
Public Comment



Proposed Amendments

2007



Proposed Amendments to the Sentencing Guidelines

January 30, 2007

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2007 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. Transportation

Synopsis of Proposed Amendment: *This proposed amendment implements a number of provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177 (hereinafter "PATRIOT Act") and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109–59 (hereinafter "SAFETEA-LU"). The proposed amendments also provide a corresponding amendment to Appendix A (Statutory Index). Specifically:*

- (A) *Section 110 of the PATRIOT Act strikes 18 U.S.C. §§ 1992 and 1993 and creates a new section 1992 (Terrorist attacks and other violence against railroad carriers and against mass transportation systems on land, on water, or through the air). The legislation creates a statutory maximum term of imprisonment of 20 years and includes a penalty of imprisonment for any years or life or, if the offense resulted in the death of any person, the defendant may be sentenced to death. There are exceptions to the life and death sentences for cases of surveillance, conveying false information, or attempting, threatening, or conspiring to engage in any violation under this section. The statute also contains aggravated offenses. First, a sentence of life or death may be imposed when the offense involved railroad on-track equipment or a mass transportation vehicle carrying a passenger or employee, or carrying hazardous material, or both. Second, a life or death sentence may be given if the offense was committed with the intent to endanger the safety of any person, or with a reckless disregard for the safety of any person, when the railroad on-track equipment or mass transportation vehicle was carrying a defined hazardous material at the time of the offense.*

The proposed amendment updates all references to 18 U.S.C. § 1992 and eliminates all references to 18 U.S.C. § 1993. The proposed amendment also adds 18 U.S.C. § 1992 to the referenced statutory provisions in §§2A1.1 (First Degree Murder), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), and 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or a Ferry). Additionally, the amendment adjusts the definition of "mass transportation" in §§2A1.4, 2A5.2, and 2K1.4 (Arson; Property Damage by Use of Explosives) to reflect the new defining section, 18 U.S.C. § 1992(d)(7). Also proposed is the addition of "Navigation" to the title and text of §2A5.2 to better reflect the full scope of the newly created 18 U.S.C. § 1992.

- (B) *Section 302 of the PATRIOT Act increases the scope of 18 U.S.C. § 1036 (Entry by false pretenses to any real property, vessel, or aircraft of the United States or secure area of any airport) by adding to the areas protected from illegal entry under this title secure and restricted areas of a seaport. Section 302 also increases the statutory maximum penalty from five years to ten years.*

The proposed amendment refers this offense to §2B2.3(b)(1) and adds seaports to the list of protected areas warranting a two-level enhancement. The amendment also adds a definition for "seaport", as one does not currently exist in the guidelines.

- (C) *Section 303 of the PATRIOT Act adds a new offense at 18 U.S.C. § 2237 (Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information). This new statute makes it a crime to refuse to stop a vessel in violation of a federal law enforcement officer's order*

or to provide materially false information to a federal law enforcement officer during a boarding of a vessel.

The proposed amendment references this new offense to §§2A2.4 (Obstructing or Impeding Officers) and 2B1.1 (Fraud, Theft, and Property Damage).

- (D) *Section 306 of the PATRIOT Act provides new offenses in 18 U.S.C. §§ 2291 (Destruction of vessel or maritime facility) and 2292 (Imparting or conveying false information). Section 2291 of title 18, United States Code, covers the destruction of vessels and maritime facilities and creates a statutory maximum term of imprisonment of 20 years. If the conduct under this section involves a vessel carrying nuclear or radioactive waste, a statutory maximum life sentence applies, and if death results, a life or death sentence is possible. Section 2292 of title 18, United States Code, prohibits providing false information regarding an attempt or alleged attempt to commit a crime and provides a statutory maximum sentence of five years.*

The proposed amendment references 18 U.S.C. § 2291 to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A1.4 (Involuntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), 2A6.1 (Threatening or Harrassing Communications; Hoaxes), 2B1.1 (Fraud, Theft, and Property Damage), 2K1.4 (Arson; Property Damage by Use of Explosives) and 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction). Section 2292 of title 18, United States Code, is referenced to §2A6.1.

- (E) *Section 307(c) of the PATRIOT Act directs the Commission to review the guidelines to determine whether a sentencing enhancement is appropriate for any offense under sections 659 or 2311 of title 18, United States Code.*

The proposed amendment provides two options to respond to this directive. Option 1 amends §2B1.1(b)(4) to provide an alternative enhancement if the defendant was convicted under 18 U.S.C. § 659. An issue for comment also requests input regarding whether any such enhancement should include convictions under 18 U.S.C. §§ 2312 and 2313. Option 2 responds to the directive by revising §2B1.1(b)(11). Currently this section provides a minimum offense level of 14 for offenses involving an organized scheme to steal vehicles or vehicle parts. The proposed amendment adds convictions under 18 U.S.C. § 659 to this section and also provides a two-level increase for all cases covered under the subsection.

- (F) *Section 308 of the PATRIOT Act increases the statutory maximum penalties for 18 U.S.C. § 2199 (Stowaways on vessels or aircraft). Absent any aggravating factors, the statutory maximum for offenses is increased from one year to five years. Section 308 adds a statutory maximum of 20 years if a person acts with the intent to commit serious bodily injury and serious bodily injury occurs. For offenses involving the intent to kill and death occurs, section 308 also adds a penalty of imprisonment for any term of years, including life or death.*

The proposed amendment references 18 U.S.C. § 2199 to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A1.4 (Involuntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), and 2A2.3 (Minor Assault).

- (G) *Section 4210 of SAFETEA-LU creates a new offense at 49 U.S.C. § 14915 for failure to release*

household goods with a statutory maximum of two years.

The proposed amendment references this section to §2B1.1 as it is the most analogous guideline.

- (H) Section 4102(b) of SAFETEA-LU creates a new criminal violation for violating a commercial motor vehicle's out-of-service order. The offense carries a statutory maximum of one year.

The proposed amendment references this section to §2X5.2 (Class A Misdemeanor (Not Covered by Another Specific Offense Guideline)).

The proposed amendment also includes five issues for comment pertaining to the following:

- (1) Section 7121 of SAFETEA-LU creates a new aggravated felony under 49 U.S.C. § 5124 that carries a statutory maximum of 10 years when conduct under the section results in the release of a hazardous material that causes bodily injury or death. Appendix A (Statutory Index) currently references 49 U.S.C. § 5124 to §2Q1.2 (Mis handling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce). An issue for comment asks whether penalties under §2Q1.2 are adequate for the new offense.
- (2) The proposed amendment adds seaports to the two-level enhancement in §2B2.3(b)(1). Section 2B2.3(c) provides a cross reference if the offense was committed with the intent to commit another criminal offense. An issue for comment asks whether, as an alternative to the cross reference provision and as a possible means of simplifying this guideline, it should amend §2B2.3 (Trespass) to provide instead a general specific offense characteristic for any trespass offense that was committed with the intent to commit another offense.
- (3) Section 309 of the PATRIOT Act creates a new offense at 18 U.S.C. § 226 (Bribery affecting port security), making it a crime to knowingly, and with the intent to commit international or domestic terrorism, bribe a public official to affect port security. It is also a crime under this section to be the recipient of such a bribe in return for being influenced in the performance of public duties affecting port security with the knowledge that such influence will be used to commit or plan to commit an act of terrorism.

The proposed amendment references 18 U.S.C. § 226 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 Official; Conspiracy to Defraud by Interference with Governmental Functions). An issue for comment addresses this proposed reference to §2C1.1 as well as the operation of the cross reference in §2C1.1(c)(1) in cases involving an intent to commit an act of international or domestic terrorism.

- (4) Whether the Commission should use the term "mass transportation" or "public transportation" in the context of §2A5.2 and other guidelines.
- (5) The proposed amendment provides options for increasing penalties for offenses under 18 U.S.C. § 659. An issue for comment asks whether the Commission also should provide similar increases for offenses under 18 U.S.C. §§ 2312 (Transportation of stolen

vehicles) and 2313 (Sale or receipt of stolen vehicles).

Proposed Amendment:

§2A1.1. First Degree Murder

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 1841(a)(2)(C), 1992(a)(7), 2113(e), 2118(c)(2), 2199, 2291, 2332b(a)(1), 2340A; 21 U.S.C. § 848(e). For additional statutory provision(s), see Appendix A (Statutory Index).

§2A1.2. Second Degree Murder

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 1841(a)(2)(C), 2199, 2291, 2332b(a)(1), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

§2A1.3. Voluntary Manslaughter

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 1841(a)(2)(C), 2199, 2291, 2332b(a)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

§2A1.4. Involuntary Manslaughter

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 1841(a)(2)(C), 2199, 2291, 2332b(a)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. Definitions.—For purposes of this guideline:

"Criminally negligent" means conduct that involves a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is not reckless. Offenses with this characteristic usually will be encountered as assimilative crimes.

"Means of transportation" includes a motor vehicle (including an automobile or a boat) and a mass transportation vehicle. "Mass transportation" has the meaning given that term in 18 U.S.C. § 1992(d)(7)~~18 U.S.C. § 1993(c)(5)~~.

"Reckless" means a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation. "Reckless" includes all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. § 1112. A homicide resulting from driving a means of transportation, or similarly dangerous actions, while under the influence of alcohol or drugs ordinarily should be treated as reckless.

* * *

§2A2.1. Assault with Intent to Commit Murder; Attempted Murder

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 113(a)(1), 351(c), 1113, 1116(a), 1751(c), 1841(a)(2)(C), 1992(a)(7)~~1993(a)(6)~~, 2199, 2291. For additional statutory provision(s), see Appendix A (Statutory Index).

§2A2.2. Aggravated Assault

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), 114, 115(a), (b)(1), 351(e), 1751(e), 1841(a)(2)(C), 1992(a)(7)~~1993(a)(6)~~, 2199, 2291, 2332b(a)(1), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

§2A2.3. Minor Assault

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 112, 115(a), 115(b)(1), 351(e), 1751(e), 2199, 2291. For additional

statutory provision(s), see Appendix A (Statutory Index).

§2A2.4. Obstructing or Impeding Officers

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 1501, 1502, 2237(a)(1), (a)(2)(A), 3056(d). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A5.2. Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle or Ferry

- (a) Base Offense Level (Apply the greatest):
- (1) **30**, if the offense involved intentionally endangering the safety of: (A) an airport or an aircraft; or (B) a mass transportation facility; or a mass transportation vehicle;~~or a ferry~~;
 - (2) **18**, if the offense involved recklessly endangering the safety of: (A) an airport or an aircraft; or (B) a mass transportation facility; or a mass transportation vehicle;~~or a ferry~~;
 - (3) if an assault occurred, the offense level from the most analogous assault guideline, §§2A2.1-2A2.4; or
 - (4) **9**.
- (b) Specific Offense Characteristic
- (1) If (A) subsection (a)(1) or (a)(2) applies; and (B)(i) a firearm was discharged, increase by **5** levels; (ii) a dangerous weapon was otherwise used, increase by **4** levels; or (iii) a dangerous weapon was brandished or its use was threatened, increase by **3** levels. If the resulting offense level is less than level **24**, increase to level **24**.
- (c) Cross References
- (1) If death resulted, apply the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

- (2) If the offense involved possession of, or a threat to use (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 1992(a)(1), (a)(4), (a)(5), (a)(6) ~~1993(a)(4), (5), (6), (b)~~; 49 U.S.C. §§ 46308, 46503, 46504 (formerly 49 U.S.C. § 1472(c), (j)). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. Definitions.—For purposes of this guideline:

"Biological agent", "chemical weapon", "nuclear byproduct material", "nuclear material", "toxin", and "weapon of mass destruction" have the meaning given those terms in Application Note 1 of the Commentary to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction).

"Brandished", "dangerous weapon", "firearm", and "otherwise used" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"Mass transportation" has the meaning given that term in 18 U.S.C. § 1992(d)(7) ~~18 U.S.C. § 1993(c)(5)~~.

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

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(c), 35(b), 871, 876, 877, 878(a), 879, 1038, 1992(a)(9), (a)(10) ~~1993(a)(7), (8)~~, 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).

* * *

§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.

[Option 1 (Section 659 offenses)

- (4) If the (A) offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property;; or (B) defendant was convicted under 18 U.S.C. § 659, 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**.

[Option 2 (Section 659 offenses):

- (11) If the (A) offense involved an organized scheme to steal vehicles or vehicle parts; or (B) defendant was convicted under 18 U.S.C. § 659, [increase by **2** levels. If ~~;~~and} the offense level is less than level **14**, increase to level **14**.]
- (12) 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**.

- (13) (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)(12)(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**.
- (14) (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**.
- (15) 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, 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), ~~1993(a)(1), (a)(4)~~, 2113(b), 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.

"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.

"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 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) *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.*
 - (v) *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 7(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.

[Option 1 (Section 659 offenses)]

5. Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4)(A).—For purposes of subsection (b)(4)(A), 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.*

[Option 2 (Section 659 offenses):

- 10. ~~*Chop Shop Enhancement under Application of Subsection (b)(11).—Subsection (b)(11) provides a minimum offense level in the case of an ongoing, sophisticated operation (such as an auto theft ring or "chop shop") to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts. This subsection also applies if the defendant was convicted of cargo theft under 18 U.S.C. § 659. "Vehicles" refers to all forms of vehicles, including aircraft and watercraft. For purposes of this subsection, "vehicle" means motor vehicle, vessel, or aircraft.]*~~
- 11. *Gross Receipts Enhancement under Subsection (b)(13)(A).—*
 - (A) *In General.*—*For purposes of subsection (b)(13)(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)(13)(B).—*
 - (A) *Application of Subsection (b)(13)(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)(13)(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)(14).—

- (A) Definitions.—For purposes of subsection (b)(14):

"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)(14)(iii).—If the same conduct that forms the basis for an enhancement under subsection (b)(14)(iii) is the only conduct that forms the basis for an enhancement

under subsection (b)(13)(B), do not apply the enhancement under subsection (b)(13)(B).

14. Application of Subsection (b)(15).—

(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)(15) 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)(15) 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)(14)(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.*

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).

[Option 2 (Section 659 offenses):

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~~ The specific offense characteristic of "organized scheme" is used in subsection (b)(11)(A) as an alternative to "loss" in setting a minimum offense level. The minimum offense level also applies to convictions under 18 U.S.C. § 659 for offenses involving cargo theft. Subsection (b)(11)(B) implements the directive in section 307 of Public Law 109-177.]

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

Subsection (b)(13)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.

Subsection (b)(13)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)(14) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(14)(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.

* * *

§2B2.3. Trespass

- (a) Base Offense Level: 4
- (b) Specific Offense Characteristics
 - (1) If the trespass occurred (A) at a secured government facility; (B) at a nuclear energy facility; (C) on a vessel or aircraft of the United States; (D) in a secured area of an airport; (E) in a secure area within a seaport;

(EF) at a residence; or (FG) on a computer system used (i) to maintain or operate a critical infrastructure; or (ii) by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels.

- (2) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.
- (3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(c) Cross Reference

- (1) If the offense was committed with the intent to commit a felony offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1030(a)(3), 1036. 2199; 42 U.S.C. § 7270b. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Airport" has the meaning given that term in section 47102 of title 49, United States Code.

"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.

"Felony offense" means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought or a conviction was obtained.

"Firearm" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions).

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

"Protected computer" means a computer described in 18 U.S.C. § 1030(e)(2)(A) or (B).

"Seaport" has the meaning given that term in 18 U.S.C. § 26.

2. Valuation of loss is discussed in the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

Background: Most trespasses punishable under federal law involve federal lands or property. The trespass section provides an enhancement for offenses involving trespass on secured government installations; (such as nuclear facilities) and other locations (such as airports and seaports) to protect a significant federal interest. Additionally, an enhancement is provided for trespass at a residence.

* * *

§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

* * *

Commentary

Statutory Provisions: 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3; 18 U.S.C. §§ 201(b)(1), (2), 226, 371 (if conspiracy to defraud by interference with governmental functions), 872, 1341 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1342 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1343 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1951. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2K1.4 Arson; Property Damage by Use of Explosives

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(a), (b), 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 1992(a)(1), (a)(2), (a)(4), ~~1993(a)(1), (a)(2), (a)(3), (b)~~, 2275, 2291, 2332a, 2332f; 49 U.S.C. § 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Explosives" includes any explosive, explosive material, or destructive device.

"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.

"Mass transportation" has the meaning given that term in 18 U.S.C. § 1992(d)(7) ~~18 U.S.C. § 1993(c)(5)~~.

"State or government facility", "infrastructure facility", "place of public use", and "public transportation system" have the meaning given those terms in 18 U.S.C. § 2332f(e)(3), (5), (6), and (7), respectively.

2. Risk of Death or Serious Bodily Injury.— *Creating a substantial risk of death or serious bodily injury includes creating that risk to fire fighters and other emergency and law enforcement personnel who respond to or investigate an offense.*
3. Upward Departure Provision.—*If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

Background: *Subsection (b)(2) implements the directive to the Commission in section 2 of Public Law 105-101.*

* * *

§2M6.1. Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy

* * *

Commentary

Statutory Provisions: *18 U.S.C. §§ 175, 175b, 175c, 229, 831, 832, 842(p)(2) (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 1992(a)(2), (a)(3), (a)(4), (b)(2) ~~1993(a)(2), (3), (b), 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D))~~, 2291, 2332h; 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), see Appendix A (Statutory Index).*

* * *

§2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants

* * *

Commentary

Statutory Provisions: 18 U.S.C. § 1992(b)(3); 33 U.S.C. § 1319(c)(3); 42 U.S.C. § 6928(e).

Application Note:

1. *If death or serious bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

Background: *This section applies to offenses committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury.*

* * *

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

- (a) Base Offense Level: The base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty.
- (b) Specific Offense Characteristics
 - (1) If an attempt, decrease by 3 levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.
 - (2) If a conspiracy, decrease by 3 levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.
 - (3) (A) If a solicitation, decrease by 3 levels unless the person solicited to commit or aid the substantive offense completed all the acts he believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar event beyond such person's control.
(B) If the statute treats solicitation of the substantive offense

identically with the substantive offense, do not apply subdivision (A) above; i.e., the offense level for solicitation is the same as that for the substantive offense.

(c) Cross Reference

- (1) When an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section.

(d) Special Instruction

- (1) Subsection (b) shall not apply to:

- (A) Any of the following offenses, if such offense involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5):

18 U.S.C. § 81;
18 U.S.C. § 930(c);
18 U.S.C. § 1362;
18 U.S.C. § 1363;
18 U.S.C. § 1992(a)(1)-(a)(7), (a)(9), (a)(10);
18 U.S.C. § 2339A;
18 U.S.C. § 2340A;
49 U.S.C. § 46504;
49 U.S.C. § 46505; and
49 U.S.C. § 60123(b).

- (B) Any of the following offenses:

18 U.S.C. § 32; and
~~18 U.S.C. § 1993;~~ and
18 U.S.C. § 2332a.

* * *

§2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)

* * *

Commentary

Statutory Provisions: 7 U.S.C. § 2156; 18 U.S.C. §§ 1365(f), 1801; 42 U.S.C. §§ 1129(a), 14133; 49 U.S.C. § 31310.

* * *

APPENDIX A

18 U.S.C. § 225 2B1.1, 2B4.1
18 U.S.C. § 226 2C1.1

18 U.S.C. § 1035 2B1.1
18 U.S.C. § 1036 2B2.3
18 U.S.C. § 1037 2B1.1

* * *

18 U.S.C. § 1992(a)(1) 2A5.2, 2B1.1, 2K1.4,
 2X1.1
18 U.S.C. § 1992(a)(2) 2K1.4, 2M6.1, 2X1.1
18 U.S.C. § 1992(a)(3) 2M6.1, 2X1.1
18 U.S.C. § 1992(a)(4) 2A5.2, 2K1.4, 2M6.1,
 2X1.1
18 U.S.C. § 1992(a)(5) 2A5.2, 2B1.1, 2X1.1
18 U.S.C. § 1992(a)(6) 2A5.2, 2X1.1
18 U.S.C. § 1992(a)(7) 2A1.1, 2A2.1, 2A2.2,
 2X1.1
18 U.S.C. § 1992(a)(8) 2X1.1
18 U.S.C. § 1992(a)(9) 2A6.1, 2X1.1
18 U.S.C. § 1992(a)(10) 2A6.1, 2X1.1
~~18 U.S.C. § 1993(a)(1)~~ ~~2B1.1, 2K1.4~~
~~18 U.S.C. § 1993(a)(2)~~ ~~2K1.4, 2M6.1~~
~~18 U.S.C. § 1993(a)(3)~~ ~~2K1.4, 2M6.1~~
~~18 U.S.C. § 1993(a)(4)~~ ~~2A5.2, 2B1.1~~
~~18 U.S.C. § 1993(a)(5)~~ ~~2A5.2~~
~~18 U.S.C. § 1993(a)(6)~~ ~~2A2.1, 2A2.2, 2A5.2~~
~~18 U.S.C. § 1993(a)(7)~~ ~~2A6.1~~
~~18 U.S.C. § 1993(a)(8)~~ ~~2A5.2 (if attempt or~~
 ~~conspiracy to commit~~
~~18 U.S.C. § 1993(a)(4);~~
~~(a)(5), or (a)(6)), 2A6.1~~
~~2A5.2, 2K1.4, 2M6.1~~

~~18 U.S.C. § 1993(b)~~

* * *

18 U.S.C. § 2197 2B1.1
18 U.S.C. § 2199 2A1.1, 2A1.2, 2A1.3,
 2A1.4, 2A2.1, 2A2.2,
 2A2.3, 2B1.1, 2B2.3

18 U.S.C. § 2233 2B1.1, 2B3.1
18 U.S.C. § 2237(a)(1), (a)(2)(A) 2A2.4
18 U.S.C. § 2237(a)(2)(B) 2B1.1

	* * *
18 U.S.C. § 2281	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1
18 U.S.C. § 2291	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2K1.4, 2M6.1
18 U.S.C. § 2292	2A6.1

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49 U.S.C. § 14912	2B1.1
49 U.S.C. § 14915	2B1.1

* * *

49 U.S.C. § 30170	2B1.1
49 U.S.C. § 31310	2X5.2

Issues for Comment

1. *The SAFETEA-LU Act, Pub. L. 109–59, amended 49 U.S.C. § 5124 to provide a new aggravated felony, with a 10-year statutory maximum term of imprisonment, for cases involving a release of a hazardous material that results in death or bodily injury. Appendix A (Statutory Index) references 49 U.S.C. § 5124 to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce). In 2004 the Commission amended §2Q1.2 to provide a two-level enhancement in §2Q1.2(b)(7) for defendants convicted of 49 U.S.C. §§ 5124 or 46312 because "[t]hese offenses pose an inherent risk to large populations in a manner not typically associated with other pollution offenses sentenced under the same guideline. See USSG App. C (Amendment 672)(effective Nov. 1, 2004). In addition to application of §2Q1.2(b)(7), a defendant convicted of 49 U.S.C. § 5124 likely would receive a four-level enhancement under §2Q1.2(b)(1)(B) for a release of a hazardous substance (because the offense of conviction necessarily involves such a release) and a nine-level enhancement for the substantial likelihood of death or serious bodily injury under §2Q1.2(b)(2). When added to the Base Offense Level of 8, the minimum offense level under §2Q1.2 would be level 23 (46-57 months at CHC I). Further, Application Note 6 states that an upward departure would be warranted in any case in which death or serious bodily injury results. The Commission requests comment regarding whether §2Q1.2 currently provides adequate penalties for a defendant convicted under 49 U.S.C. § 5124. If not, how should the Commission amend §2Q1.2 to address adequately these offenses? For example, should the Commission provide an enhancement greater than two levels for such offenses? Should the Commission provide a minimum offense level for 49 U.S.C. § 5124 offenses that actually result in death or serious bodily injury?*
2. *The USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177, amended 18 U.S.C. § 1036 to add seaports to the list of covered locations and to increase the statutory*

maximum term of imprisonment from 5 years to 10 years. The proposed amendment adds seaports to the two-level enhancement in §2B2.3(b)(1). Section 2B2.3 (Trespass) also provides a cross reference in subsection (c) if the offense was committed with the intent to commit a felony offense. The Commission requests comment regarding whether, as an alternative to the cross reference provision, and as a possible means of simplifying this guideline, it should amend §2B2.3 to provide instead a general specific offense characteristic for any trespass offense that was committed with the intent to commit a felony. If so, how many levels would be appropriate? Should the Commission consider amending §2B2.3(b)(1) to provide an additional increase if the trespass on any of the enumerated locations was committed with the intent to commit a felony offense?

3. *The USA PATRIOT Improvement and Reauthorization Act provided a new offense at 18 U.S.C. § 226 for bribery affecting port security. The provision criminalizes bribery with the intent to commit international terrorism or domestic terrorism and provides a statutory maximum term of imprisonment of 15 years. In general, the guidelines reference bribery offenses 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), which provides alternative base offense levels of 14, if the defendant was public official, or 12, otherwise. Section 2C1.1(c)(1) provides a cross reference if the offense was committed for the purpose of facilitating the commission of another criminal offense (and the guideline applicable to a conspiracy to commit that other offense results in a greater offense level than §2C1.1). The Commission requests comment regarding whether it should reference 18 U.S.C. § 226 to §2C1.1 and, if so, whether the cross reference provision is a sufficient means of handling bribery cases involving an intent to commit an act of international or domestic terrorism. If the offense is referenced to §2C1.1, should the Commission, as an alternative to the cross reference provision and as a possible means of simplifying this guideline, provide a specific offense characteristic for convictions of 18 U.S.C. § 226 that results in an offense level proportionate to other terrorism-related offenses (e.g., providing a minimum offense level of 26 would provide parity with offenses sentenced under §2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or for a Terrorist Purpose)). Alternatively, should the Commission reference 18 U.S.C. § 226 to §2M5.3?*
4. *In addition to consolidating 18 U.S.C. §§ 1992 and 1993, the USA PATRIOT Improvement and Reauthorization Act of 2005 replaced the term "public transportation" (added by the SAFETEA-LU Act) with "mass transportation" (the term used in 18 U.S.C. § 1992 prior to SAFETEA-LU). "Mass transportation" now is defined at 18 U.S.C. § 1992(d)(7) to have the same meaning as "public transportation" (defined at 49 U.S.C. § 5302(a)(7)) except that, for purposes of 18 U.S.C. § 1992, "mass transportation" includes school bus, charter, sightseeing transportation, and passenger vessel. School bus and charter are otherwise expressly excluded from the definition of "public transportation" as are intercity bus transportation and intercity passenger rail transportation. The Commission requests comment regarding the appropriate term to use in the context of §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or a Ferry). Specifically, should the Commission use "mass transportation" as that term is now defined by 18 U.S.C. § 1992(d)(7) (i.e., including school bus, charter, sightseeing transportation and passenger vessel) or use the more limited term "public transportation" (i.e., excluding school bus, charter, intercity bus transportation, and intercity passenger rail transportation)?*

5. *The proposed amendment provides two options for amending §2B1.1 to address 18 U.S.C. § 659 (Cargo theft). The Commission requests comment regarding whether, rather than an enhancement based on the statute of conviction, it ought to provide an enhancement based on real offense conduct such as if the offense involved cargo theft. The Commission also requests comment regarding whether it should provide an enhancement for conduct covered by convictions under 18 U.S.C. §§ 2312 (Transportation of stolen vehicles) and 2313 (Sale or receipt of stolen vehicles), either as part of the proposed enhancement for 18 U.S.C. § 659 offenses or as a separate enhancement.*

2. Sex Offenses

Synopsis of Proposed Amendment: *This multi-part proposed amendment implements the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109–248.*

Part I of this proposed amendment implements the directive in section 141 of the Act pertaining to the new offense in 18 U.S.C. § 2250 for failure to register as a sex offender. The directive instructs the Commission, in promulgating guidelines for use by a sentencing court in determining the sentence to be imposed for [18 U.S.C. § 2250], to consider the following matters:

- (1) Whether the person committed another sex offense in connection with, or during, the period for which the person failed to register.*
- (2) Whether the person committed an offense against a minor in connection with, or during, the period for which the person failed to register.*
- (3) Whether the person voluntarily attempted to correct the failure to register.*
- (4) The seriousness of the offense which gave rise to the requirement to register, including whether such offense is a tier I, tier II, or tier III offense, as those terms are defined in section 111 of the Act.*
- (5) Whether the person has been convicted or adjudicated delinquent for any offense other than the offense which gave rise to the requirement to register.*

Section 2250 of title 18, United States Code, provides a statutory maximum term of imprisonment of ten years for the failure to register. There is an additional mandatory consecutive term of 5 years' imprisonment applicable if a person commits a crime of violence while in failure to register status (18 U.S.C. § 2250(c)). The requirements pertaining to who must register, where the registration must occur, and for how long are set forth in 42 U.S.C. § 16911.

The proposed amendment provides a new guideline in §2A3.5 (Failure to Register as a Sex Offender). The proposed amendment presents two options for addressing the fourth matter of the directive. Option One provides multiple base offense levels based on the category of offense that gave rise to the registration requirement: level 16 if the offense that gave rise to the requirement to register was a Tier III offense; level 14 if the offense that gave rise to the requirement to register was a Tier II offense; and level 12 if the offense that gave rise to the requirement to register was a Tier I offense. Option Two provides a base offense level of 12 and a specific offense characteristic in §2A3.5(b)(1) providing a two-level increase if the offense that gave rise to the requirement to register was a Tier II offense and a four-level increase if the offense that gave rise to the requirement to register was a Tier III offense. The resulting offense level under either option is the same for each tier of offense. The definitions for Tier I, II, and III offenses are the statutory definitions provided in 42 U.S.C. § 16911(2),(3), and (4), respectively.

The first and second matters are addressed in §2A3.5(b)(1) of Option One, and in §2A3.5(b)(2) of Option Two. Both options provide alternative increases based on the type of offense committed while in a failure to register status and on whether that offense was committed against a minor or an adult. The proposed amendment provides a 6-level increase if, while in a failure to register status, the defendant committed a sex offense against an adult, or kidnapped or falsely imprisoned a minor. If the defendant committed a sex offense against a minor, the proposed amendment provides an 8-level increase and a minimum

offense level of [24]-[28].

The third matter is addressed in §2A3.5(b)(2) in Option One, and in §2A3.5(b)(3) in Option Two. Both options provide a [2][4]-level decrease if the defendant voluntarily attempted to correct the failure to register.

Issues for comment #2 and #3 in Part V of the proposed amendment request comment regarding the scope of these proposed enhancements. Issue for comment #3 also asks whether the Commission should include an instruction that the reduction does not apply if any of the proposed specific offense characteristics also apply.

The proposed amendment does not specifically address the fifth matter because application of Chapter Four will take into account whether the person has been convicted or adjudicated delinquent for any offense other than the offense which gave rise to the requirement to register.

The proposed amendment also provides another new guideline for certain aggravated offenses related to the requirement to register as a sex offender. As noted previously, 18 U.S.C. § 2250(c) provides a mandatory consecutive term of 5 years if a crime of violence was committed while the defendant was in a failure to register status. Section 2260A of title 18, United States Code, provides a mandatory consecutive term of 10 years' imprisonment if a person who is required to register commits an enumerated offense (including kidnapping, human trafficking, and various sex offenses). The new guideline, §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender), will apply to convictions under 18 U.S.C. §§ 2250(c) or 2260A, and instructs the court that the guideline sentence for any such conviction is the term of imprisonment required by statute. Neither Chapters Three nor Four will apply to any count of conviction covered by this guideline. This approach is the same approach the Commission has taken with other statutes that provide mandatory consecutive terms of imprisonment, namely 18 U.S.C. § 1028A (see §2B1.6 (Aggravated Identity Theft) and 18 U.S.C. § 924(c) (See §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes).)

Part II implements other new offenses and increased penalties as follows:

- (A) The Act provides a mandatory minimum term of imprisonment of 30 years for convictions under 18 U.S.C. § 2241(c) (Aggravated sexual abuse with children). This statute covers crossing state lines to engage in the sexual abuse of a child under the age of 12 years. It also covers engaging in a sexual act under the circumstances described in 18 U.S.C. § 2241(a) and (b) (force, threat, or other means) with a child who is between the ages of 12 years and 16 years and is at least four years younger than the person who is engaging in the sexual act. The proposed amendment provides a base offense level of 40 in §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the defendant was convicted under 18 U.S.C. § 2241(c). The specific offense characteristic for the age of the victim, subsection (b)(2), would not apply because the higher base offense level takes into account the age of the victim. There also is an application note that instructs the court not to apply the enhancement in §2A3.1(b)(1) (four-level enhancement if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b)) if the basis for the conviction under 18 U.S.C. § 2241(c) is that the defendant engaged in conduct described in 18 U.S.C. § 2241(a) or (b).
- (B) The Act increased the statutory maximum term of imprisonment for convictions under 18 U.S.C. § 2243(b) for sexual abuse of a ward from five years to 15 years. The proposed

amendment proposes to increase the base offense level in §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts) to level [14][16][18][20].

- (C) *The Act created a new offense in 18 U.S.C. § 2244(a)(5) for sexual contact offenses that would have violated 18 U.S.C. § 2241(c) had the sexual contact been a sexual act. (Section 2241(c) covers sexual acts with a child under 12 years old or sexual acts involving conduct described in 18 U.S.C. §2241(a) or (b) with a child between the ages of 12 and 16 and who is at least four years younger than the defendant.) The offense has a statutory maximum term of imprisonment of life.*

The proposed amendment addresses this new offense by increasing the minimum offense level in the age enhancement in subsection §2A3.4(b)(1) from level 20 to level 22.

Issue for Comment #4 in Part V of the proposed amendment addresses whether §2A3.4 already adequately accounts for the new offense and therefore does not need to be amended.

- (D) *The Act amended 18 U.S.C. § 1591 (sex trafficking of children or by force, fraud, or coercion) to provide a mandatory minimum term of imprisonment of 15 years if the sex trafficking offense involved a minor who had not attained the age of 14 years or involved force, fraud, or coercion (subsection 1591(b)(1)) and a mandatory minimum of 10 years if the offense involved a minor who had attained the age of 14 years but had not attained the age of 18 years (subsection 1591(b)(2)). The Act also increased the statutory maximum term of imprisonment from 40 years to life for 18 U.S.C. § 1591(b)(2) offenses. To address the increased statutory minimums, the proposed amendment modifies the base offense levels in §§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).*

With respect to offenses involving force, fraud, or coercion, the proposed amendment would create a heightened base offense level of [34][36] in §2G1.1 if the offense of conviction is 18 U.S.C. § 1591 and the offense involved conduct described in subsection (b)(1) of that statute. An alternative base offense level of 14 would apply in all other cases. The proposed amendment also excludes application of the enhancement in §2G1.1(b)(1) to cases that are sentenced under §2G1.1(a)(1) because cases to which that base offense level apply necessarily involve fraud or coercion.

With respect to offenses involving minors, the proposed amendment would create alternative base offense levels in §2G1.3 based on the statute of conviction and the conduct described in that conviction. For convictions under 18 U.S.C. § 1591 in which the offense involved conduct described in subsection (b)(1) of that statute (i.e., offense was effected by force, fraud, or coercion, or involved a minor who had not attained the age of 14 years), the proposed base offense level is [34][36]. For convictions under 18 U.S.C. § 1591 in which the offense involved conduct described in subsection (b)(2) of that statute (i.e., offense involved a minor who had attained the age of 14 but had not attained the age of 18 years), the proposed base offense level is [30][32].

The Act also increased the penalties for 18 U.S.C. §§ 2422(b) (Coercion and enticement [of a minor to engage in criminal sexual activity]) and 2423(a) (Transportation [of a

minor] with intent to engage in criminal sexual activity). Both statutes now have a mandatory minimum term of 10 years (increased from 5 years) and a statutory maximum term of imprisonment of life (increased from 30 years). The proposed amendment would add §2G1.3(a)(3) with a base offense level of [28][30] if the defendant was convicted under 18 U.S.C. §§ 2422(b) or 2423(a). If the Commission decides that the base offense level should be the same for offenses under 18 U.S.C. §§ 1591(b)(2), 2422(b), and 2423(a), then the Team would modify the proposed amendment to consolidate these offenses into one base offense level.

The proposed amendment also provides a range of [4]-[8] at §2G1.3(b)(5). It also addresses the interaction of subsection (b)(5), which provides an 8-level increase if the offense involve a minor who had not attained the age of 12 years, and the proposed addition of alternative base offense levels. Now that age is a factor the court considers in determining the appropriate base offense level for convictions under 18 U.S.C. § 1591, the proposed amendment provides a new application note that instructs the court not to apply subsection (b)(5) if subsection (a)(1) applies. The proposed amendment also provides an option for modifying the enhancement.

Issue for comment #8 asks whether the Commission should consider providing an increase of four or six levels, instead of eight levels, at §2G1.3(b)(5) in any case in which the age of the minor victim is taken into account by base offense level.

- (E) The Act created a new offense in 18 U.S.C. § 2257A that imposes recordkeeping requirements on individuals who produce depictions of simulated sexually explicit conduct. Failure to comply with the recordkeeping requirements carries a statutory maximum term of imprisonment of 1 year. If the offense was intended to conceal a child pornography offense, the statute provides a statutory maximum term of imprisonment of 5 years for the first offense; for the second offense, the penalty is a 2-year mandatory minimum and a statutory maximum of 10 years.

The proposed amendment references this new offense to §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email).

Issue for Comment #5 in Part V of the proposed amendment requests comment regarding the refusal to allow inspection of records in violation of 18 U.S.C. §§ 2257(f)(5) or 2257A.

- (F) The Act created a new offense in 18 U.S.C. § 2252A(g) that prohibits engaging in child exploitation enterprises, defined in the statute as violating 18 U.S.C. §§ 1591, 1201 (if the victim is a minor), Chapter 109A (involving a minor), Chapter 110 (except for 18 U.S.C. §§ 2257 and 2257A), or Chapter 117 (involving a minor), as part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and committing those offenses in concert with three or more other people. The statute provides a mandatory minimum term of imprisonment of 20 years.

The proposed amendment creates a new guideline, §2G2.6 (Child Exploitation Enterprises), to cover this new offense. The guideline provides a base offense level of

[34][35][36][37] and three specific offense characteristics, based on the age of the victim (subsection (b)(1)), whether the defendant was the parent or had some other custodial care of the victim (subsection (b)(2)), and whether the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) (subsection (b)(3)).

Issue for Comment #6 requests comment regarding the base offense level, the scope of the proposed specific offense characteristics, and whether the Commission should consider other conduct for purposes of providing additional specific offense characteristics.

- (G) *The Act created a new offense in 18 U.S.C. § 2252C that prohibits knowingly embedding words or images into the source code of a website with the intent to deceive a person into viewing obscenity, or to deceive a minor into viewing material harmful to minors. The statute carries a statutory maximum term of imprisonment of 20 years if the offense involved a minor, or a maximum of 10 years, otherwise. Application Note 2 proposes that the specific offense characteristic at §2G3.1(b)(3) not apply for offenses under 18 U.S.C. § 2252C.*

The proposed amendment modifies subsection (b)(2) of §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), which currently provides a two-level enhancement if the offense involved misleading domain names. The proposed amendment adds to this enhancement embedding words or digital images on a website and also presents the option of providing a four-level increase for this enhancement.

Issue for Comment #7 requests comment regarding whether the Commission should provide an enhancement if the defendant intended to deceive someone other than a minor into viewing obscenity.

Part III addresses other criminal provisions contained in the Act as follows:

- (A) *The Act created a new Class A misdemeanor in 42 U.S.C. § 16984 prohibiting the use of a child's fingerprints that were derived from a program funded by federal grants to support voluntary fingerprinting of children for any purpose other than providing the fingerprints to the child's parents or guardian. The proposed amendment references this*

new offense to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Return Information) and provides a base offense level of 6 for the offense. The heading of the guideline also is amended to cover personal information of this sort.

The Act also created 42 U.S.C. § 16962 prohibiting the improper release of information obtained in fingerprint-based checks for the background check of foster or adoptive parents or of a person employed by, or considering employment with, a private or public educational agency. The statute provides a statutory maximum term of imprisonment of 10 years. The proposed amendment references this offense to §2H3.1 and such offenses will receive a base offense level of 9 under §2H3.1(a)(1).

- (B) *The Act amended 18 U.S.C. § 1001 to provide an enhanced penalty of up to 8 years if the*

matter relates to an offense under 18 U.S.C. § 1591 or Chapters 109A, 110, or 117 of title 18, United States Code. The proposed amendment adds a [2]-[12] level enhancement in subsection (b)(1)(C) of §2J1.2 (Obstruction of Justice) to cover such conduct.

- (C) *The Act added 18 U.S.C. § 1591 to the list in 18 U.S.C. § 3559(e)(2) of repeated sex offenses committed against children that require a mandatory life imprisonment. The proposed amendment adds 18 U.S.C. § 1591 to the list of covered sex offenses in Application Note 2 of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).*

Part IV addresses the probation and supervised release aspects of the Act. First, the proposed amendment updates subsection (a)(9) of §5B1.3 (Conditions of Probation) and subsection (a)(7) of §5D1.3 to include compliance with SORNA as one of the mandatory conditions. Second, it adds to the list of "special conditions" in §§5B1.3(d) and 5D1.3(d) a condition requiring a sex offender to submit to a search, as added to 18 U.S.C. §§ 3563(b) and 3583(d) by the Act. Third, the proposed amendment modifies §5D1.2 (Term of Supervised Release) to add Chapter 109B and 18 U.S.C. §§ 1201 and 1591 to the definition of sex offense in Application Note 1 of that guideline.

Part V sets forth all of the issues for comment. In addition to the specific issues noted in this synopsis, Issue for Comment #1 requests input regarding how the Commission should incorporate the mandatory minimum terms of imprisonment created or increased by the Adam Walsh Act and discusses four approaches for incorporating these penalties.

Proposed Amendment

Part I - Implementing Directive Regarding 18 U.S.C. § 2250 Offenses

3. CRIMINAL SEXUAL ABUSE AND OFFENSES RELATED TO REGISTRATION AS A SEX OFFENDER

§2A3.5. Failure to Register as a Sex Offender

Option 1:

[(a) Base Offense Level:

- (1) **16**, if the offense that gave rise to the requirement to register was a Tier III offense;
- (2) **14**, if the offense that gave rise to the requirement to register was a Tier II offense; or
- (3) **12**, if the offense that gave rise to the requirement to register was a Tier I offense.

(b) Specific Offense Characteristics

- (1) If, while in a failure to register status, the defendant (A)(i)

committed a sex offense against someone other than a minor; or (ii) kidnapped or falsely imprisoned a minor, increase by 6 levels; or (B) committed a sex offense against a minor, increase by 8 levels. If the offense level resulting from application of subdivision (B) is less than level [24]-[28], increase to level [24]-[28].

- (2) If the defendant voluntarily attempted to correct the failure to register, decrease by [2][4] levels.]

Option 2:

[(a) Base Offense Level: 12

(b) Specific Offense Characteristics

- (1) If the offense that gave rise to the requirement to register was a (A) Tier II offense, increase by 2 levels; or (B) Tier III offense, increase by 4 levels.
- (2) If, while in a failure to register status, the defendant (A)(i) committed a sex offense against a person other than a minor; or (ii) kidnapped or falsely imprisoned a minor, increase by 6 levels; or (B) committed a sex offense against a minor, increase by 8 levels. If the offense level resulting from application of subdivision (B) is less than level [24]-[28], increase to level [24]-[28].
- (3) If the defendant voluntarily attempted to correct the failure to register, decrease by [2][4] levels.]

Commentary

Statutory Provision: 18 U.S.C. § 2250(a).

Application Note:

1. Definitions.—For purposes of this guideline:

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

"Sex offense" has the meaning given that term in 42 U.S.C. § 16911(5), except that kidnapping and false imprisonment are not included.

["Tier I offense"], "tier II offense", and "tier III offense" have the meaning given those terms in 42 U.S.C. § 16911[(2)], (3) and (4), respectively.

§2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender

- (a) If the defendant was convicted under 18 U.S.C. § 2250(c) or § 2260A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2250(c), 2260A.

Application Notes:

1. In General.—Sections 2250(c) and 2260A of title 18, United States Code, provide mandatory minimum terms of imprisonment that are required to be imposed consecutively to other offenses. Accordingly, the guideline sentence for a defendant convicted under either statute is the term required by the statute.
2. Inapplicability of Chapters Three and Four.—Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

Part II - Implementing New Sex Offenses and Increased Penalties:

(A) New Mandatory Minimum for 18 U.S.C. § 2241(c)

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

- (a) Base Offense Level: ~~30~~
- (1) 40, if the defendant was convicted under 18 U.S.C. § 2241(c); or
 - (2) 30, otherwise.
- (b) Specific Offense Characteristics
- (1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b),

increase by 4 levels.

- (2) If subsection (a)(2) applies and (A) ~~if~~ the victim had not attained the age of twelve years, increase by 4 levels; or (B) ~~if~~ the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by 2 levels.
- (3) If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by 2 levels.
- (4) (A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.
- (5) If the victim was abducted, increase by 4 levels.
- (6) If, to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or if, to facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, the offense involved (A) the knowing misrepresentation of a participant's identity; or (B) the use of a computer or an interactive computer service, increase by 2 levels.

(c) 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), if the resulting offense level is greater than that determined above.
- (2) 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.

(d) Special Instruction

- (1) If the offense occurred in the custody or control of a prison or other correctional facility and the victim was a prison official, the offense shall be deemed to have an official victim for purposes of subsection (c)(2) of §3A1.2 (Official Victim).

Commentary

Statutory Provisions: 18 U.S.C. §§ 2241, 2242. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Abducted", "permanent or life-threatening bodily injury", and "serious bodily injury" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

"Custody or control" and "prison official" have the meaning given those terms in Application Note 4 of the Commentary to §3A1.2 (Official Victim).

"Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

"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, transportation, and advertisement, 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)).

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

"Victim" includes an undercover law enforcement officer.

2. Application of Subsection (b)(1).—

(A) Definitions.—For purposes of subsection (b)(1), "conduct described in 18 U.S.C. §

2241(a) or (b)" is engaging in, or causing another person to engage in, a sexual act with another person by: (A) using force against the victim; (B) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (C) rendering the victim unconscious; or (D) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.

(B) Application in Cases Involving a Conviction under 18 U.S.C. § 2241(c).—If the conduct that forms the basis for a conviction under 18 U.S.C. § 2241(c) is that the defendant engaged in conduct described in 18 U.S.C. § 2241(a) or (b), do not apply subsection (b)(1).

3. Application of Subsection (b)(3).—

(A) Care, Custody, or Supervisory Control.—Subsection (b)(3) is to be construed broadly 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 in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

4. Application of Subsection (b)(6).—

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

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