such as a fraud or an immigration violation). A violator is subject to a mandatory consecutive term of imprisonment of 2 years or, if the other felony was a terrorism offense, 5 years.*

Offenses under 18 U.S.C. § 1028A are referenced in Appendix A (Statutory Index) to §2B1.6 (Aggravated Identity Theft).

- (3) *18 U.S.C. § 1030 (fraud and related activity in connection with computers) provides for several offenses as follows:*

- (A) *18 U.S.C. § 1030(a)(1) makes it unlawful to retain national security information after having obtained it by computer without authority, or to disclose such information to a person not entitled to receive it. A violator is subject to a fine under title 18, United States Code, and imprisonment up to 10 years (for a first offense) or 20 years (for a repeat offender).*

Offenses under 18 U.S.C. § 1030(a)(1) are referenced in the Statutory Index to §2M3.2 (Gathering National Defense Information).

- (B) *18 U.S.C. § 1030(a)(2) makes it unlawful to obtain by computer, without authority, information of a financial institution or of a federal agency. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 1 year (for a first offense), 5 years (for an offense involving valuable information, an offense for purposes of commercial advantage or financial gain, or an offense in furtherance of another crime or tort), or 10 years (for a repeat offender).*

Offenses under 18 U.S.C. § 1030(a)(2) are referenced in the Statutory Index to §2B1.1 (Theft, Property Destruction, and Fraud).

- (C) *18 U.S.C. § 1030(a)(3) makes it unlawful to access, without authority, a nonpublic computer of a federal agency. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 1 year (for a first offense) or 10 years (for a repeat offender).*

Offenses under 18 U.S.C. § 1030(a)(3) are referenced in the Statutory Index to §2B2.3 (Trespass).

- (D) *18 U.S.C. § 1030(a)(4) makes it unlawful to access a "protected computer" (i.e., a computer of a financial institution or a federal agency) without authority and, by means of doing so, further an intended fraud and obtain a thing of value. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 5 years (for a first offense) or 10 years (for a repeat offender).*

Offenses under 18 U.S.C. § 1030(a)(4) are referenced in the Statutory Index to §2B1.1 (Theft, Property Destruction, and Fraud).

- (E) *18 U.S.C. § 1030(a)(5) makes it unlawful to use a computer to cause damage to a "protected computer" (i.e., a computer of a financial institution or a federal agency). A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 1 year, 5 years, 10 years, 20 years, or life, depending on the circumstances.*

Offenses under 18 U.S.C. § 1030(a)(5) are referenced in the Statutory Index to §2B1.1 (Theft, Property Destruction, and Fraud).

- (F) *18 U.S.C. § 1030(a)(6) makes it unlawful to traffic in any password or similar information through which a computer may be accessed without authorization,*

if the trafficking affects interstate or foreign commerce or if the computer is used by or for a federal agency. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 1 year (for a first offense) or 10 years (for a repeat offender).

Offenses under 18 U.S.C. § 1030(a)(6) are referenced in the Statutory Index to §2B1.1 (Theft, Property Destruction, and Fraud).

- (G) *18 U.S.C. § 1030(a)(7) makes it unlawful to threaten to cause damage to, or obtain information from, a "protected computer" (i.e., a computer of a financial institution or a federal agency), without authority and with intent to extort. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 5 years (for a first offense) or 10 years (for a repeat offender).*

Offenses under 18 U.S.C. § 1030(a)(7) are referenced in the Statutory Index to §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

- (H) *18 U.S.C. § 1030(b) makes it unlawful to conspire to commit, or attempt to commit, a section 1030(a) offense. A violator is subject to the same penalty as for the section 1030(a) offense.*

Offenses under 18 U.S.C. § 1030(b) are referenced in the Statutory Index to §2X1.1 (Attempt, Solicitation, or Conspiracy).

- (4) *18 U.S.C. § 2511 (interception and disclosure of wire, oral, or electronic communications prohibited) makes it unlawful to intercept or disclose any wire, oral, or electronic communication. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 5 years.*

Offenses under 18 U.S.C. § 2511 are referenced in the Statutory Index to §§2B5.3 (Criminal Infringement of Copyright or Trademark) and 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information).

- (5) *18 U.S.C. § 2701 (unlawful access to stored communications) makes it unlawful to access, without authority, a facility through which an electronic communication service is provided and obtain, alter, or prevent authorized access to a wire or electronic communication stored in that facility. A violator is subject to a fine under title 18, United States Code, and imprisonment. If the offense is committed for commercial advantage, malicious damage, or commercial gain, or in furtherance of a crime or tort, the maximum term of imprisonment is 5 years (for a first offender) or 10 years (for a repeat offender); otherwise, the maximum term of imprisonment is 1 year (for a first offender) or 5 years (for a repeat offender).*

Offenses under 18 U.S.C. § 2701 are referenced in the Statutory Index to §2B1.1 (Theft, Property Destruction, and Fraud).

Section 209(b) of the Act requires that, in determining the appropriate sentence for the above

referenced crimes, the Commission “shall consider the extent to which the current guidelines and policy statements may or may not adequately account for the following factors in order to create an effective deterrent to computer crime and the theft or misuse of personally identifiable data”:

- (1) The level of sophistication and planning involved in such offense.*
- (2) Whether such offense was committed for purpose of commercial advantage or private financial benefit.*
- (3) The potential and actual loss resulting from the offense including—*
 - (A) the value of information obtained from a protected computer, regardless of whether the owner was deprived of use of the information; and*
 - (B) where the information obtained constitutes a trade secret or other proprietary information, the cost the victim incurred developing or compiling the information.*
- (4) Whether the defendant acted with intent to cause either physical or property harm in committing the offense.*
- (5) The extent to which the offense violated the privacy rights of individuals.*
- (6) The effect of the offense upon the operations of an agency of the United States Government, or of a State or local government.*
- (7) Whether the offense involved a computer used by the United States Government, a State, or a local government in furtherance of national defense, national security, or the administration of justice.*
- (8) Whether the offense was intended to, or had the effect of, significantly interfering with or disrupting a critical infrastructure.*
- (9) Whether the offense was intended to, or had the effect of, creating a threat to public health or safety, causing injury to any person, or causing death.*
- (10) Whether the defendant purposefully involved a juvenile in the commission of the offense.*
- (11) Whether the defendant’s intent to cause damage or intent to obtain personal information should be disaggregated and considered separately from the other factors set forth in USSG 2B1.1(b)(14) [currently §2B1.1(b)(15)].*
- (12) Whether the term “victim” as used in USSG 2B1.1, should include individuals whose privacy was violated as a result of the offense in addition to individuals who suffered monetary harm as a result of the offense.*
- (13) Whether the defendant disclosed personal information obtained during the commission of the offense.*

Section 209(c) of the Act requires that in responding to the directive, the Commission:

- (1) assure reasonable consistency with other relevant directives and with other sentencing guidelines;*
- (2) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges;*
- (3) make any conforming changes to the sentencing guidelines; and*
- (4) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.*

This proposed amendment addresses the factors set forth in section 209(b) of the Act, and other related issues arising under the Act and under case law.

First, the proposed amendment makes a series of changes to §2B1.1, as follows.

With regard to the factors in the directive that involve privacy and personal information (factors (5), (11), (12), and (13)), the amendment proposes to disaggregate the intent to obtain personal information prong from the other prongs in §2B1.1(b)(15). The proposed amendment adds a new 2-level enhancement to §2B1.1 if (A) the defendant was convicted of an offense under 18 U.S.C. § 1030 and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information.

Next, the proposed amendment amends the Commentary to §2B1.1 to provide that an individual whose means of identification was used unlawfully or without authority is counted as a "victim" for purposes of the victims table in subsection (b)(2).

With regard to factor (3) of the directive, which concerns proprietary information, the proposed amendment addresses two types of information: information that the victim retains but that is copied by the defendant, and information that constitutes a trade secret or other proprietary information of the victim. The proposed amendment amends a provision in Application Note 3(C), to specify that the estimate of loss may be based upon the fair market value of property copied. The proposed amendment adds a provision in Application Note 3(C), specifying that, in any case involving proprietary information (e.g., trade secrets), the court should consider, as a factor in determining loss, the cost of developing that information or the reduction in the value of that information that resulted from the offense.

Next, the proposed amendment amends §2H3.1 with regard to factor (5) of the directive. It amends Application Note 5 to §2H3.1, suggesting that an upward departure may be warranted not only in a case in which the offense involved confidential phone records information or tax return information of a substantial number of individuals (as the application note currently provides), but also in a case in which the offense involved personal information or means of identification of a substantial number of individuals. As a conforming change, the proposed amendment defines the term "personal information", for purposes of §2H3.1, in the same manner as the term "personal information" is defined for purposes of §2B1.1(b)(15).

The proposed amendment clarifies that information is "personal information" only if it involves an identifiable individual.

The Commission concluded that the remaining eight factors in the directive (factors (1), (2), (4), (6), (7), (8), (9), and (10)) are already adequately accounted for by the guidelines.

Finally, the proposed amendment makes several technical changes. In particular, it corrects several places in the Guidelines Manual that erroneously refer to subsection "(b)(15)(iii)" of §2B1.1; the reference should have been to subsection (b)(15)(A)(iii). Also, it conforms a statutory reference in §2B1.1(b)(15)(A)(ii), which refers to 18 U.S.C. § 1030(a)(5)(A)(i); the Act redesignated this statute, and the reference should now be to 1030(a)(5)(A).

It also clarifies Application Note 2(B) of §3B1.3 (Abuse of Position of Trust or Use of Special Skill). There is a concern that Application Note 2(B) is internally inconsistent in a case in which the defendant, as discussed in the example in Application Note 2(B)(i), is an employee of a state motor vehicle department who knowingly issues without proper authority a driver's license based on false, incomplete, or misleading information. Arguably, to "obtain" or "use" a means of identification (the terms used in the first sentence of Application Note 2(B)) does not necessarily include to "issue" a means of identification (the term used in the example in Application Note 2(B)(i)). The proposed amendment clarifies the first sentence of Application Note 2(B) so that it expressly covers not only obtaining or using, but also issuing or transferring, a means of identification.

Proposed Amendment:

§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

(a) Base Offense Level:

- (1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
- (2) 6, otherwise.

(b) Specific Offense Characteristics

- (1) If the loss exceeded \$5,000, increase the offense level as follows:

<u>Loss</u> (Apply the Greatest)	<u>Increase in Level</u>
(A) \$5,000 or less	no increase
(B) More than \$5,000	add 2
(C) More than \$10,000	add 4
(D) More than \$30,000	add 6
(E) More than \$70,000	add 8
(F) More than \$120,000	add 10
(G) More than \$200,000	add 12
(H) More than \$400,000	add 14
(I) More than \$1,000,000	add 16

(J)	More than \$2,500,000	add 18
(K)	More than \$7,000,000	add 20
(L)	More than \$20,000,000	add 22
(M)	More than \$50,000,000	add 24
(N)	More than \$100,000,000	add 26
(O)	More than \$200,000,000	add 28
(P)	More than \$400,000,000	add 30 .

- (2) (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2** levels;
 - (B) involved 50 or more victims, increase by **4** levels; or
 - (C) involved 250 or more victims, increase by **6** levels.
- (3) If the offense involved a theft from the person of another, increase by **2** levels.
- (4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.
- (5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **2** levels.
- (6) If the offense involved theft of, damage to, or destruction of, property from a national cemetery or veterans' memorial, increase by **2** levels.
- (7) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.
- (8) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.
- (9) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory

officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

- (10) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (11) If the offense involved conduct described in 18 U.S.C. § 1040, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (12) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
- (13) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
- (14) (Apply the greater) If—
 - (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or
 - (B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by **4** levels.
 - (C) The cumulative adjustments from application of both subsections (b)(2) and (b)(14)(B) shall not exceed **8** levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

(15) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.

(~~15~~16) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved ~~(I)~~ a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security; ~~or (II) an intent to obtain personal information~~, increase by **2** levels.

(ii) 18 U.S.C. § 1030(a)(5)(A)(~~i~~), increase by **4** levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.

(~~16~~17) If the offense involved—

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by **4** levels.

(C) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive

material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

- (2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.
- (3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.
- (4) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1037, 1040, 1341-1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312-2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Cultural heritage resource" has the meaning given that term in Application Note 1 of the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources).

"Equity securities" has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(11)).

"Financial institution" includes any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," primarily include large pension funds that serve many persons (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

"Firearm" and "destructive device" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

"Foreign instrumentality" and "foreign agent" have the meaning given those terms in 18 U.S.C. § 1839(1) and (2), respectively.

"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).

"National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

"Personal information" means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (i) medical records; (ii) wills; (iii) diaries; (iv) private correspondence, including e-mail; (v) financial records; (vi) photographs of a sensitive or private nature; or (vii) similar information.

"Publicly traded company" means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). "Issuer" has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).

"Theft from the person of another" means theft, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing and non-forcible purse-snatching, such as the theft of a purse from a shopping cart.

"Trade secret" has the meaning given that term in 18 U.S.C. § 1839(3).

"Veterans' memorial" means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).

"Victim" means (A) any person who sustained any part of the actual loss determined under

subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

2. Application of Subsection (a)(1).—

- (A) "Referenced to this Guideline".—For purposes of subsection (a)(1), an offense is "referenced to this guideline" if (i) this guideline is the applicable Chapter Two guideline determined under the provisions of §1B1.2 (Applicable Guidelines) for the offense of conviction; or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which §2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.
- (B) Definition of "Statutory Maximum Term of Imprisonment".—For purposes of this guideline, "statutory maximum term of imprisonment" means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.
- (C) Base Offense Level Determination for Cases Involving Multiple Counts.—In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.

3. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

- (A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.
 - (i) Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.
 - (ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).
 - (iii) Pecuniary Harm.—"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.
 - (iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.
 - (v) Rules of Construction in Certain Cases.—In the cases described in subdivisions

(I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

- (I) Product Substitution Cases.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim’s business operations caused by the product substitution.
 - (II) Procurement Fraud Cases.—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.
 - (III) Offenses Under 18 U.S.C. § 1030.—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.
- (B) Gain.—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.
- (C) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court’s loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

- (i) The fair market value of the property unlawfully taken, *copied*, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.
- (ii) *In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.*
- (iii) The cost of repairs to damaged property.

- (iii) *The approximate number of victims multiplied by the average loss to each victim.*
 - (iv) *The reduction that resulted from the offense in the value of equity securities or other corporate assets.*
 - (vi) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*
- (D) Exclusions from Loss.—*Loss shall not include the following:*
- (i) *Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.*
 - (ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.*
- (E) Credits Against Loss.—*Loss shall be reduced by the following:*
- (i) *The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.*
 - (ii) *In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.*
- (F) Special Rules.—*Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:*
- (i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—*In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 9(A).*
 - (ii) Government Benefits.—*In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less*

than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, loss is \$50.

- (iii) Davis-Bacon Act Violations.—In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.
- (iv) Ponzi and Other Fraudulent Investment Schemes.—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).
- (v) Certain Other Unlawful Misrepresentation Schemes.—In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.
- (vi) Value of Controlled Substances.—In a case involving controlled substances, loss is the estimated street value of the controlled substances.
- (vii) Value of Cultural Heritage Resources.—In a case involving a cultural heritage resource, loss attributable to that cultural heritage resource shall be determined in accordance with the rules for determining the "value of the cultural heritage resource" set forth in Application Note 2 of the Commentary to §2B1.5.

4. Application of Subsection (b)(2).—

- (A) Definition.—For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.
- (B) Applicability to Transmission of Multiple Commercial Electronic Mail Messages.—For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was

convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.

(C) Undelivered United States Mail.—

(i) In General.—In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, "victim" means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.

(ii) Special Rule.—A case described in subdivision (C)(i) of this note that involved—

(I) a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims.

(II) a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise,

be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.

(iii) Definition.—"Undelivered United States mail" means mail that has not actually been received by the addressee or his agent (e.g., mail taken from the addressee's mail box).

(D) Vulnerable Victims.—If subsection (b)(2)(B) or (C) applies, an enhancement under §3A1.1(b)(2) shall not apply.

(E) Cases Involving Means of Identification.—For purposes of subsection (b)(2), in a case involving means of identification "victim" means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.

5. Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4).—For purposes of subsection (b)(4), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:

(A) The regularity and sophistication of the defendant's activities.

(B) The value and size of the inventory of stolen property maintained by the defendant.

(C) The extent to which the defendant's activities encouraged or facilitated other crimes.

(D) The defendant's past activities involving stolen property.

6. Application of Subsection (b)(7).—For purposes of subsection (b)(7), "improper means" includes the unauthorized harvesting of electronic mail addresses of users of a website, proprietary service, or other online public forum.
7. Application of Subsection (b)(8).—
- (A) In General.—The adjustments in subsection (b)(8) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.
- (B) Misrepresentations Regarding Charitable and Other Institutions.—Subsection (b)(8)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable, educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant's personal gain). Subsection (b)(8)(A) applies, for example, to the following:
- (i) A defendant who solicited contributions for a non-existent famine relief organization.
- (ii) A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.
- (iii) A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant's personal benefit.
- (C) Fraud in Contravention of Prior Judicial Order.—Subsection (b)(8)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §3C1.3 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).
- (D) College Scholarship Fraud.—For purposes of subsection (b)(8)(D):
- "Financial assistance" means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.

"Institution of higher education" has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).

(E) Non-Applicability of Enhancements.—

(i) Subsection (b)(8)(A).—If the conduct that forms the basis for an enhancement under subsection (b)(8)(A) is the only conduct that forms the basis for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under §3B1.3.

(ii) Subsection (b)(8)(B) and (C).—If the conduct that forms the basis for an enhancement under subsection (b)(8)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under §3C1.1.

8. Sophisticated Means Enhancement under Subsection (b)(9).—

(A) Definition of United States.—For purposes of subsection (b)(9)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

(B) Sophisticated Means Enhancement.—For purposes of subsection (b)(9)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

(C) Non-Applicability of Enhancement.—If the conduct that forms the basis for an enhancement under subsection (b)(9) is the only conduct that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.

9. Application of Subsection (b)(10).—

(A) Definitions.—For purposes of subsection (b)(10):

"Authentication feature" has the meaning given that term in 18 U.S.C. § 1028(d)(1).

"Counterfeit access device" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service.

"Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).

"Device-making equipment" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (ii) includes (I) any hardware or software that has been configured

as described in 18 U.S.C. § 1029(a)(9); and (II) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). "Scanning receiver" has the meaning given that term in 18 U.S.C. § 1029(e)(8).

~~"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).~~

"Produce" includes manufacture, design, alter, authenticate, duplicate, or assemble. "Production" includes manufacture, design, alteration, authentication, duplication, or assembly.

"Unauthorized access device" has the meaning given that term in 18 U.S.C. § 1029(e)(3).

- (B) Authentication Features and Identification Documents.—Offenses involving authentication features, identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or

§2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.

- (C) Application of Subsection (b)(10)(C)(i).—

(i) In General.—Subsection (b)(10)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

(ii) Examples.—Examples of conduct to which subsection (b)(10)(C)(i) applies are as follows:

(I) A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.

(II) A defendant obtains an individual's name and address from a source (e.g., from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.

(iii) Nonapplicability of Subsection (b)(10)(C)(i).—Examples of conduct to which

subsection (b)(10)(C)(i) does not apply are as follows:

- (I) *A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.*
 - (II) *A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.*
- (D) *Application of Subsection (b)(10)(C)(ii).—Subsection (b)(10)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.*
- 10. *Application of Subsection (b)(12).—Subsection (b)(12) provides a minimum offense level in the case of an ongoing, sophisticated operation (e.g., an auto theft ring or "chop shop") to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, "vehicle" means motor vehicle, vessel, or aircraft. A "cargo shipment" includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.*
- 11. *Gross Receipts Enhancement under Subsection (b)(14)(A).—*
 - (A) *In General.—For purposes of subsection (b)(14)(A), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.*
 - (B) *Definition.—"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).*
- 12. *Application of Subsection (b)(14)(B).—*
 - (A) *Application of Subsection (b)(14)(B)(i).—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:*
 - (i) *The financial institution became insolvent.*
 - (ii) *The financial institution substantially reduced benefits to pensioners or insureds.*
 - (iii) *The financial institution was unable on demand to refund fully any deposit, payment, or investment.*
 - (iv) *The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.*

(B) Application of Subsection (b)(14)(B)(ii).—

- (i) Definition.—For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).
- (ii) In General.—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:
 - (I) The organization became insolvent or suffered a substantial reduction in the value of its assets.
 - (II) The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).
 - (III) The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.
 - (IV) The organization substantially reduced its workforce.
 - (V) The organization substantially reduced its employee pension benefits.
 - (VI) The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.

13. Application of Subsection (b)(~~15~~16).—

(A) Definitions.—For purposes of subsection (b)(~~15~~16):

"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).

~~"Personal information" means sensitive or private information (including such information in the possession of a third party), including (i) medical records, (ii) wills, (iii) diaries, (iv) private correspondence, including e-mail, (v) financial records, (vi) photographs of a sensitive or private nature; or (vii) similar information.]~~

(B) Subsection (b)(~~15~~16)(A)(iii).—If the same conduct that forms the basis for an

enhancement under subsection (b)(~~15~~16)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(14)(B), do not apply the enhancement under subsection (b)(14)(B).

14. Application of Subsection (b)(~~16~~17).—

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

"Commodities law" means (i) the Commodities Exchange Act (7 U.S.C. § 1 et seq.); and (ii) includes the rules, regulations, and orders issued by the Commodities Futures Trading Commission.

"Commodity pool operator" has the meaning given that term in section 1a(4) of the Commodities Exchange Act (7 U.S.C. § 1a(4)).

"Commodity trading advisor" has the meaning given that term in section 1a(5) of the Commodities Exchange Act (7 U.S.C. § 1a(5)).

"Futures commission merchant" has the meaning given that term in section 1a(20) of the Commodities Exchange Act (7 U.S.C. § 1a(20)).

"Introducing broker" has the meaning given that term in section 1a(23) of the Commodities Exchange Act (7 U.S.C. § 1a(23)).

"Investment adviser" has the meaning given that term in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(11)).

"Person associated with a broker or dealer" has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(18)).

"Person associated with an investment adviser" has the meaning given that term in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(17)).

"Registered broker or dealer" has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(48)).

"Securities law" (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.

(B) In General.—A conviction under a securities law or commodities law is not required in order for subsection (b)(~~16~~17) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.

- (C) Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)(617) applies, do not apply §3B1.3.
15. 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 involving fraudulent conduct that is 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 involves fraudulent conduct that 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; Conspiracy to Defraud by Interference with Governmental Functions).
16. Continuing Financial Crimes Enterprise.—If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise".
17. Partially Completed Offenses.—In the case of a partially completed offense (e.g., an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 of the Commentary to §2X1.1.
18. Multiple-Count Indictments.—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).
19. Departure Considerations.—
- (A) Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:
- (i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.
- (ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma,

or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.

- (iii) *The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).*
- (iv) *The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).*
- (v) *In a case involving stolen information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.*
- (vi) *In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:*
 - (I) *The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.*
 - (II) *An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.*
 - (III) *The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.*

- (B) *Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)(~~15~~16)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.*
- (C) *Downward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.*
- (D) *Downward Departure for Major Disaster or Emergency Victims.—If (i) the minimum offense level of level 12 in subsection (b)(11) applies; (ii) the defendant sustained*

damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.

***Background:** This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States).*

Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their

crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under §2B3.1 (Robbery).

A minimum offense level of level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of "organized scheme" is used as an alternative to "loss" in setting a minimum offense level.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Offenses that involve the use of financial transactions or financial accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum offense level of level 12 is provided for these offenses.

Subsection (b)(6) implements the instruction to the Commission in section 2 of Public Law 105–101.

Subsection (b)(8)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106–420.

Subsection (b)(9) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.

Subsections (b)(10)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.

Subsection (b)(10)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding", in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification", the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (i.e., produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

Subsection (b)(11) implements the directive in section 5 of Public Law 110–179.

Subsection (b)(13)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)(14)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.

Subsection (b)(14)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)(15) implements the directive in section 209 of Public Law 110–326.

Subsection (b)(~~15~~16) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(~~15~~16)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.

§2H3.1. Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information

- (a) Base Offense Level (Apply the greater):
- (1) **9**; or
 - (2) **6**, if the offense of conviction has a statutory maximum term of imprisonment of one year or less but more than six months.
- (b) Specific Offense Characteristics
- (1) If (A) the defendant is convicted under 18 U.S.C. § 1039(d) or (e); or (B) the purpose of the offense was to obtain direct or indirect commercial advantage or economic gain, increase by **3** levels.
 - (2) (Apply the greater) If—
 - (A) the defendant is convicted under 18 U.S.C. § 119, increase by **8** levels; or
 - (B) the defendant is convicted under 18 U.S.C. § 119, and the offense involved the use of a computer or an interactive computer service to make restricted personal information about a covered person publicly available, increase by **10** levels.
- (c) Cross Reference
- (1) If the purpose of the offense was to facilitate another offense, apply the guideline applicable to an attempt to commit that other offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 8 U.S.C. § 1375a(d)(3)(C), (d)(5)(B); 18 U.S.C. §§ 119, 1039, 1905, 2511; 26 U.S.C. §§ 7213(a)(1)-(3), (a)(5), (d), 7213A, 7216; 42 U.S.C. §§ 16962, 16984; 47 U.S.C. § 605. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Satellite Cable Transmissions.—If the offense involved interception of satellite cable transmissions for purposes of commercial advantage or private financial gain (including avoiding payment of fees), apply §2B5.3 (Criminal Infringement of Copyright) rather than this guideline.
2. Imposition of Sentence for 18 U.S.C. § 1039(d) and (e).—Subsections 1039(d) and (e) of title 18, United States Code, require a term of imprisonment of not more than 5 years to be imposed in

addition to any sentence imposed for a conviction under 18 U.S.C. § 1039(a), (b), or (c). In order to comply with the statute, the court should determine the appropriate "total punishment" and divide the sentence on the judgment form between the sentence attributable to the conviction under 18 U.S.C. § 1039(d) or (e) and the sentence attributable to the conviction under 18 U.S.C. § 1039(a), (b), or (c), specifying the number of months to be served for the conviction under 18 U.S.C. § 1039(d) or (e). For example, if the applicable adjusted guideline range is 15-21 months and the court determines a "total punishment" of 21 months is appropriate, a sentence of 9 months for conduct under 18 U.S.C. § 1039(a) plus 12 months for 18 U.S.C. § 1039(d) conduct would achieve the "total punishment" in a manner that satisfies the statutory requirement.

3. Inapplicability of Chapter Three (Adjustments).—If the enhancement under subsection (b)(2) applies, do not apply §3A1.2 (Official Victim).

4. Definitions.—For purposes of ~~subsection (b)(2)(B)~~ **this guideline**:

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

"Covered person" has the meaning given that term in 18 U.S.C. § 119(b).

"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)).

"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).

"Personal information" means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (i) medical records; (ii) wills; (iii) diaries; (iv) private correspondence, including e-mail; (v) financial records; (vi) photographs of a sensitive or private nature; or (vii) similar information.]

"Restricted personal information" has the meaning given that term in 18 U.S.C. § 119(b).

5. Upward Departure.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. The following are examples of cases in which an upward departure may be warranted:

(i) The offense involved **personal information, means of identification**, confidential phone records information, or tax return information of a substantial number of individuals.

(ii) The offense caused or risked substantial non-monetary harm (e.g. physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.

* * *

§3B1.3. Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).

Commentary

Application Notes:

1. *Definition of "Public or Private Trust".—"Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.*
2. *Application of Adjustment in Certain Circumstances.—Notwithstanding Application Note 1, or any other provision of this guideline, an adjustment under this guideline shall apply to the following:*
 - (A) *An employee of the United States Postal Service who engages in the theft or destruction of undelivered United States mail.*
 - (B) *A defendant who exceeds or abuses the authority of his or her position in order to obtain, transfer, or issue unlawfully, or use without authority, any means of identification. "Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7). The following are examples to which this subdivision would apply: (i) an employee of a state motor vehicle department who exceeds or abuses the authority of his or her position by knowingly issuing a driver's license based on false, incomplete, or misleading information; (ii) a hospital orderly who exceeds or abuses the authority of his or her position by obtaining or misusing patient identification information from a patient chart; and (iii) a volunteer at a charitable organization who exceeds or abuses the authority of his or her position by obtaining or misusing identification information from a donor's file.*
3. *This adjustment also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact,*

the defendant does not. For example, the adjustment applies in the case of a defendant who (A) perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker; or (B) perpetrates a fraud by representing falsely to a patient or employer that the defendant is a licensed physician. In making the misrepresentation, the defendant assumes a position of trust, relative to the victim, that provides the defendant with the same opportunity to commit a difficult-to-detect crime that the defendant would have had if the position were held legitimately.

4. *"Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.*
5. *The following additional illustrations of an abuse of a position of trust pertain to theft or embezzlement from employee pension or welfare benefit plans or labor unions:*
 - (A) *If the offense involved theft or embezzlement from an employee pension or welfare benefit plan and the defendant was a fiduciary of the benefit plan, an adjustment under this section for abuse of a position of trust will apply. "Fiduciary of the benefit plan" is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.*
 - (B) *If the offense involved theft or embezzlement from a labor union and the defendant was a union officer or occupied a position of trust in the union (as set forth in 29 U.S.C. § 501(a)), an adjustment under this section for an abuse of a position of trust will apply.*

Background: This adjustment applies to persons who abuse their positions of trust or their special skills to facilitate significantly the commission or concealment of a crime. The adjustment also applies to persons who provide sufficient indicia to the victim that they legitimately hold a position of public or private trust when, in fact, they do not. Such persons generally are viewed as more culpable.