



Amendments to the Sentencing Guidelines

May 1, 2005

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GUIDELINES**

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2005 AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. Aggravated Identity Theft

Synopsis of Amendment: *This amendment implements sections 2 and 5 of the Identity Theft Penalty Enhancement Act, Public Law 108–275, 118 Stat. 831 ("the Act"), which create two new criminal offenses at 18 U.S.C. § 1028A and direct the Sentencing Commission to expand the upward adjustment at §3B1.3 (Abuse of Position of Trust/Special Skill). This amendment also provides guidance to the courts on imposing sentences for multiple violations of section 1028A.*

The Act creates a new offense at 18 U.S.C. § 1028A(a)(1) that prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, specific enumerated felonies. These felonies consist of various types of fraud, including mail and wire fraud in connection with passports, visas and other immigration, nationality, and citizenship laws, programs under the Social Security Act, and the acquisition of firearms. A conviction under section 1028A(a)(1) carries a two-year mandatory term of imprisonment that must run consecutively to any other term of imprisonment, including the sentence for the underlying felony conviction. The Act also creates a new offense at 18 U.S.C. § 1028A(b)(1) that prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, specific felonies enumerated in 18 U.S.C. § 2332b(g)(5)(B) ("federal crimes of terrorism"). Section 1028A(b)(1) provides a five-year mandatory term of imprisonment that must run consecutively to any other term of imprisonment, including the sentence for the underlying felony conviction. As described below, section 1028A(b)(4) creates an exception to the requirement for consecutive terms of imprisonment in cases involving multiple violations of the statute sentenced at the same time.

First, in response to the creation of these new criminal offenses, the amendment creates a new guideline at §2B1.6 (Aggravated Identity Theft). This guideline is patterned after §2K2.4 (Use of a Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to a Certain Crimes). Because the new offenses carry a fixed, mandatory consecutive term of imprisonment, the new guideline, as does §2K2.4, provides that the guideline sentence is the term of imprisonment required by statute. To avoid unwarranted double-counting, the amendment contains an application note that prohibits the application of any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense in cases in which a sentence under §2B1.6 is imposed in conjunction with a sentence for an underlying offense. Also, consistent with §2K2.4, the new guideline at §2B1.6 contains an application note that provides that adjustments under Chapters Three and Four are inapplicable to sentences under this guideline.

Second, in response to the directive in section 5 to amend §3B1.3 (Abuse of Trust or Use of Special Skill) to include a "defendant [who] exceeds or abuses the authority of his or her position in order to obtain unlawfully or use without authority any means of identification," the Commission created Application Note 2 to §3B1.3 to include such defendants within the scope of the guideline. The application note contains several examples to illustrate the types of conduct intended to be within the scope of the new provision.

Third, the amendment adds a number of provisions at appropriate guidelines in order to provide guidance to courts in accordance with section 2 of the Act (18 U.S.C. § 1028A(b)(4)). That section states

that "a term of imprisonment imposed on a person for violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission" The amendment states a general rule, at §5G1.2 (Sentencing on Multiple Counts of Conviction), Application Note 2(B), providing that the court has discretion to impose concurrent or consecutive, or partially concurrent and partially consecutive, terms of imprisonment for multiple violations of 18 U.S.C. § 1028A. A non-exhaustive list of factors for courts to consider in making this determination is provided, including the nature and seriousness of the underlying offenses and whether the offenses would be groupable under §3D1.2 (Multiple Counts).

Finally, the amendment modifies §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) to make clear that section 1028A offenses are excluded from the general grouping rules in §§3D1.2 - 3D1.5 and makes conforming additions and changes to the new guideline at §2B1.6 (Aggravated Identity Theft) in Application Note 1 and §3D1.1(b)(1) and (2).

§2B1.6. Aggravated Identity Theft

- (a) If the defendant was convicted of violating 18 U.S.C. § 1028A, 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 Provision: 18 U.S.C. § 1028A. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Imposition of Sentence.—

- (A) In General.—Section 1028A of title 18, United State Code, provides a mandatory term of imprisonment. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 1028A is the term required by that statute. Except as provided in subdivision (B), 18 U.S.C. § 1028A also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.
- (B) Multiple Convictions Under Section 1028A.—Section 1028A(b)(4) of title 18, United State Code, provides that in the case of multiple convictions under 18 U.S.C. § 1028A, the terms of imprisonment imposed on such counts may, in the discretion of the court, run concurrently, in whole or in part, with each other. See the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance regarding imposition of sentence on multiple counts of 18 U.S.C. § 1028A.

2. *Inapplicability of Chapter Two Enhancement.*—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. A sentence under this guideline accounts for this factor for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). "Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7).

3. *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.

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

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Commentary

Application Notes:

1. *Definition of "Public or Private Trust".*—"Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

~~Notwithstanding the preceding paragraph, because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail.~~

2. *Application of Adjustment in Certain Circumstances.*—Notwithstanding Application Note 1, or any other provision of this guideline, an adjustment under this guideline shall apply to the following:
 - (A) An employee of the United States Postal Service who engages in the theft or

destruction of undelivered United States mail.

(B) *A defendant who exceeds or abuses the authority of his or her position in order to obtain unlawfully, or use without authority, any means of identification. "Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7). The following are examples to which this subdivision would apply: (i) an employee of a state motor vehicle department who exceeds or abuses the authority of his or her position by knowingly issuing a driver's license based on false, incomplete, or misleading information; (ii) a hospital orderly who exceeds or abuses the authority of his or her position by obtaining or misusing patient identification information from a patient chart; and (iii) a volunteer at a charitable organization who exceeds or abuses the authority of his or her position by obtaining or misusing identification information from a donor's file.*

~~23.~~ * * *

~~34.~~ * * *

~~45.~~ * * *

§3D1.1. Procedure for Determining Offense Level on Multiple Counts

* * *

(b) Exclude from the application of §§3D1.2-3D1.5 **the following:**

- (1) ~~a~~Any count for which the statute (~~†A~~) specifies a term of imprisonment to be imposed; and (~~2B~~) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of §5G1.2(a).
- (2) Any count of conviction under 18 U.S.C. § 1028A. See Application Note 2(B) of the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance on how sentences for multiple counts of conviction under 18 U.S.C. § 1028A should be imposed.

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§5G1.2. Sentencing on Multiple Counts of Conviction

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Commentary

2. Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by

Subsection (e).—

(A) ***In General.***—Subsection (a) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.,* 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment) and 18 U.S.C. § 1028A (requiring a mandatory term of imprisonment of either two or five years, based on the conduct involved, and also requiring, except in the circumstances described in subdivision (B), the sentence imposed to run consecutively to any other term of imprisonment). Except for certain career offender situations in which subsection (c) of §4B1.1 (Career Offender) applies, the term of years to be imposed consecutively is the minimum required by the statute of conviction and is independent of the guideline sentence on any other count. *See, e.g.,* the Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding the determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. ~~Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. *See* 18 U.S.C. § 3624(e).~~ Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. *See, e.g.,* Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.

(B) ***Multiple Convictions Under 18 U.S.C. § 1028A.***—Section 1028A of title 18, United States Code, generally requires that the mandatory term of imprisonment for a violation of such section be imposed consecutively to any other term of imprisonment. However, 18 U.S.C. § 1028A(b)(4) permits the court, in its discretion, to impose the mandatory term of imprisonment on a defendant for a violation of such section "concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission. . .".

In determining whether multiple counts of 18 U.S.C. § 1028A should run concurrently with, or consecutively to, each other, the court should consider the following non-exhaustive list of factors:

- (i) *The nature and seriousness of the underlying offenses. For example, the court should consider the appropriateness of imposing consecutive, or partially consecutive, terms of imprisonment for multiple counts of 18 U.S.C. § 1028A in a case in which an underlying offense for one of the 18 U.S.C. § 1028A offenses is a crime of violence or an offense enumerated in 18 U.S.C. § 2332b(g)(5)(B).*
- (ii) *Whether the underlying offenses are groupable under §3D1.2 (Multiple Counts). Generally, multiple counts of 18 U.S.C. § 1028A should run concurrently with*

one another in cases in which the underlying offenses are groupable under §3D1.2.

(iii) Whether the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are better achieved by imposing a concurrent or a consecutive sentence for multiple counts of 18 U.S.C. § 1028A.

(C) Imposition of Supervised Release.—In the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e).

APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 1028	2B1.1
18 U.S.C. § 1028A	2B1.6

2. Antitrust Offenses

Synopsis of Amendment: *This amendment responds to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108–237 (the "Act"). The Act increased the statutory maximum term of imprisonment for antitrust offenses under 15 U.S.C. §§ 1 and 3(b) from three to ten years. The amendment responds to congressional concern about the seriousness of antitrust offenses and provides for antitrust penalties that are more proportionate to those for sophisticated frauds sentenced under §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The Commission has long recognized the similarity of antitrust offenses to sophisticated frauds.*

The amendment increases the base offense level for antitrust offenses in §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) to level 12. The higher base offense level ensures that penalties for antitrust offenses will be coextensive with those for sophisticated frauds sentenced under §2B1.1 and recognizes congressional concern about the inherent seriousness of antitrust offenses. The penalties for sophisticated fraud have been increased incrementally due to a series of amendments to §2B1.1, while no commensurate increases for antitrust offenses had occurred. Raising the base offense level of §2R1.1 helps restore the historic proportionality in the treatment of antitrust offenses and sophisticated frauds.

The "volume of commerce" table at §2R1.1(b)(2) is amended to provide up to 16 additional offense levels for the defendant whose offense involves more than \$1,500,000,000, while the new table's first threshold is raised from \$400,000 to \$1,000,000. The new volume of commerce table: (1) recognizes the depreciation in the value of the dollar since the table was last revised in 1991; (2) responds to data indicating that the financial magnitude of antitrust offenses has increased significantly; and (3) provides greater deterrence of large scale price-fixing crimes.

Application Note 1 to §2R1.1 is amended to emphasize the potential relevance of such Chapter Three enhancements as §3B1.1 (Aggravating Role), §3B1.3 (Abuse of Position of Trust or Use of Special Skill), and §3C1.1 (Obstructing or Impeding the Administration of Justice) in determining the appropriate sentence for an antitrust offender. Application Note 2 also is amended to highlight the potential relevance of the defendant's role in the offense in determining the amount of fine to be imposed. Finally, the amendment strikes outdated background commentary.

§2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

- (a) Base Offense Level: ~~10~~**12**
- (b) Specific Offense Characteristics

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- (2) If the volume of commerce attributable to the defendant was more than ~~\$400,000~~, **\$1,000,000**, adjust the offense level as follows:

<u>Volume of Commerce (Apply the Greatest)</u>	<u>Adjustment to Offense Level</u>
(A) More than \$400,000	add 1
(B) More than \$1,000,000	add 2
(C) More than \$2,500,000	add 3
(D) More than \$6,250,000	add 4
(E) More than \$15,000,000	add 5
(F) More than \$37,500,000	add 6
(G) More than \$100,000,000	add 7.

<u>Volume of Commerce (Apply the Greatest)</u>	<u>Adjustment to Offense Level</u>
(A) More than \$1,000,000	add 2
(B) More than \$10,000,000	add 4
(C) More than \$40,000,000	add 6
(D) More than \$100,000,000	add 8
(E) More than \$250,000,000	add 10
(F) More than \$500,000,000	add 12
(G) More than \$1,000,000,000	add 14
(H) More than \$1,500,000,000	add 16.

* * *

Commentary

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Application Notes:

- ~~The provisions of §3B1.1 (Aggravating Role) and §3B1.2 (Mitigating Role) should be applied to an individual defendant as appropriate to reflect the individual's role in committing the offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, a 4-level increase is called for under §3B1.1. An individual defendant should be considered for a downward adjustment under §3B1.2 for a mitigating role in the offense only if he was responsible in some minor way for his firm's participation in the conspiracy.~~
- Application of Chapter Three (Adjustments).—Sections 3B1.1 (Aggravating Role), 3B1.2 (Mitigating Role), 3B1.3 (Abuse of Position of Trust or Use of Special Skill), and 3C1.1 (Obstructing or Impeding the Administration of Justice) may be relevant in determining the seriousness of the defendant's offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, the 4-level increase at §3B1.1(a) should be applied to reflect the defendant's aggravated role in the offense. For purposes of applying §3B1.2, an individual defendant should be considered for a mitigating role adjustment only if he were responsible in some minor way for his firm's participation in the conspiracy.*
- Considerations in Setting Fine for Individuals.—In setting the fine for individuals, the court*

should consider the extent of the defendant's participation in the offense, ~~his~~*the defendant's* role, and the degree to which ~~he~~*the defendant* personally profited from the offense (including salary, bonuses, and career enhancement). If the court concludes that the defendant lacks the ability to pay the guideline fine, it should impose community service in lieu of a portion of the fine. The community service should be equally as burdensome as a fine.

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Background:

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The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal per se, i.e., without any inquiry in individual cases as to their actual competitive effect. ~~The Commission believes that the most effective method to deter individuals from committing this crime is through imposing short prison sentences coupled with large fines. The controlling consideration underlying this guideline is general deterrence.~~

Under the guidelines, prison terms for these offenders should be much more common, and usually somewhat longer, than typical under pre-guidelines practice. Absent adjustments, the guidelines require *some period of* confinement of six months or longer in the great majority of cases that are prosecuted, including all bid-rigging cases. The court will have the discretion to impose considerably longer sentences within the guideline ranges. Adjustments from Chapter Three, Part E (Acceptance of Responsibility) and, in rare instances, Chapter Three, Part B (Role in the Offense), may decrease these minimum sentences; nonetheless, in very few cases will the guidelines not require that some confinement be imposed. Adjustments will not affect the level of fines.

* * *

The Commission believes that most antitrust defendants have the resources and earning capacity to pay the fines called for by this guideline, at least over time on an installment basis. ~~The statutory maximum fine is \$350,000 for individuals and \$10,000,000 for organizations, but is increased when there are convictions on multiple counts.~~

3. Miscellaneous Amendments

Synopsis of Amendment: *This ten-part amendment consists of technical and conforming amendments to various guidelines.*

First, this amendment deletes unnecessary background commentary in §2A2.4 (Obstructing or Impeding Officers).

Second, this amendment makes minor clarifying amendments to Application Note 15 in the fraud guideline, §2B1.1, to make clear that, in order for the cross reference at §2B1.1(c)(3) to apply, the conduct set forth in the count of conviction must establish a fraud or false statement-type offense.

Third, this amendment makes technical amendments to several guidelines to conform to changes made in the public corruption guidelines in the 2004 amendment cycle (see Appendix C to the Guidelines Manual, Amendment 666). Specifically, the proposed amendment corrects title references to §2C1.1 in §§2B3.3(c)(1), 2C1.3(c)(1), and 2C1.8(c)(1) and strikes references to §2C1.7 in §§3D1.2(d) and 8C2.1.

Fourth, this amendment clarifies Application Note 5 in the drug guideline, §2D1.1, regarding drug analogues. The current note suggests that drug analogues are less potent than the drug for which it is an analogue. However, by statute, analogues can only be the same or more potent.

Fifth, this amendment redesignates incorrect references in a number of Application Notes in the drug guideline, §2D1.1.

Sixth, this amendment conforms §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to changes made in the drug guideline, §2D1.1, in the 2004 amendment cycle (see Appendix C to the Guidelines Manual, Amendment 667). Specifically, the proposed amendment amends the Chemical Quantity Table in §2D1.11(e) so that the amount of gamma-butyrolactone (GBL), at any particular offense level, is the amount that provides a 100 percent yield of gamma-hydroxybutyric acid (GHB).

Seventh, this amendment updates the statutory provisions in §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to account for redesignations of 18 U.S.C. § 924 offenses.

Eighth, this amendment corrects a typographical error in §2M6.1 (Weapons of Mass Destruction).

Ninth, this amendment corrects the title to §5C1.2 (Limitation on Applicability of Statutory Minimum Sentence in Certain Cases) in Application Note 2 of §5D1.2 (Terms of Supervised Release).

Tenth, this amendment corrects Appendix A (Statutory Index) to account for redesignations of 18 U.S.C. § 924 offenses.

(A) **Deleting Background Commentary in §2A2.4**

§2A2.4. Obstructing or Impeding Officers

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Commentary

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~~*Background: Violations of 18 U.S.C. §§ 1501, 1502, and 3056(d) are misdemeanors; violation of 18 U.S.C. § 111 is a felony.*~~

(B) **Clarifying Cross Reference Regarding Conduct Establishing an Offense Covered by Another Guideline**

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

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Commentary

Application Notes:

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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).

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(C) Conforming Various Guideline References to the Public Corruption Amendments (effective November 1, 2004)

§2B3.3. Blackmail and Similar Forms of Extortion

* * *

(c) Cross References

- (1) If the offense involved extortion under color of official right, apply §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**).

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

* * *

(c) Cross Reference

- (1) If the offense involved a bribe or gratuity, apply §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**) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than the offense level determined above.

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§2C1.8. Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property

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(c) Cross Reference

- (1) If the offense involved a bribe or gratuity, apply §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) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than the offense level determined above.

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§3D1.2. Groups of Closely Related Counts

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

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

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, ~~2C1.7~~, 2C1.8;

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§8C2.1. Applicability of Fine Guidelines

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- (a) §§2B1.1, 2B1.4, 2B2.3, 2B4.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.6, ~~2C1.7~~;

* * *

(D) Correcting Drug Analogue Analysis in the Commentary to §2D1.1

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

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Application Notes:

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5. *Analogues and Controlled Substances Not Referenced in this Guideline.—Any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance. Any*

reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. For purposes of this guideline "analogue" has the meaning given the term "controlled substance analogue" in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider ~~whether a greater quantity of the analogue is needed to produce a substantially similar effect on the central nervous system as~~ *whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.*

* * *

(E) Redesignation of Incorrect References in §2D1.1

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

* * *

Application Notes:

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19. Hazardous or Toxic Substances.—Subsection (b)(56)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(56)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. *See* 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).

20. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—
 - (A) Factors to Consider.—In determining, for purposes of subsection (b)(56)(B) or (C), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:
 - (i) The quantity of any chemicals or hazardous or toxic substances found at the

laboratory, and the manner in which the chemicals or substances were stored.

- (ii) *The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.*
- (iii) *The duration of the offense, and the extent of the manufacturing operation.*
- (iv) *The location of the laboratory (e.g., whether the laboratory is located in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm.*

(B) Definitions.—For purposes of subsection (b)(56)(C):

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

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

21. Applicability of Subsection (b)(67).—*The applicability of subsection (b)(67) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(67) applies.*

Background:

* * *

Subsection (b)(56)(A) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsections (b)(56)(B) and (C) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.

(F) Revising Yield Ratio of GBL to GHB

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

* * *

(e) CHEMICAL QUANTITY TABLE*
(All Other Precursor Chemicals)

Listed Chemicals and QuantityBase Offense Level

- (1) List I Chemicals **Level 30**
- * * *
- 227+1135.5 L or more of Gamma-butyrolactone;
714 G or more of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.
- * * *
- (2) List I Chemicals **Level 28**
- At least ~~681.3~~340.7 L but less than ~~227+~~1135.5 L of Gamma-butyrolactone;
At least 214 G but less than 714 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;
- * * *
- (3) List I Chemicals **Level 26**
- * * *
- At least ~~227+~~113.6 L but less than ~~681.3~~340.7 L of Gamma-butyrolactone;
At least 71 G but less than 214 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;
- * * *
- (4) List I Chemicals **Level 24**
- * * *
- At least ~~159~~79.5 L but less than ~~227+~~113.6 L of Gamma-butyrolactone;
At least 50 G but less than 71 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;
- * * *
- (5) List I Chemicals **Level 22**
- * * *
- At least ~~90.8~~45.4 L but less than ~~159~~79.5 L of Gamma-butyrolactone;
At least 29 G but less than 50 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;
- * * *
- (6) List I Chemicals **Level 20**

* * *

At least ~~22.7~~ 11.4 L but less than ~~90.8~~ 45.4 L of Gamma-butyrolactone;
At least 7 G but less than 29 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

* * *

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

* * *

At least ~~18.2~~ 9.1 L but less than ~~22.7~~ 11.4 L of Gamma-butyrolactone;
At least 6 G but less than 7 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

* * *

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

* * *

At least ~~13.6~~ 6.8 L but less than ~~18.2~~ 9.1 L of Gamma-butyrolactone;
At least 4 G but less than 6 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

* * *

(9) List I Chemicals **Level 14**

* * *

At least ~~9.1~~ 4.5 L but less than ~~13.6~~ 6.8 L of Gamma-butyrolactone;
At least 3 G but less than 4 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

* * *

(10) List I Chemicals **Level 12**

* * *

Less than ~~9.1~~ 4.5 L of Gamma-butyrolactone;
Less than 3 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

* * *

(G) Amending Statutory Provisions in §2K2.1

§2K2.1. **Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r)-(w), (x)(1), 924(a), (b), (e)-(ih), (kj)-(on); 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).

* * *

(H) Striking Note in §2M6.1(b)(1)(A) and Making Noted Change

§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**

* * *

(b) Specific Offense Characteristics

- (1) If (A) subsection (a)(2) or (a)(4)(A)*applies; and (B) the offense involved a threat to use, or otherwise involved (i) a select biological agent; (ii) a listed precursor or a listed toxic chemical; (iii) nuclear material or nuclear byproduct material; or (iv) a weapon of mass destruction that contains any agent, precursor, toxic chemical, or material referred to in subdivision (i), (ii), or (iii), increase by 2 levels.

* * *

~~*Note: The reference to "(a)(4)" should be to "(a)(4)(A)".~~

* * *

(I) Correcting Reference to §5C1.2 in the Commentary to §5D1.2

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

* * *

Commentary

Application Notes:

* * *

2. *Safety Valve Cases.*—A defendant who qualifies under §5C1.2 (*Limitation on Applicability of Statutory Minimum Sentence in Certain Cases*) is not subject to any statutory minimum sentence of supervised release. See 18 U.S.C. § 3553(f). In such a case, the term of supervised release shall be determined under subsection (a).

* * *

(J) Correcting Statutory Index References

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 924(i)	2K2.1
18 U.S.C. § 924(ji)(1)	2A1.1, 2A1.2
18 U.S.C. § 924(ji)(2)	2A1.3, 2A1.4
18 U.S.C. § 924(kj)-(on)	2K2.1