



Amendments to the Sentencing Guidelines

May 11, 2007

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TABLE OF CONTENTS

<u>AMENDMENT</u>	<u>PAGE NO.</u>
1. Reductions in Term of Imprisonment Based on Bureau of Prisons Motion	1
2. Transportation	3
3. Terrorism	13
4. Sex Offenses	24
5. Corrections to §§2B1.1 and 2L1.1	48
6. Miscellaneous Laws	50
7. Repromulgation of Emergency Amendment on Intellectual Property	52
8. Drugs	56
9. Cocaine Base Sentencing	71
10. Technical Amendments	82
11. Repromulgation of Emergency Amendment on Pretexting	84
12. Criminal History	87

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

1. §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons)

Reason for Amendment: *This amendment modifies the policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons) to further effectuate the directive in 28 U.S.C. § 994(t). Section 994(t) provides that the Commission "in promulgating general policy statements regarding the sentence modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." The amendment revises Application Note 1(A) of §1B1.13 to provide four examples of circumstances that, provided the defendant is not a danger to the safety of any other person or to the community, would constitute "extraordinary and compelling reasons" for purposes of 18 U.S.C. § 3582(c)(1)(A).*

Amendment:

§1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement)

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

- (1) (A) extraordinary and compelling reasons warrant the reduction; or
(B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;
- (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
- (3) the reduction is consistent with this policy statement.

Commentary

Application Notes:

1. Application of Subsection (1)(A).—

- (A) Extraordinary and Compelling Reasons.—*A determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of subdivision (1)(A). **Provided the defendant meets the requirements of subdivision (2), extraordinary***

and compelling reasons exist under any of the following circumstances:

- (i) The defendant is suffering from a terminal illness.*
- (ii) The defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.*
- (iii) The death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children.*
- (iv) As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i), (ii), and (iii).*

(B) Rehabilitation of the Defendant.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of subdivision (1)(A).

2. Application of Subdivision (3).—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

*Background: This policy statement is an initial step toward implementing **implements** 28 U.S.C. § 994(t). The Commission intends to develop further criteria to be applied and a list of specific examples of extraordinary and compelling reasons for sentence reduction pursuant to such statute.*

2. Transportation

Reason for Amendment: *This amendment implements various provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177 (the "PATRIOT Reauthorization Act") and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109–59 ("SAFETEA-LU").*

The PATRIOT Reauthorization Act created several new offenses and increased the scope of or penalty for several existing offenses. SAFETEA-LU also created two new offenses. This amendment references both the new statutes and those with increased scope and penalties to existing guidelines. The amendment also provides a corresponding amendment to Appendix A (Statutory Index). The Commission concluded that referencing the new offenses to existing guidelines was appropriate because the type of conduct criminalized by the new statutes was adequately addressed and penalized by the guidelines. Section 307(c) of the PATRIOT Reauthorization Act directed 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. This amendment responds to the directive by revising the enhancement at subsection (b)(11) of §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The amendment expands the scope of this enhancement to cover cargo theft and adds a reference to the receipt of stolen vehicles or goods to ensure application of the enhancement is consistent with the scope of 18 U.S.C. §§ 659 and 2313. The Commission determined that the two-level increase, and the minimum offense level of 14, appropriately responds to concerns regarding the increased instances of organized cargo theft operations.

Amendment:

§2A1.1. First Degree Murder

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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

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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

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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

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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

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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;~~

* * *

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

(b) Specific Offense Characteristics

* * *

- (11) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by 2 levels. If and the offense level is less than level 14, increase to level 14.

* * *

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:

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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 e.g., an auto theft ring or "chop shop") to steal or to receive stolen (A) vehicles or vehicle parts, ~~or~~; or (B) goods or chattels that are part of a cargo shipment. ~~to receive stolen vehicles or vehicle parts.~~ "Vehicles" refers to all forms of vehicles, including aircraft and watercraft. For purposes of this subsection, "vehicle" means motor vehicle, vessel, or aircraft. A "cargo shipment" includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.

* * *

§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 or a seaport; (E) at a residence; or (F) 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.

* * *

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:

* * *

"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

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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.

* * *

§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**

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Commentary

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

* * *

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

* * *

(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)

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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 (Statutory Index)

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
18 U.S.C. § 1037

2B2.3
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. § 1992~~

~~2A1.1, 2B1.1, 2K1.4,
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~~

~~18 U.S.C. § 1993(b)~~

~~2A5.2, 2K1.4, 2M6.1~~

* * *

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

* * *

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

* * *

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

3. Terrorism

Reason for Amendment: *This amendment implements the USA PATRIOT Improvement and Reauthorization Act of 2005 (the "PATRIOT Reauthorization Act"), Pub. L. 109–177, and the Department of Homeland Security Appropriations Act, 2007 (the "Homeland Security Act"), Pub. L. 109–295.*

First, the amendment addresses section 122 of the PATRIOT Reauthorization Act, which created a new offense at 21 U.S.C. § 960a covering narco-terrorism. This new offense prohibits engaging in conduct that would be covered under 21 U.S.C. § 841(a) if committed under the jurisdiction of the United States, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act) or terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (this act is made up of separate parts divided by fiscal year)). The penalty is not less than twice the statutory minimum punishment under 21 U.S.C. § 841(b)(1) and not more than life. Section 960a also provides a mandatory term of supervised release of at least five years.

The amendment creates a new guideline at §2D1.14 (Narco-Terrorism) because an offense under 21 U.S.C. § 960a differs from basic drug offenses because it involves trafficking that benefits terrorist activity. The guideline also provides that the base offense level is the offense level determined under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) for the underlying offense, except that the "mitigating role cap" in §2D1.1(a)(3)(A) and (B) and the two-level reduction for meeting the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) shall not apply. The Commission determined that these exclusions are appropriate to reflect that this is not a typical drug offense, in that an individual convicted under this provision must have had knowledge that the person or organization receiving the funds or support generated by the drug trafficking "has engaged or engages in terrorist activity . . . or terrorism . . . ". The guideline also contains a specific offense characteristic that provides a six-level increase if the adjustment in §3A1.4 (Terrorism) does not apply. This six-level increase fully effectuates the statute's doubling of the minimum punishment for the underlying drug offense, while avoiding potential double counting with the 12-level adjustment at §3A1.4. The amendment also provides a corresponding reference for the new offense to §2D1.14 in Appendix A (Statutory Index).

Second, the amendment responds to the directive in section 551 of the Homeland Security Act, which created a new offense in 18 U.S.C. § 554 regarding the construction of border tunnels and subterranean passages that cross the international boundary between the United States and another country. Section 551(c) of the Homeland Security Act directed the Commission to promulgate or amend the guidelines to provide for increased penalties for persons convicted of offenses under 18 U.S.C. § 554 and required the Commission to consider a number of factors. Section 554(a) prohibits the construction or financing of such tunnels and passages and provides a statutory maximum term of imprisonment of 20 years. Section 554(b) prohibits the knowing or reckless disregard of the construction on land the person owns or controls and provides a statutory maximum term of imprisonment of 10 years. Section 554(c) prohibits the use of the tunnels to smuggle an alien, goods (in violation of 18 U.S.C. § 545), controlled substances, weapons of mass destruction (including biological weapons), or a member of a terrorist organization (defined in 18 U.S.C. § 2339B(g)(6)) and provides a penalty of twice the maximum term of imprisonment that otherwise would have been applicable had the unlawful activity not made use of the tunnel or passage.

The amendment creates a new guideline at §2X7.1 (Border Tunnels and Subterranean Passages) for convictions under 18 U.S.C. § 554. The new guideline provides that a conviction under 18 U.S.C. § 554(a) receives a base offense level 16, which is commensurate with certain other offenses with statutory maximum terms of imprisonment of 20 years and ensures a sentence of imprisonment. A conviction under 18 U.S.C. § 554(c) will receive a four-level increase over the offense level applicable to the underlying smuggling offense, which ensures that the seriousness of the underlying offense is the primary measure of offense severity. The four-level increase also satisfies the directive's instruction to account for the aggravating nature of the use of a tunnel or subterranean passage to breach the border to accomplish the smuggling offense and effectuates the statute's doubling of the statutory maximum penalty. A conviction under 18 U.S.C. § 554(b) receives a base offense level of 8, which reflects the less aggravated nature of this offense.

Third, the amendment addresses other new offenses created by the PATRIOT Reauthorization Act. Based on an assessment of similar offenses already covered by the relevant guidelines, the amendment provides as follows:

(A) The new offense in 18 U.S.C. § 554, pertaining to smuggling of goods from the United States, is referenced to §§2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), and 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants).

(B) The new offense in 18 U.S.C. § 2282A, pertaining to mining of United States navigable waters, is referenced to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 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), 2K1.4 (Arson; Property Damage by Use of Explosives), and 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)). The amendment also adds vessel, maritime facility, and a vessel's cargo to §2K1.4(a)(1) and (a)(2) to cover conduct described in 18 U.S.C. § 2282A. The definitions provided for "vessel," "maritime facility," and "aids to maritime navigation" come from title 33 of the Code of Federal Regulations pertaining to the United States Coast Guard, specifically Navigation and Navigable Waters.

Section 2282B, pertaining to violence against maritime navigational aids, is referenced to §§2B1.1, 2K1.4, and 2X1.1. Section 2K1.4(a) is amended to provide a new base offense level of 16 if the offense involved the destruction of or tampering with aids to maritime navigation.

(C) The new offense in 18 U.S.C. § 2283 pertaining to transporting biological and chemical weapons is referenced to §§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorism Organizations or For a Terrorist Purpose), and 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). The new offense in 18 U.S.C. § 2284 pertaining to transporting terrorists is referenced to §§2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or For a Terrorist Purpose), 2X2.1 (Aiding and Abetting), and 2X3.1 (Accessory After the Fact).

- (D) *Section 2341 of title 18, United States Code, which provides definitions for offenses involving contraband cigarettes and smokeless tobacco, was amended to reduce the number of contraband cigarettes necessary to violate the substantive offenses set forth in 18 U.S.C. §§ 2342 and 2344 from 60,000 to 10,000. The amendment makes conforming changes to the background commentary of §2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes) and expands the headings of Chapter Two, Part E, Subpart 4 and §2E4.1 to include smokeless tobacco.*
- (E) *The Patriot Reauthorization Act increased the statutory maximum term of imprisonment for offenses covered by the International Emergency Economic Powers Act (50 U.S.C. § 1705) from 10 years to 20 years' imprisonment. The amendment references 50 U.S.C. § 1705 to §2M5.3 and modifies the heading of the guideline to include "specially designated global terrorist".*

Fourth, the amendment sets forth the statutory references in Appendix A (Statutory Index) for the new offenses. Appendix A (Statutory Index) is amended to provide a parenthetical description for the two statutory references to 18 U.S.C. § 554 created by the PATRIOT Reauthorization Act.

Fifth, the amendment implements a directive in section 1191(c) of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162. The Act directed the Commission to amend the guidelines "to assure that the sentence imposed on a defendant who is convicted of a Federal offense while wearing or displaying insignia and uniform received in violation of section 716 of title 18, United States Code, reflects the gravity of this aggravating factor." Section 716 of title 18, United States Code, is a Class B misdemeanor which is not covered by the guidelines, see §1B1.9 (Class B or C Misdemeanors and Infractions); however, the amendment creates a new policy statement at §5K2.24 (Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform) providing that an upward departure may be warranted if, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. § 716.

Amendment:

§2A1.1. First Degree Murder

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 1841(a)(2)(C), 2113(e), 2118(c)(2), 2282A, 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), **2282A**, 2332b(a)(1), 2340A. 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

* * *

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, 1993(a)(1), (a)(4), 2113(b), **2282A**, **2282B**, 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. §§ 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources

* * *

Commentary

Statutory Provisions: 16 U.S.C. §§ 470ee, 668(a), 707(b); 18 U.S.C. §§ 541-546, **554**, 641, 661-662, 666, 668, 1152-1153, 1163, 1168, 1170, 1361, 1369, 2232, 2314-2315.

* * *

§2D1.14. Narco-Terrorism

(a) **Base Offense Level:**

- (1) **The offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applicable to the underlying**

offense, except that §2D1.1(a)(3)(A), (a)(3)(B), and (b)(11)¹ shall not apply.

(b) Specific Offense Characteristic

(1) If §3A1.4 (Terrorism) does not apply, increase by 6 levels.

Commentary

Statutory Provision: 21 U.S.C. § 960a.

* * *

4. **TRAFFICKING IN CONTRABAND CIGARETTES AND SMOKELESS TOBACCO**

§2E4.1. **Unlawful Conduct Relating to Contraband Cigarettes and Smokeless Tobacco**

* * *

Background: The conduct covered by this section generally involves evasion of state excise taxes. At least ~~60,000~~10,000 cigarettes must be involved. Because this offense is basically a tax matter, it is graded by use of the tax table in §2T4.1.

* * *

§2K1.3. **Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials**

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a)-(e), (h), (i), (l)-(o), (p)(2), 844(d), (g), 1716, 2283; 26 U.S.C. § 5685.

* * *

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

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

(1) **24**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; or (B) involved the destruction or attempted destruction of a dwelling, an airport, an aircraft, a mass transportation

¹The "safety valve reduction" currently in §2D1.1(b)(9) will be redesignated as §2D1.1(b)(11) by Amendment 8 (Drugs).

facility, a mass transportation vehicle, ~~a ferry,~~ **a maritime facility, a vessel, or a vessel's cargo**, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use;

(2) **20**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than (i) a dwelling, or (ii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, ~~a ferry,~~ **a maritime facility, a vessel, or a vessel's cargo**, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or (C) endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, ~~a ferry,~~ **a maritime facility, a vessel, or a vessel's cargo**, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; ~~or~~

(3) **16**, if the offense involved the destruction of or tampering with aids to maritime navigation; or

~~(3)~~(4) **2** plus the offense level from §2B1.1 (Theft, Property Destruction, and Fraud).

(b) Specific Offense Characteristics

(1) If the offense was committed to conceal another offense, increase by **2** levels.

(2) If the base offense level is not determined under (a)~~(3)~~(4), and the offense occurred on a national cemetery, increase by **2** levels.

(c) Cross Reference

(1) If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.

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, 1993(a)(1), (a)(2), (a)(3), (b), 2275, **2282A, 2282B, 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:

"Aids to maritime navigation" means any device external to a vessel intended to assist the navigator to determine position or save course, or to warn of dangers or obstructions to navigation.

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

"Maritime facility" means any structure or facility of any kind located in, on, under, or adjacent to any waters subject to the jurisdiction of the United States and used, operated, or maintained by a public or private entity, including any contiguous or adjoining property under common ownership or operation.

"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. § ~~1993(c)(5)~~ 1992(d)(7).

"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.

"Vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

* * *

§2M5.2. Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License

- (a) Base Offense Level:
- (1) **26**, except as provided in subdivision (2) below;
 - (2) **14**, if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten.

Commentary

Statutory Provisions: *18 U.S.C. § 554; 22 U.S.C. §§ 2778, 2780.*

* * *

§2M5.3. Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 2283, 2284, 2339B, 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(B)); 50 U.S.C. §§ 1701, 1705.

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"Specially designated global terrorist" has the meaning given that term in 31 C.F.R. § 594.513.

* * *

§2M6.1. **Unlawful Activity Involving 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)), 1993(a)(2), (3), (b), 2283, 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 2332h; 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2Q2.1. **Offenses Involving Fish, Wildlife, and Plants**

* * *

Commentary

Statutory Provisions: 16 U.S.C. §§ 668(a), 707(b), 1174(a), 1338(a), 1375(b), 1540(b), 3373(d); 18 U.S.C. §§ 545, 554. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

Background: This section applies to violations of the Endangered Species Act, the Bald Eagle Protection Act, the Migratory Bird Treaty, the Marine Mammal Protection Act, the Wild Free-Roaming Horses and

Burros Act, the Fur Seal Act, the Lacey Act, and to violations of 18 U.S.C. §§ 545 and 554 whereif the smuggling activity involved fish, wildlife, or plants.

* * *

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

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 371, 372, 2271, 2282A, 2282B. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2X2.1. Aiding and Abetting

The offense level is the same level as that for the underlying offense.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2, 2284, 2339, 2339A, 2339C(a)(1)(A).

* * *

§2X3.1. Accessory After the Fact

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 3, 757, 1071, 1072, 2284, 2339, 2339A, 2339C(c)(2)(A), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(A)).

* * *

7. OFFENSES INVOLVING BORDER TUNNELS

§2X7.1. Border Tunnels and Subterranean Passages

(a) Base Offense Level:

- (1) If the defendant was convicted under 18 U.S.C. § 554(c), 4 plus the offense level applicable to the underlying smuggling offense. If the resulting offense level is less than level 16, increase to level 16.
- (2) 16, if the defendant was convicted under 18 U.S.C. § 554(a); or

(3) 8, if the defendant was convicted under 18 U.S.C. § 554(b).

Commentary

Statutory Provision: 18 U.S.C. § 554.

Application Note:

1. Definition.—For purposes of this guideline, "underlying smuggling offense" means the smuggling offense the defendant committed through the use of the tunnel or subterranean passage.

* * *

§5K2.24. Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (Policy Statement)

If, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. § 716, an upward departure may be warranted.

Commentary

Application Note:

1. Definition.—For purposes of this policy statement, "official insignia or uniform" has the meaning given that term in 18 U.S.C. § 716(c)(3).

* * *

Appendix A (Statutory Index)

18 U.S.C. § 553(a)(2)	2B1.1, 2B6.1
18 U.S.C. § 554 (Border tunnels and passages)	2X7.1
18 U.S.C. § 554 (Smuggling goods from the United States)	2B1.5, 2M5.2, 2Q2.1

* * *

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,
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18 U.S.C. § 2282A 2X1.1
2A1.1, 2A1.2, 2B1.1,
2K1.4, 2X1.1
18 U.S.C. § 2282B 2B1.1, 2K1.4, 2X1.1
18 U.S.C. § 2283 2K1.3, 2M5.3, 2M6.1
18 U.S.C. § 2284 2M5.3, 2X2.1, 2X3.1

* * *

18 U.S.C. § 2339 2M5.3, 2X2.1, 2X3.1

* * *

21 U.S.C. § 960(d)(7) 2D3.2
21 U.S.C. § 960a 2D1.14

* * *

50 U.S.C. § 783(c) 2M3.3
50 U.S.C. § 1701 2M5.1, 2M5.2, 2M5.3
50 U.S.C. § 1705 2M5.3

* * *

~~50 U.S.C. App. § 1701 2M5.1, 2M5.2~~

4. Sex Offenses

Reason for Amendment: *This amendment responds to the Adam Walsh Child Protection and Safety Act of 2006 (the "Adam Walsh Act"), Pub. L. 109–248, which contained a directive to the Commission, created new sexual offenses, and enhanced penalties for existing sexual offenses. The amendment implements the directive by creating two new guidelines, §§2A3.5 (Criminal Sexual Abuse and Offenses Related to Registration as a Sex Offender) and 2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender). It further addresses relevant provisions in the Adam Walsh Act by making changes to Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse) and Part G (Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity), §2J1.2 (Obstruction of Justice), §3D1.2 (Groups of Closely Related Counts), §4B1.5 (Repeat and Dangerous Sex Offender Against Minors), §5B1.3 (Conditions of Probation), §5D1.2 (Term of Supervised Release), §5D1.3 (Conditions of Supervised Release) and Appendix A (Statutory Index).*

First, section 206 of the Adam Walsh Act amended 18 U.S.C. § 2241(c) to add a new mandatory minimum term of imprisonment of 30 years for offenses related to the aggravated sexual abuse of a child under 12 years old, or of a child between 12 and 16 years old if force, threat, or other means was used. In response to the new mandatory minimum for these offenses, the amendment increases the base offense level at §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) from level 30 to level 38. The base offense level of 30 has been retained for all other offenses. At least one specific offense characteristic applied to every conviction under 18 U.S.C. § 2241(c) sentenced under §2A3.1 in fiscal year 2006. Accordingly, the mandatory minimum 360 months' imprisonment is expected to be reached or exceeded in every case with a base offense level of 38.

The amendment provides a new application note that precludes application of the specific offense characteristic at §2A3.1(b)(1) regarding conduct described in 18 U.S.C. § 2241(a) or (b) 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) (force, threat, or other means). The amendment also precludes application of the specific offense characteristic for the age of a victim at §2A3.1(b)(2) if the defendant was convicted under section 2241(c). The heightened base offense level of 38 takes into account the age of the victim. These instructions, therefore, avoid unwarranted double counting.

Second, section 207 of the Adam Walsh Act increased the statutory maximum term of imprisonment under 18 U.S.C. § 2243(b) from 5 years to 15 years for the sexual abuse of a person in official detention or under custodial authority. In response to increased penalty, the amendment increases the base offense level from 12 to 14 in §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts). The amendment also adds a new definition of "minor" consistent with how this term is defined elsewhere in the guidelines manual. In addition, the amendment includes an application note precluding application of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) for these offenses because an abuse of position of trust is assumed in all such cases and, therefore, is built into the base offense level.

Third, section 206 of the Adam Walsh Act created a new subsection at 18 U.S.C. § 2244. Section 2244(a)(5) provides a penalty of any term of years if the sexual conduct would have violated 18 U.S.C. § 2241(c) had the contact been a sexual act. Section 2241(c) conduct involves the aggravated sexual abuse of a child under 12 years old or of a child between 12 and 16 years old if force, threat, or other means was used, as defined in 18 U.S.C. § 2241(a) and (b). Prior to the Adam Walsh Act, the penalty for offenses involving children under 12 years old was "twice that otherwise provided," and the penalty for sexual contact involving behavior described in 18 U.S.C. § 2241 was a statutory maximum term of imprisonment of 10 years.

The amendment addresses this new offense by increasing the minimum offense level in the age enhancement in subsection (b)(1) of §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact) from level 20 to level 22.

Fourth, section 141 of the Adam Walsh Act created a new offense under 18 U.S.C. § 2250(a) for the failure to register as a sex offender. The basic offense carries a statutory maximum term of imprisonment of 10 years. Section 141 also included a directive to the Commission that when promulgating guidelines for the offense, to consider, among other factors, the seriousness of the sex offender's conviction that gave rise to the requirement to register; relevant further offense conduct during the period for which the defendant failed to register; and the offender's criminal history.

The amendment creates a new guideline, §2A3.5 (Failure to Register as a Sex Offender), to address the directive. The new guideline provides three alternative base offense levels based on the tiered category of the sex offender: level 16 if the defendant was required to register as a Tier III offender; level 14 if the defendant was required to register as a Tier II offender; and level 12 if the defendant was required to register as a Tier I offender.

The amendment also provides two specific offense characteristics. First, subsection (b)(1) provides a tiered enhancement to address criminal conduct committed while the defendant is in a failure to register status. Specifically, §2A3.5(b)(1) provides a six-level increase if, while in a failure to register status, the defendant committed a sex offense against an adult, a six-level increase if the defendant committed a felony offense against a minor, and an eight-level increase if the defendant committed a sex offense against a minor.

Second, §2A3.5(b)(2) provides a three-level decrease if the defendant voluntarily corrected the failure to register or voluntarily attempted to register but was prevented from registering by uncontrollable circumstances, and the defendant did not contribute to the creation of those circumstances. The reduction covers cases in which (1) the defendant either does not attempt to register until after the relevant registration period has expired but subsequently successfully registers, thereby correcting the failure to register status, or (2) the defendant, either before or after the registration period has expired, attempted to register but circumstances beyond the defendant's control prevented the defendant from successfully registering. An application note specifies that the voluntary attempt to register or to correct the failure to register must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction had detected the failure to register. The application note also provides that the reduction does not apply if the enhancement for committing one of the enumerated offenses in §2A3.5(b)(1) applies.

Additionally, the amendment adds §2A3.5 to the list of offenses that are considered groupable under §3D1.2(d) because the failure to register offense is an ongoing and continuous offense.

Fifth, section 141 of the Adam Walsh Act created two new aggravated offenses relating to the registration as a sex offender. Section 141 of the Act created 18 U.S.C. § 2250(c), which carries a mandatory minimum term of imprisonment of 5 years and a statutory maximum term of imprisonment of 30 years if a defendant commits a crime of violence while in a failure to register status, with the sentence to be consecutive to the punishment provided for the failure to register. Section 702 of the Adam Walsh Act created a new offense at 18 U.S.C. § 2260A that prohibits the commission of various enumerated offenses while in a failure to register status. The penalty for this offense is a mandatory term of imprisonment of 10 years to be imposed consecutively to the underlying offense.

The amendment creates a new guideline at §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) to address these new offenses. The new guideline provides that for offenses under section 2250(c), the guideline sentence is the minimum term of imprisonment required by statute, and for offenses under section 2260A, the guideline sentence is the term of imprisonment required by statute. Chapters Three and Four are not to apply. This is consistent with how the guidelines treat other offenses that carry both a specified term of imprisonment and a requirement that such term be imposed consecutively. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

The guideline includes an application note that provides an upward departure stating that a sentence above the minimum term required by section 2250(c) is an upward departure from the guideline sentence. An upward departure may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.

Sixth, section 208 of the Adam Walsh Act added a new mandatory minimum term of imprisonment of 15 years under 18 U.S.C. § 1591(b)(1) for sex trafficking of an adult by force, fraud, or coercion. In response, the amendment provides a new base offense level of 34 in §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) if the offense of conviction is 18 U.S.C. § 1591(b)(1), but retains a base offense level of 14 for all other offenses. In addition, the amendment limits application of the specific offense characteristic at §2G1.1(b)(1) that applies if the offense involved fraud or coercion only to those offenses receiving a base offense level of 14. Offenses under 18 U.S.C. § 1591(b)(1) necessarily involve fraud and coercion and, therefore, such conduct is built into the heightened base offense level of 34. This limitation thus avoids unwarranted double counting.

Seventh, section 208 of the Adam Walsh Act added a new mandatory minimum term of imprisonment of 15 years under 18 U.S.C. § 1591(b)(1) for sex trafficking of children under 14 years of age and added a new mandatory minimum term of imprisonment of 10 years and increased the statutory maximum term of imprisonment from 40 years to life under 18 U.S.C. § 1591(b)(2) for sex trafficking of children who had attained the age of 14 years but had not attained the age of 18 years. Further, the Adam Walsh Act increased the mandatory minimum term of imprisonment from 5 years to 10 years and increased the statutory maximum term of imprisonment from 30 years to life under both 18 U.S.C. § 2422(b), for persuading or enticing any person who has not attained the age of 18 years to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, and 18 U.S.C. § 2423(a), for transporting a person who has not attained the age of 18 years in interstate or foreign commerce, with the intent that the person engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense.

In response, the amendment provides alternative base offense levels in §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) based on the statute of conviction and the conduct described in that conviction. For convictions under 18 U.S.C. § 1591(b)(1), the base offense level is 34. For convictions under 18 U.S.C. § 1591(b)(2), the base offense level is 30.

The amendment further provides a base offense level of 28 for convictions under 18 U.S.C. §§ 2422(b) and 2423(a). The two-level enhancement for the use of a computer at §2G1.3(b)(3) applied to 95 percent of offenders convicted under 18 U.S.C. § 2422(b) and sentenced under §2G1.3 in fiscal year 2006. In addition, the two-level enhancement for the offense involving a sexual act or sexual contact at

§2G1.3(b)(4) applied to 95 percent of offenders convicted under 18 U.S.C. § 2423(a) and sentenced under this guideline in fiscal year 2006. With application of either enhancement, the mandatory minimum term of imprisonment of 120 months will be reached in the majority of convictions under 18 U.S.C. §§ 2422(b) and 2423(a), before application of other guidelines adjustments.

Further, the amendment addresses the interaction of two specific offense characteristics with the alternative base offense levels. First, every conviction under 18 U.S.C. § 1591 necessarily involves a commercial sex act. With the base offense levels being determined based on the statute of conviction, the amendment clarifies that §2G1.3(b)(4)(B), which provides a two-level enhancement if the offense involved a commercial sex act, does not apply if the defendant is convicted under 18 U.S.C. § 1591. Second, the amendment precludes application of the age enhancement in §2G1.3(b)(5) if the base offense level is determined under subsection (a)(1) of §2G1.3 for a conviction under 18 U.S.C. § 1591(b)(1). The base offense level provided by subsection (a)(1) of §2G1.3 takes into account the age of the victim and, therefore, limitations on application of subsections (b)(4)(B) and (b)(5) of §2G1.3 avoid unwarranted double counting.

Eighth, section 503 of the Adam Walsh Act created a new section, 18 U.S.C. § 2257A, adopting new recordkeeping obligations for the production of any book, magazine, periodical, film, videotape, or digital image that contains a visual depiction of simulated sexually explicit conduct. Section 2257A has a statutory maximum of one year imprisonment for the failure to comply with the recordkeeping requirements and a statutory maximum term of imprisonment of five years if the violation was to conceal a substantive offense that involves either causing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction or trafficking in material involving the sexual exploitation of a minor. The new offense is similar to 18 U.S.C. § 2257, which is referenced to §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Mail). Accordingly, the amendment refers the new offense to §2G2.5.

Ninth, section 701 of the Adam Walsh Act created a new offense in 18 U.S.C. § 2252A(g) that prohibits engaging in child exploitation enterprises, defined as violating 18 U.S.C. §§ 1591, 1201 (if the victim is a minor), chapter 109A (involving a minor victim), chapter 110 (except for 18 U.S.C. §§ 2257 and 2257A), or chapter 117 (involving a minor victim), 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 amendment creates a new guideline at §2G2.6 (Child Exploitation Enterprises) to cover this new offense. The guideline provides a base offense level of 35 and four specific offense characteristics. The Commission anticipates these offenses typically will involve conduct encompassing at least one of the specific offense characteristics, resulting in an offense level of at least level 37. Thus, the mandatory minimum term of imprisonment of 240 months typically is expected to be reached or exceeded, before application of other guideline adjustments.

Tenth, section 206 of the Adam Walsh Act increased the statutory maximum term of imprisonment from 4 years to 10 years under 18 U.S.C. § 2252B(b) for knowingly using a misleading domain name with the intent to deceive a minor into viewing material harmful to minors on the Internet. In addition, section 703 of the Act created a new section, 18 U.S.C. § 2252C, that carries a statutory maximum term of imprisonment of 10 years for knowingly embedding words or digital images into the source code of a website with the intent to deceive a person into viewing material constituting obscenity. Section 2252C(b) carries a statutory maximum term of imprisonment of 20 years for knowingly embedding words

or digital images into the source code of a website with the intent to deceive a minor into viewing material harmful to minors on the Internet.

In response to the new offense, the amendment expands the scope of subsection (b)(2) of §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names) by adding to this enhancement "embedded words or digital images into the source code on a website."

Eleventh, section 141 of the Adam Walsh Act added a new provision in 18 U.S.C. § 1001 that carries a statutory maximum term of imprisonment of 8 years for falsifying or covering up by any scheme or making materially false or fraudulent statements or making or using any false writings or documents that relate to offenses under chapters 109A, 109B, 110, and 117, and under section 1591 of chapter 77. The amendment adds a new specific offense characteristic at subsection (b)(1)(A) of §2J1.2 (Obstruction of Justice) enhancing the offense level by four levels if the defendant was convicted under 18 U.S.C. § 1001 and the statutory maximum term of 8 years' imprisonment applies because the matter relates to sex offenses. The amendment also added language to Application Note 4 stating an upward departure may be warranted under the guideline in a case involving a particularly serious sex offense.

Twelfth, section 206 of the Adam Walsh Act added 18 U.S.C. § 1591 to the list of offenses for which a defendant is to be sentenced to life under 18 U.S.C. § 3559(e)(2)(A). The amendment adds 18 U.S.C. § 1591 to the list of instant offenses of convictions that are covered sex crimes under §4B1.5.

Thirteenth, section 141 of the Adam Walsh Act amended 18 U.S.C. §§ 3563 and 3583. The amendment adds a new subdivision to (a)(9) of §5B1.3 and to (a)(7) of §5D1.3 to require a defendant to comply with the new registration requirements provided by the Adam Walsh Act. The amendment also modifies the language in §§5B1.3(a)(9) and 5D1.3(a)(7) relating to defendants convicted of a sexual offense described in 18 U.S.C. § 4042(c)(4). Not all states have implemented the new requirements, continuing to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act. Thus, it is necessary to maintain the language in the guidelines providing for conditions of probation and supervised release for those offenders.

Fourteenth, section 141 of the Act amended 18 U.S.C. § 3583(k), which provides that the authorized term of supervised release for any offense under enumerated sex offenses is any term of years or life. In response, the amendment adds offenses under chapter 109B and sections 1201 and 1591 of title 18 United States Code or 18 U.S.C. §§ 1201 and 1591 to the definition of sex offense under §5D1.2(b)(2) for which the length of the term of supervised release shall be not less than the minimum term of years specified for the offense and may be up to life.

Finally, the amendment provides a definition of "minor" in relevant guidelines that is consistent with how this term is defined elsewhere in the guidelines. Outdated background commentary also is deleted by this amendment.

Amendment:

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

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

- (a) Base Offense Level: ~~30~~
 - (1) **38**, 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.

* * *

Commentary

* * *

Application Notes:

* * *

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).

* * *

~~*Background: Sexual offenses addressed in this section are crimes of violence. Because of their dangerousness, attempts are treated the same as completed acts of criminal sexual abuse. The maximum term of imprisonment authorized by statute is life imprisonment. The base offense level represents sexual*~~

~~abuse as set forth in 18 U.S.C. § 2242. An enhancement is provided for use of force, threat of death, serious bodily injury, or kidnapping; or certain other means as defined in 18 U.S.C. § 2241. This includes any use or threatened use of a dangerous weapon.~~

~~— An enhancement is provided when the victim is less than sixteen years of age. An additional enhancement is provided where the victim is less than twelve years of age. Any criminal sexual abuse with a child less than twelve years of age, regardless of "consent," is governed by §2A3.1 (Criminal Sexual Abuse).~~

~~— An enhancement for a custodial relationship between defendant and victim is also provided. Whether the custodial relationship is temporary or permanent, the defendant in such a case is a person the victim trusts or to whom the victim is entrusted. This represents the potential for greater and prolonged psychological damage. Also, an enhancement is provided where the victim was an inmate of, or a person employed in, a correctional facility. Finally, enhancements are provided for permanent, life-threatening, or serious bodily injury and abduction.~~

* * *

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

(a) Base Offense Level: ~~12~~**14**

* * *

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

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

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of the

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

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

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

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

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

4. *Inapplicability of §3B1.3.—Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

~~*Background: The offense covered by this section is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.*~~

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

* * *

(b) Specific Offense Characteristics

- (1) If the victim had not attained the age of twelve years, increase by 4 levels; but if the resulting offense level is less than ~~20~~**22**, increase to level ~~20~~**22**.

* * *

Commentary

Statutory Provisions: 18 U.S.C. § 2244(a)(1), (2), (3). For additional statutory provision(s), see Appendix A (Statutory Index).

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

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

- (a) Base Offense Level (apply the greatest):
 - (1) **16**, if the defendant was required to register as a Tier III offender;
 - (2) **14**, if the defendant was required to register as a Tier II offender; or
 - (3) **12**, if the defendant was required to register as a Tier I offender.
- (b) Specific Offense Characteristics
 - (1) (Apply the greatest):

If, while in a failure to register status, the defendant committed—

 - (A) a sex offense against someone other than a minor increase by **6** levels;
 - (B) a felony offense against a minor not otherwise covered by subdivision (C), increase by **6** levels; or
 - (C) a sex offense against a minor, increase by **8** levels.
 - (2) If the defendant voluntarily (A) corrected the failure to register; or (B) attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances, decrease by **3** levels.

Commentary

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

Application Notes:

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).

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

2. Application of Subsection (b)(2).—

(A) In General.—In order for subsection (b)(2) to apply, the defendant's voluntary attempt to register or to correct the failure to register must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction had detected the failure to register.

(B) Interaction with Subsection (b)(1).—Do not apply subsection (b)(2) if subsection (b)(1) also applies.

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

If the defendant was convicted under—

(a) 18 U.S.C. § 2250(c), the guideline sentence is the minimum term of imprisonment required by statute; or

(b) 18 U.S.C. § 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 any count of conviction covered by this guideline.

Commentary

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

Application Notes:

1. In General.—Section 2250(c) of title 18, United States Code, provides a mandatory minimum term of five years' imprisonment and a statutory maximum term of 30 years' imprisonment. The statute also requires a sentence to be imposed consecutively to any sentence imposed for a conviction under 18 U.S.C. § 2250(a). Section 2260A of title 18, United States Code, provides a term of imprisonment of 10 years that is required to be imposed consecutively to any sentence imposed for an offense enumerated under that section.

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).

3. *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 that is based on the same conduct as the conduct comprising the conviction under 18 U.S.C. § 2250(c) or 2260A.*
4. *Upward Departure.—In a case in which the guideline sentence is determined under subsection (a), a sentence above the minimum term required by 18 U.S.C. § 2250(c) is an upward departure from the guideline sentence. A departure may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.*

* * *

§2G1.1. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor

- (a) Base Offense Level: ~~14~~
 - (1) **34**, if the offense of conviction is 18 U.S.C. § 1591(b)(1); or
 - (2) **14**, otherwise.
- (b) Specific Offense Characteristic
 - (1) If (A) subsection (a)(2) applies; and (B) the offense involved fraud or coercion, increase by **4** levels.

* * *

Commentary

* * *

~~*Background: This guideline covers offenses that involve promoting prostitution or prohibited sexual conduct with an adult through a variety of means. Offenses that involve promoting prostitution or prohibited sexual conduct with an adult are sentenced under this guideline, unless criminal sexual abuse occurs as part of the offense, in which case the cross reference would apply.*~~

~~*—This guideline also covers offenses under section 1591 of title 18, United States Code, that involve recruiting or transporting a person, other than a minor, in interstate commerce knowing that force, fraud, or coercion will be used to cause the person to engage in a commercial sex act.*~~

~~*—Offenses of promoting prostitution or prohibited sexual conduct in which a minor victim is involved are to be sentenced under §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor;*~~

~~Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor).~~

* * *

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

(a) Base Offense Level: ~~24~~

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

(b) Specific Offense Characteristics

* * *

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

* * *

Commentary

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

* * *

Background: ~~This guideline covers offenses under chapter 117 of title 18, United States Code, involving transportation of a minor for illegal sexual activity through a variety of means. This guideline also covers offenses involving a minor under section 1591 of title 18, United States Code. Offenses involving~~

an individual who had attained the age of 18 years are covered under §2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor):

* * *

§2G2.5. Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email

* * *

Commentary

Statutory Provisions: 15 U.S.C. § 7704(d); 18 U.S.C. §§ 2257, 2257A.

§2G2.6. Child Exploitation Enterprises

- (a) Base Offense Level: **35**
- (b) Specific Offense Characteristics
 - (1) If a victim (A) had not attained the age of 12 years, increase by **4** levels; or (B) had attained the age of 12 years but had not attained the age of 16 years, increase by **2** levels.
 - (2) If (A) the defendant was a parent, relative, or legal guardian of a minor victim; or (B) a minor victim was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.
 - (3) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by **2** levels.
 - (4) If a computer or an interactive computer service was used in furtherance of the offense, increase by **2** levels.

Commentary

Statutory Provision: 18 U.S.C. § 2252A(g).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

"Minor" means (A) an individual who had not attained the age of 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.

2. Application of Subsection (b)(2).—

(A) Custody, Care, or Supervisory Control.—Subsection (b)(2) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement under subsection (b)(2) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. Application of Subsection (b)(3).—For purposes of subsection (b)(3), "conduct described in 18 U.S.C. § 2241(a) or (b)" is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

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

* * *

(b) Specific Offense Characteristics

* * *

~~(2) — If the offense involved the use of a misleading domain name on the Internet with the intent to deceive a minor into viewing material on the Internet that is harmful to minors, increase by 2 levels.~~

(2) If, with the intent to deceive a minor into viewing material that is harmful to minors, the offense involved the use of (A) a misleading domain name on the Internet; or (B) embedded words or digital images in the source code of a website, increase by 2 levels.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1460-1463, 1465, 1466, 1470, 2252B, 2252C. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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2. Inapplicability of Subsection (b)(3).—If the defendant is convicted of 18 U.S.C. § 2252B or § 2252C, subsection (b)(3) shall not apply.

* * *

§2J1.2. Obstruction of Justice

- (a) Base Offense Level: **14**
- (b) Specific Offense Characteristics
 - (1) (Apply the greater):
 - (A) If the (i) defendant was convicted under 18 U.S.C. § 1001; and (ii) statutory maximum term of eight years’ imprisonment applies because the matter relates to sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code, increase by **4** levels.
 - (AB) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by **8** levels.
 - (BC) If the (i) defendant was convicted under 18 U.S.C. § 1001 or § 1505; and (ii) the statutory maximum term of **eight years’ imprisonment applies because the matter relates to imprisonment relating to international terrorism or domestic terrorism is applicable**, increase by **12** levels.
 - (2) If the offense resulted in substantial interference with the administration of justice, increase by **3** levels.
 - (3) If the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation, increase by **2** levels.
- (c) Cross Reference
 - (1) If the offense involved obstructing the investigation or prosecution of a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to

that criminal offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1001 (when the statutory maximum term of *eight years*' imprisonment applies because the matter relates to ~~relating to~~ international terrorism or domestic terrorism, or to sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code ~~is applicable~~), 1503, 1505-1513, 1516, 1519. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Domestic terrorism" has the meaning given that term in 18 U.S.C. § 2331(5).

"International terrorism" has the meaning given that term in 18 U.S.C. § 2331(1).

"Records, documents, or tangible objects" includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.

"Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

2. Chapter Three Adjustments.—

(A) Inapplicability of Chapter Three, Part C.—For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation, prosecution, or sentencing of the obstruction of justice count.

(B) Interaction with Terrorism Adjustment.—If §3A1.4 (Terrorism) applies, do not apply subsection (b)(1)(B).

3. Convictions for the Underlying Offense.—In the event that the defendant is convicted of an offense sentenced under this section as well as for the underlying offense (*i.e.*, the offense that is the object of the obstruction), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).

4. Upward Departure Considerations.—If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures). In a case involving an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness's face) *or a particularly serious sex offense*, an upward departure would be warranted.

5. Subsection (b)(1)(B).—The inclusion of "property damage" under subsection (b)(1)(B) is

designed to address cases in which property damage is caused or threatened as a means of intimidation or retaliation (e.g., to intimidate a witness from, or retaliate against a witness for, testifying). Subsection (b)(1)(B) is not intended to apply, for example, where the offense consisted of destroying a ledger containing an incriminating entry.

* * *

§3D1.2. Groups of Closely Related Counts

* * *

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

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

§2A3.5;
§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.8;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§2E4.1, 2E5.1;
§§2G2.2, 2G3.1;
§2K2.1;
§§2L1.1, 2L2.1;
§2N3.1;
§2Q2.1;
§2R1.1;
§§2S1.1, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5);
§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E2.1;
§§2G1.1, 2G2.1;
§§2H1.1, 2H2.1, 2H4.1;
§§2L2.2, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3;
§2X6.1.

* * *

§4B1.5. Repeat and Dangerous Sex Offender Against Minors

* * *

Commentary

Application Notes:

1. *Definition.*—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.

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

~~"Minor victim" includes (A) an undercover law enforcement officer who represented to the defendant that the officer was a minor; or (B) any minor the officer represented to the defendant would be involved in the prohibited sexual conduct.~~

2. *Covered Sex Crime as Instant Offense of Conviction.*—For purposes of this guideline, the instant offense of conviction must be a covered sex crime, *i.e.*: (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; **or (iv) 18 U.S.C. § 1591**; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through ~~(iii)~~(iv) of this note.

* * *

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

Section 401(i)(1)(A) of Public Law 108–21 directly amended Application Note 4(b)(i), effective April 30, 2003.

* * *

§5B1.3. Conditions of Probation

- (a) Mandatory Conditions—

* * *

- (9) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4)(Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; **or**
- (B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;

* * *

- (d) (Policy Statement) The following "special" conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

* * *

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release) --

- (A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.
- (B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.
- (C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic

communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

* * *

Commentary

Application Note:

1. Application of Subsection (b)(9)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (b)(9)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (b)(9)(B) will apply. (See 42 U.S.C. §§ 16911 and 16913.)

* * *

§5D1.2. Term of Supervised Release

* * *

Commentary

Application Notes:

1. ~~Definition.—For purposes of this guideline, "sex offense" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense, or (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual, or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iii) of this note.~~

1. Definitions.—For purposes of this guideline:

"Sex offense" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 109B of such title; (iii) chapter 110 of such title, not including a recordkeeping offense; (iv) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (v) an offense under 18 U.S.C. § 1201; or (vi) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (vi) of this note.

"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.

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).
3. *Substantial Assistance Cases.*—Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. *See* 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).

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

§5D1.3. Conditions of Supervised Release

(a) Mandatory Conditions--

* * *

- (7) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (*see* 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; **or**
- (B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (A) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (B) provide information required by 42 U.S.C. § 16914; and (C) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;

* * *

- (d) (Policy Statement) The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

* * *

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release) --

- (A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.
- (B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.
- (C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

* * *

Commentary

Application Note:

1. *Application of Subsection (b)(7)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (b)(7)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (b)(7)(B) will apply. (See 42 U.S.C. §§ 16911 and 16913.)*

Appendix A (Statutory Index)

- 18 U.S.C. § 1001 2B1.1, 2J1.2 (when the statutory maximum term of imprisonment relating to eight years' imprisonment applies because the matter relates to imprisonment relating to international terrorism or domestic terrorism, or to sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States

Code is applicable)

18 U.S.C. § 2245	2A1.1	* * *
18 U.S.C. § 2250(a)	2A3.5	
18 U.S.C. § 2250(c)	2A3.6	
		* * *
18 U.S.C. § 2252B	2G2.5	
18 U.S.C. § 2252C	2G3.1	
		* * *
18 U.S.C. § 2257	2G2.5	
18 U.S.C. § 2257A	2G2.5	
		* * *
18 U.S.C. § 2260(b)	2G2.2	
18 U.S.C. § 2260A	2A3.6	
		* * *

5. Corrections to §§2B1.1 and 2L1.1

Reason for Amendment: *This amendment corrects typographical errors in subsection (b)(13)(C) of §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) and subsection (b)(1) of §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien).*

The typographical error to §2B1.1(b)(13)(C) stems from redesignations made to §2B1.1 in 2004 when the Commission added a new subsection (b)(7) in response to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act"), Pub. L. 108–187. (USSG App. C Amendment 665) (November 1, 2004).

The typographical error in §2L1.1(b)(1) stems from redesignations made to §2L1.1 in 2006 when the Commission added a new subsection (a)(1) for aliens who are inadmissible for national security related reasons. (USSG App. C Amendment 692) (November 1, 2006).

The Commission has determined that this amendment should be applied retroactively because (A) the purpose of the amendment is to correct typographical errors; (B) the number of cases involved is minimal even given the potential change in guideline ranges (i.e., ensuring application of the maximum increase of 8 levels in §2B1.1(b)(13)(C) and providing correct application of the three-level reduction in §2L1.1(b)(1)); and (C) the amendment would not be difficult to apply retroactively. These factors, combined, meet the standards set forth in the relevant background commentary to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).

Amendment:

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

* * *

(b) Specific Offense Characteristics

* * *

(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)~~(13)(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.

* * *

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

* * *

(b) Specific Offense Characteristics

- (1) If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), and (B) the base offense level is determined under subsection ~~(a)(2)~~(3), decrease by 3 levels.

* * *

6. Miscellaneous Laws

Reason for Amendment: *This amendment addresses two new offenses, 38 U.S.C. § 2413, which was created by the Respect for America’s Fallen Heroes Act, Pub. L. 109–228, and 31 U.S.C. § 5363, which was created by the Security and Accountability for Every Port Act of 2006, Pub. L. 109–347.*

The new offense at 38 U.S.C. § 2413 prohibits certain demonstrations at Arlington National Cemetery and at cemeteries controlled by the National Cemetery Administration and provides a statutory maximum penalty of imprisonment of not more than one year, a fine, or both. The amendment references convictions under 38 U.S.C. § 2413 to §2B2.3 (Trespass) and expands the scope of the two-level enhancement at §2B2.3(b)(1) for trespass offenses that occur in certain locations to include trespass at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration. The Commission determined that the need to protect the final resting places of the nation’s war dead and the need to discourage violent confrontations at the funerals of veterans who are killed in action justifies expanding the scope of the enhancement to cover such conduct.

The new offense at 31 U.S.C. § 5363 prohibits acceptance of any financial instrument for unlawful Internet gambling and provides a statutory maximum term of imprisonment of five years. The amendment references convictions under 31 U.S.C. § 5363 to §2E3.1 (Gambling Offenses).

Amendment:

§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) at a residence; ~~or (F) at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration;~~ ~~or (F)~~ (G) 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.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1030(a)(3), 1036; 38 U.S.C. § 2413; 42 U.S.C. § 7270b. For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

§2E3.1. Gambling Offenses

* * *

Commentary

Statutory Provisions: 15 U.S.C. §§ 1172-1175; 18 U.S.C. §§ 1082, 1301-1304, 1306, 1511, 1953, 1955;
31 U.S.C. § 5363. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

APPENDIX A (Statutory Index)

31 U.S.C. § 5332	2S1.3
31 U.S.C. § 5363	2E3.1

* * *

38 U.S.C. § 787	2B1.1
38 U.S.C. § 2413	2B2.3

* * *

7. Repromulgation of Emergency Amendment on Intellectual Property

Reason for Amendment: *This amendment re-promulgates as permanent the temporary, emergency amendment (effective Sept. 12, 2006) that implemented the emergency directive in section 1(c) of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109–181 (2006). The directive, which required the Commission to promulgate an amendment under emergency amendment authority by September 12, 2006, instructs the Commission to "review, and if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 2318 or 2320 of title 18, United States Code."*

In carrying out [the directive], the United States Sentencing Commission shall determine whether the definition of "infringement amount" set forth in application note 2 of section 2B5.3 of the Federal sentencing guidelines is adequate to address situations in which the defendant has been convicted of one of the offenses [under section 2318 or 2320 of title 18, United States Code,] and the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement, such as an anti-circumvention device, or the item in which the defendant trafficked was infringing and also was intended to facilitate infringement in another good or service, such as a counterfeit label, documentation, or packaging, taking into account cases such as U.S. v. Sung, 87 F.3d 194 (7th Cir. 1996).

The amendment adds subdivision (vii) to Application Note 2(A) of §2B5.3 (Criminal Infringement of Copyright or Trademark) to provide that the infringement amount is based on the retail value of the infringed item in a case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service.

In addition to re-promulgating the emergency amendment, the amendment responds to the directive by addressing violations of 17 U.S.C. §§ 1201 and 1204 involving circumvention devices. The amendment addresses circumvention devices in two ways. First, the amendment adds an application note regarding the determination of the infringement amount in cases under 17 U.S.C. §§ 1201 and 1204 in which the defendant used a circumvention device and thus obtained unauthorized access to a copyrighted work. Such an offense would involve an identifiable copyrighted work. Accordingly, consistent with the existing rules in §2B5.3, the "retail value of the infringed item" would be used for purposes of determining the infringement amount. The amendment adds subsection (viii) to Application Note 2(A), and explains that the "retail value of the infringed item" is the price the user would have paid to access lawfully the copyrighted work, and the "infringed item" is the accessed work. If the defendant violated 17 U.S.C. §§ 1201 and 1204 by conduct that did not include use of a circumvention device, Application Note 2(B) would apply by default. Thus, as it does in any case not otherwise covered by Application Note 2(A), the infringement amount would be determined by reference to the value of the infringing item, which in these cases would be the circumvention device.

Second, the amendment expands the sentencing enhancement in §2B5.3(b)(3) to include convictions under 17 U.S.C. §§ 1201 and 1204 for trafficking in circumvention devices. Prior to the amendment, §2B5.3(b)(3) provided a two-level enhancement and a minimum offense level of 12 for cases involving the manufacture, importation, or uploading of infringing items. The purpose of the enhancement in §2B5.3(b)(3) is to provide greater punishment for defendants who put infringing items into the stream of commerce in a manner that enables others to infringe the copyright or trademark. The Commission

determined that trafficking in circumvention devices similarly enables others to infringe a copyright and warrants greater punishment.

The amendment also strikes language in Application Note 3 mandating an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) in every case in which the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item. Instead, the note indicates that application of the adjustment may be appropriate in such a case because the Commission determined that not every case involving de-encryption or circumvention requires the level of skill contemplated by the special skill adjustment.

Finally, the amendment modifies Application Note 4 to address downward departures. The addition of this language recognizes that in some instances the method for calculating the infringement amount may be based on a formula or extrapolation that overstates the actual pecuniary harm to the copyright or trademark owner. This language is analogous to departure language in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) and thus promotes consistency between these two economic crime guidelines.

Amendment:

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
 - (1) If the infringement amount (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
 - (2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by **2** levels.
 - (3) If the (A) offense involved the manufacture, importation, or uploading of infringing items; or (B) defendant was convicted under 17 U.S.C. §§ 1201 and 1204 for trafficking in circumvention devices, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
 - (4) If the offense was not committed for commercial advantage or private financial gain, decrease by **2** levels, but the resulting offense level shall be not less than level **8**.
 - (5) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the

resulting offense level is less than level **13**, increase to level **13**.

Commentary

Statutory Provisions: 17 U.S.C. § 506(a), **1201, 1204**; 18 U.S.C. §§ 2318-2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Circumvention devices" are devices used to perform the activity described in 17 U.S.C. §§ 1201(a)(3)(A) and 1201(b)(2)(A).

"Commercial advantage or private financial gain" means the receipt, or expectation of receipt, of anything of value, including other protected works.

"Infringed item" means the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.

"Infringing item" means the item that violates the copyright or trademark laws.

"Uploading" means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the infringing item, including by storing the infringing item as an openly shared file. "Uploading" does not include merely downloading or installing an infringing item on a hard drive on a defendant's personal computer unless the infringing item is an openly shared file.

"Work being prepared for commercial distribution" has the meaning given that term in 17 U.S.C. § 506(a)(3).

2. Determination of Infringement Amount.—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).

(A) Use of Retail Value of Infringed Item.—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving any of the following:

* * *

(vi) *The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case involving such an offense, the "retail value of the infringed item" is the value of that item upon its initial commercial distribution.*

(vii) *A case under 18 U.S.C. §§ 2318 or 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been*

affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service.

(viii) A case under 17 U.S.C. §§ 1201 and 1204 in which the defendant used a circumvention device. In such an offense, the "retail value of the infringed item" is the price the user would have paid to access lawfully the copyrighted work, and the "infringed item" is the accessed work.

* * *

3. Application of §3B1.3.—*If the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) ~~shall~~may apply.*

4. Upward-Departure Considerations.—*If the offense level determined under this guideline substantially understates **or overstates** the seriousness of the offense, ~~an upward-~~a departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether ~~an upward-~~a departure may be warranted:*

(A) *The offense involved substantial harm to the reputation of the copyright or trademark owner.*

(B) *The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.*

(C) *The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.*

* * *

Appendix A (Statutory Index)

17 U.S.C. § 506(a)	2B5.3
17 U.S.C. § 1201	2B5.3
17 U.S.C. § 1204	2B5.3

8. Drugs

Reason for Amendment: *This amendment responds to the new offenses created by the USA PATRIOT Improvement and Reauthorization Act of 2005 (the "PATRIOT Reauthorization Act"), Pub. L. 109–177, and the Adam Walsh Child Protection and Safety Act of 2006 (the "Adam Walsh Act"), Pub. L. 109–248.*

First, the amendment addresses section 731 of the PATRIOT Reauthorization Act, which created a new offense at 21 U.S.C. § 865. The new offense provides a mandatory consecutive sentence of 15 years' imprisonment for smuggling of methamphetamine or its precursor chemicals into the United States by a person enrolled in, or acting on behalf of someone or some entity enrolled in, any dedicated commuter lane, alternative or accelerated inspection system, or other facilitated entry program administered by the federal government for use in entering the United States. The amendment refers the new offense to both §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), and provides a new two-level enhancement in §§2D1.1(b)(5) and 2D1.11(b)(5) if the defendant is convicted under 21 U.S.C. § 865. The Commission determined that a two-level enhancement is appropriate because such conduct is analogous to abusing a position of trust, which receives a two-level adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Second, the amendment modifies §2D1.1 to address the new offense in 21 U.S.C. § 841(g) (Internet Sales of Date Rape Drugs) created by the Adam Walsh Act. This offense, which is punishable up to statutory maximum term of imprisonment of 20 years, prohibits the use of the Internet to distribute a date rape drug to any person, "knowing or with reasonable cause to believe that — (A) the drug would be used in the commission of criminal sexual conduct; or (B) the person is not an authorized purchaser." The statute defines "date rape drug" as "(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol; (ii) ketamine; (iii) flunitrazipam; or (iv) any substance which the Attorney General designates . . . to be used in committing rape or sexual assault." The amendment provides a new two-level enhancement in §2D1.1(b)(9) that is tailored to focus on the more serious conduct covered by the new statute, specifically conviction under 21 U.S.C. § 841(g)(A), which covers individuals who know or have reasonable cause to believe the drug would be used in the commission of criminal sexual conduct.

Third, the amendment eliminates the maximum base offense level of level 20 for ketamine offenses. Ketamine is a Schedule III controlled substance. The Drug Quantity Table at §2D1.1(c) provides a maximum offense level of 20 for most Schedule III substances because such substances are subject to a statutory maximum term of imprisonment of 5 years. If a defendant is convicted under 21 U.S.C. § 841(g) for distributing ketamine, however, the defendant is subject to a statutory maximum term of imprisonment of 20 years. Accordingly, the amendment modifies the Drug Quantity Table in order to allow for appropriate sentencing of 21 U.S.C. § 841(g) offenses involving larger quantities of ketamine that correspond to offense levels greater than level 20. This approach is consistent with how other drug offenses with a statutory maximum term of imprisonment of 20 years are penalized and with how other date rape drugs are penalized. The amendment also provides a marihuana equivalency in Application Note 10 for ketamine (1 unit of ketamine = 1 gram of marihuana).

Fourth, the amendment adds to §2D1.1, Application Note 10, a new drug equivalency for 1,4-butanediol (BD) and gamma butyrolactone (GBL), both of which are included in the definition of date rape drugs under 21 U.S.C. § 841(g). Neither is a controlled substance. The drug equivalency is 1 ml of BD or GBL equals 8.8 grams of marihuana. The Commission has received testimony that both substances are at least

equipotent as GHB, which is punished at the same marijuana equivalency.

Fifth, the amendment addresses the new offense in 21 U.S.C. § 860a (Consecutive sentence for manufacturing or distributing, or possessing with intent to manufacture or distribute, methamphetamine on premises where children are present or reside), created by the PATRIOT Reauthorization Act. The new offense provides that a term of not more than 20 years' imprisonment is to be imposed, in addition to any other sentence imposed, for manufacturing, distributing, or possessing with the intent to manufacture or distribute, methamphetamine on a premises where a minor is present or resides. The amendment modifies §2D1.1(b)(8)(C) to provide a two-level increase (with a minimum offense level of 14) if the defendant is convicted under 21 U.S.C. § 860a involving the distribution or possession with intent to distribute methamphetamine and a three-level increase (with a minimum offense level of 27) if the defendant is convicted under 21 U.S.C. § 860a involving the manufacture or possession with intent to manufacture methamphetamine.

To account for the spectrum of harms created by methamphetamine offenses, and to address the specific harms created by 21 U.S.C. § 860a, the amendment builds on the "substantial risk enhancement." This multi-tiered enhancement was added to §2D1.1 in 2000 in response to the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106-310, Title XXXVI. See USSG App. C (Amendments 608 and 620 (effective Dec. 12, 2000, and Nov. 1, 2001, respectively)). Prior to this amendment, the first tier provided a two-level increase for basic environmental harms, such as discharging hazardous substances into the environment. The second tier provided a three-level increase, and a minimum offense level of 27, for the substantial risk of harm to the life of someone other than a minor or an incompetent. The final tier provided a six-level increase and a minimum offense level of 30 for the substantial risk of harm to the life of a minor or incompetent or the environment.

The Commission determined that distributing, or possessing with the intent to distribute, methamphetamine on a premises where a minor is present or resides presents a greater harm than discharging a hazardous substance into the environment, but is a lesser harm than the substantial risk of harm to adults or to the environment created by the manufacture of methamphetamine. Therefore, the amendment adds a new tier to the enhancement in the new subdivision (b)(10)(B) in order to account for this conduct. A defendant convicted under 21 U.S.C. § 860a for distributing, or possessing with the intent to distribute, methamphetamine on a premises where a minor is present or resides will receive a two-level enhancement, with a minimum offense level of 14.

To address the overlap of conduct covered by the enhancement for the substantial risk of harm to the life of a minor and the new offense of manufacturing, or possessing with the intent to manufacture, methamphetamine on a premises where a minor is present or resides, a three-level enhancement and a minimum offense level of level 27 will apply in a case in which a minor is present, but in which the offense did not create a substantial risk of harm to the life of a minor. In any methamphetamine manufacturing offense which creates a substantial risk of harm to the life of a minor, a six-level enhancement and a minimum offense level of level 30 will apply.

Sixth, the amendment updates Appendix A (Statutory Index) to include references to the new offenses created by the PATRIOT Reauthorization and Adam Walsh Acts.

Amendment:

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

* * *

(b) Specific Offense Characteristics

* * *

(5) If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.

~~(5)~~(6) If the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by 2 levels.

~~(6)~~(7) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.

~~(7)~~(8) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.

(9) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by 2 levels.

~~(8)~~(10) (Apply the greater~~est~~):

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

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

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

(C) If—

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

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial

risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

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

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

~~(9)~~(11) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

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

* * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

- (1) ● 30 KG or more of Heroin; ● 150 KG or more of Cocaine; ● 1.5 KG or more of Cocaine Base; ● 30 KG or more of PCP, or 3 KG or more of PCP (actual); ● 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice"; ● 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual); ● 300 G or more of LSD; ● 12 KG or more of Fentanyl; ● 3 KG or more of a Fentanyl Analogue; ● 30,000 KG or more of Marihuana; ● 6,000 KG or more of Hashish; ● 600 KG or more of Hashish Oil; ● 30,000,000 units or more of Ketamine; ● 30,000,000 units or more of Schedule I or II Depressants; ● 1,875,000 units or more of Flunitrazepam. **Level 38**
- (2) ● At least 10 KG but less than 30 KG of Heroin; ● At least 50 KG but less than 150 KG of Cocaine; ● At least 500 G but less than 1.5 KG of Cocaine Base; ● At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); ● At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice"; ● At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual); ● At least 100 G but less than 300 G of LSD; ● At least 4 KG but less than 12 KG of Fentanyl; ● At least 1 KG but less than 3 KG of a Fentanyl Analogue; ● At least 10,000 KG but less than 30,000 KG of Marihuana; ● At least 2,000 KG but less than 6,000 KG of Hashish; ● At least 200 KG but less than 600 KG of Hashish Oil; ● At least 10,000,000 but less than 30,000,000 units of Ketamine; ● At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants; ● At least 625,000 but less than 1,875,000 units of Flunitrazepam. **Level 36**
- (3) ● At least 3 KG but less than 10 KG of Heroin; ● At least 15 KG but less than 50 KG of Cocaine; ● At least 150 G but less than 500 G of Cocaine Base; ● At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual); ● At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice"; ● At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual); ● At least 30 G but less than 100 G of LSD; ● At least 1.2 KG but less than 4 KG of Fentanyl; ● At least 300 G but less than 1 KG of a Fentanyl Analogue; **Level 34**

- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam.

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

Level 32

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

Level 30

- (6)
- At least 400 G but less than 700 G of Heroin;
 - At least 2 KG but less than 3.5 KG of Cocaine;
 - At least 20 G but less than 35 G of Cocaine Base;
 - At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
 - At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35

Level 28

G of "Ice";

- At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;
- At least 160 G but less than 280 G of Fentanyl;
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 25,000 but less than 43,750 units of Flunitrazepam.

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

Level 26

- (8) ● At least 80 G but less than 100 G of Heroin;
- At least 400 G but less than 500 G of Cocaine;
- At least 4 G but less than 5 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
- At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
- At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
- At least 800 MG but less than 1 G of LSD;
- At least 32 G but less than 40 G of Fentanyl;
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 6,250 units of Flunitrazepam.

Level 24

- (9) ● At least 60 G but less than 80 G of Heroin;
- At least 300 G but less than 400 G of Cocaine;

Level 22

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

- (10) ● At least 40 G but less than 60 G of Heroin;
- At least 200 G but less than 300 G of Cocaine;
 - At least 2 G but less than 3 G of Cocaine Base;
 - At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
 - At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
 - At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
 - At least 400 MG but less than 600 MG of LSD;
 - At least 16 G but less than 24 G of Fentanyl;
 - At least 4 G but less than 6 G of a Fentanyl Analogue;
 - At least 40 KG but less than 60 KG of Marihuana;
 - At least 8 KG but less than 12 KG of Hashish;
 - At least 800 G but less than 1.2 KG of Hashish Oil;
 - At least 40,000 but less than 60,000 units of Ketamine;
 - At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
 - 40,000 or more units of Schedule III substances (except Ketamine);
 - At least 2,500 but less than 3,750 units of Flunitrazepam.

Level 20

- (11) ● At least 20 G but less than 40 G of Heroin;
- At least 100 G but less than 200 G of Cocaine;
 - At least 1 G but less than 2 G of Cocaine Base;
 - At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
 - At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
 - At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
 - At least 200 MG but less than 400 MG of LSD;
 - At least 8 G but less than 16 G of Fentanyl;
 - At least 2 G but less than 4 G of a Fentanyl Analogue;
 - At least 20 KG but less than 40 KG of Marihuana;
 - At least 5 KG but less than 8 KG of Hashish;
 - At least 500 G but less than 800 G of Hashish Oil;
 - At least 20,000 but less than 40,000 units of Ketamine;

Level 18

- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine);
- At least 1,250 but less than 2,500 units of Flunitrazepam.

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

Level 16

- (13) ● At least 5 G but less than 10 G of Heroin; ● At least 25 G but less than 50 G of Cocaine; ● At least 250 MG but less than 500 MG of Cocaine Base; ● At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual); ● At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice"; ● At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual); ● At least 50 MG but less than 100 MG of LSD; ● At least 2 G but less than 4 G of Fentanyl; ● At least 500 MG but less than 1 G of a Fentanyl Analogue; ● At least 5 KG but less than 10 KG of Marihuana; ● At least 1 KG but less than 2 KG of Hashish; ● At least 100 G but less than 200 G of Hashish Oil; ● At least 5,000 but less than 10,000 units of Ketamine; ● At least 5,000 but less than 10,000 units of Schedule I or II Depressants; ● At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine); ● At least 312 but less than 625 units of Flunitrazepam.

Level 14

- (14) ● Less than 5 G of Heroin; ● Less than 25 G of Cocaine; ● Less than 250 MG of Cocaine Base; ● Less than 5 G of PCP, or less than 500 MG of PCP (actual); ● Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice"; ● Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine

Level 12

(actual);

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

- (15) ● At least 1 KG but less than 2.5 KG of Marihuana; **Level 10**
● At least 200 G but less than 500 G of Hashish;
● At least 20 G but less than 50 G of Hashish Oil;
● At least 1,000 units but less than 2,500 units of Ketamine;
● At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
● At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine);
● At least 62 but less than 156 units of Flunitrazepam;
● At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).

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

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

* * *

Commentary

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

* * *

10. The Commission has used the sentences provided in, and equivalences derived from, the statute

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

* * *

DRUG EQUIVALENCY TABLES

* * *

Gamma-hydroxybutyric Acid

1 ml of gamma-hydroxybutyric acid = 8.8 gm of marihuana

Schedule III Substances (except ketamine)***

1 unit of a Schedule III Substance = 1 gm of marihuana

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

Ketamine

1 unit of ketamine = 1 gm of marihuana

* * *

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

1 gm of Ephedrine = 10 kg of marihuana
1 gm of Phenylpropanolamine = 10 kg of marihuana
1 gm of Pseudoephedrine = 10 kg of marihuana

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

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

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

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

* * *

19. Hazardous or Toxic Substances.—Subsection (b)(8)(10)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource

Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(8)(10)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).

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

(A) Factors to Consider.—In determining, for purposes of subsection (b)(8)(B) or ~~(C)~~(b)(10)(C)(ii) or (D), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:

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

(B) Definitions.—For purposes of subsection ~~(b)(8)(C)~~(b)(10)(D):

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

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

21. Applicability of Subsection (b)(9)(11).—The applicability of subsection (b)(9)(11) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(9)(11) applies.

22. Imposition of Consecutive Sentence for 21 U.S.C. § 860a or § 865.—Sections 860a and 865 of title 21, United States Code, require the imposition of a mandatory consecutive term of imprisonment of not more than 20 years and 15 years, respectively. In order to comply with the relevant statute, the court should determine the appropriate "total punishment" and divide the sentence on the judgment form between the sentence attributable to the underlying drug offense

and the sentence attributable to 21 U.S.C. § 860a or § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 860a or § 865. For example, if the applicable adjusted guideline range is 151-188 months and the court determines a "total punishment" of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 860a or § 865 would achieve the "total punishment" in a manner that satisfies the statutory requirement of a consecutive sentence.

~~22~~23. Application of Subsection (b)(5)(6).—For purposes of subsection (b)(5)(6), "mass-marketing by means of an interactive computer service" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(5)(6) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "Interactive computer service", for purposes of subsection (b)(5)(6) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

~~23~~24. Application of Subsection (e)(1).—

(A) Definition.—For purposes of this guideline, "sexual offense" means a "sexual act" or "sexual contact" as those terms are defined in 18 U.S.C. § 2246(2) and (3), respectively.

(B) Upward Departure Provision.—If the defendant committed a sexual offense against more than one individual, an upward departure would be warranted.

~~24~~25. Application of Subsection (b)(6)(7).—For purposes of subsection (b)(6)(7), "masking agent" means a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual's body.

~~25~~26. Application of Subsection (b)(7)(8).—For purposes of subsection (b)(7)(8), "athlete" means an individual who participates in an athletic activity conducted by (i) an intercollegiate athletic association or interscholastic athletic association; (ii) a professional athletic association; or (iii) an amateur athletic organization.

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

* * *

Subsection (b)(8)(10)(A) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsections ~~(b)(8)(B) or (C)~~(b)(10)(C)(ii) and (D) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

(5) If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.

* * *

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(c)(1), (2), (f)(1), 865, 960(d)(1), (2), (3), (4).

Application Notes:

* * *

- 7. Application of Subsection (b)(4).—For purposes of subsection (b)(4), "mass-marketing by means of an interactive computer service" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(4) would apply to a defendant who operated a web site to promote the sale of Gamma-butyrolactone (GBL) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "Interactive computer service", for purposes of subsection (b)(4) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).
- 8. Imposition of Consecutive Sentence for 21 U.S.C. § 865.—Section 865 of title 21, United States Code, requires the imposition of a mandatory consecutive term of imprisonment of not more than 15 years. In order to comply with the relevant statute, the court should determine the appropriate "total punishment" and, on the judgment form, divide the sentence between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 865. For example, if the applicable adjusted guideline range is 151-188 months and the court determines a "total punishment" of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 865 would achieve the "total punishment" in a manner that satisfies the statutory requirement of a consecutive sentence.

* * *

Appendix A (Statutory Index)

21 U.S.C. § 841(f)(1)	2D1.11, 2D1.13
21 U.S.C. § 841(g)	2D1.1

* * *

21 U.S.C. § 860	2D1.2
21 U.S.C. § 860a	2D1.1

* * *

21 U.S.C. § 864	2D1.12
21 U.S.C. § 865	2D1.1, 2D1.11

9. Cocaine Base Sentencing

Reason for Amendment: *The Commission identified as a policy priority for the amendment cycle ending May 1, 2007, "continuation of its work with the congressional, executive, and judicial branches of the government and other interested parties on cocaine sentencing policy," including reevaluating the Commission's 2002 report to Congress, Cocaine and Federal Sentencing Policy. As a result of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 21 U.S.C. § 841(b)(1) requires a five-year mandatory minimum penalty for a first-time trafficking offense involving 5 grams or more of crack cocaine, or 500 grams of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more of powder cocaine. Because 100 times more powder cocaine than crack cocaine is required to trigger the same mandatory minimum penalty, this penalty structure is commonly referred to as the "100-to-1 drug quantity ratio."*

To assist the Commission in its consideration of Federal cocaine sentencing policy, the Commission received statements and heard expert testimony from the Executive Branch, the Federal judiciary, defense practitioners, state and local law enforcement representatives, medical and treatment experts, academicians, social scientists, and interested community representatives at hearings on November 14, 2006, and March 20, 2007. The Commission also received substantial written public comment on Federal cocaine sentencing policy throughout the amendment cycle.

During the amendment cycle, the Commission updated its analysis of key sentencing data about cocaine offenses and offenders; reviewed recent scientific literature regarding cocaine use, effects, dependency, prenatal effects, and prevalence; researched trends in cocaine trafficking patterns, price, and use; surveyed the state laws regarding cocaine penalties; and monitored case law developments.

Current data and information continue to support the Commission's consistently held position that the 100-to-1 drug quantity ratio significantly undermines various congressional objectives set forth in the Sentencing Reform Act and elsewhere. These findings will be more thoroughly explained in a forthcoming report that will present to Congress, on or before May 15, 2007, a number of recommendations for modifications to the statutory penalties for crack cocaine offenses. It is the Commission's firm desire that this report will facilitate prompt congressional action addressing the 100-to-1 drug quantity ratio.

The Commission's recommendation and strong desire for prompt legislative action notwithstanding, the problems associated with the 100-to-1 drug quantity ratio are so urgent and compelling that this amendment is promulgated as an interim measure to alleviate some of those problems. The Commission has concluded that the manner in which the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) was constructed to incorporate the statutory mandatory minimum penalties for crack cocaine offenses is an area in which the Federal sentencing guidelines contribute to the problems associated with the 100-to-1 drug quantity ratio.

When Congress passed the 1986 Act, the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. The drug quantity thresholds in the Drug Quantity Table are set so as to provide base offense levels corresponding to guideline ranges that are above the statutory mandatory minimum penalties. Accordingly, offenses involving 5 grams or more of crack cocaine were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the five-year statutory minimum for such offenses by at least three months). Similarly, offenses involving 50 grams or more of crack cocaine were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeds the ten-year statutory minimum for such offenses by at least one month).

Crack cocaine offenses for quantities above and below the mandatory minimum threshold quantities were set accordingly using the 100-to-1 drug quantity ratio.

This amendment modifies the drug quantity thresholds in the Drug Quantity Table so as to assign, for crack cocaine offenses, base offense levels corresponding to guideline ranges that include the statutory mandatory minimum penalties. Accordingly, pursuant to the amendment, 5 grams of cocaine base are assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and 50 grams of cocaine base are assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). Crack cocaine offenses for quantities above and below the mandatory minimum threshold quantities similarly are adjusted downward by two levels. The amendment also includes a mechanism to determine a combined base offense level in an offense involving crack cocaine and other controlled substances.

The Commission's prison impact model predicts that, assuming no change in the existing statutory mandatory minimum penalties, this modification to the Drug Quantity Table will affect 69.7 percent of crack cocaine offenses sentenced under §2D1.1 and will result in a reduction in the estimated average sentence of all crack cocaine offenses from 121 months to 106 months, based on an analysis of cases sentenced in fiscal year 2006 under §2D1.1 involving crack cocaine.

Having concluded once again that the 100-to-1 drug quantity ratio should be modified, the Commission recognizes that establishing federal cocaine sentencing policy ultimately is Congress's prerogative. Accordingly, the Commission tailored the amendment to fit within the existing statutory penalty scheme by assigning base offense levels that provide guideline ranges that include the statutory mandatory minimum penalties for crack cocaine offenses. The Commission, however, views the amendment only as an interim solution to some of the problems associated with the 100-to-1 drug quantity ratio. It is neither a permanent nor a complete solution to those problems. Any comprehensive solution to the 100-to-1 drug quantity ratio requires appropriate legislative action by Congress.

Amendment:

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

* * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
(1) ● 30 KG or more of Heroin; ● 150 KG or more of Cocaine; ● 1.5 4.5 KG or more of Cocaine Base; ● 30 KG or more of PCP, or 3 KG or more of PCP (actual); ● 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice"; ● 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual); ● 300 G or more of LSD; ● 12 KG or more of Fentanyl; ● 3 KG or more of a Fentanyl Analogue; ● 30,000 KG or more of Marijuana; ● 6,000 KG or more of Hashish; ● 600 KG or more of Hashish Oil; ● 30,000,000 units or more of Schedule I or II Depressants; ● 1,875,000 units or more of Flunitrazepam.	Level 38
(2) ● At least 10 KG but less than 30 KG of Heroin; ● At least 50 KG but less than 150 KG of Cocaine;	Level 36

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

- (3)
- At least 3 KG but less than 10 KG of Heroin;
 - At least 15 KG but less than 50 KG of Cocaine;
 - At least ~~150~~ **500 G** but less than ~~500 G~~ **1.5 KG** of Cocaine Base;
 - At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
 - At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";
 - At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
 - At least 30 G but less than 100 G of LSD;
 - At least 1.2 KG but less than 4 KG of Fentanyl;
 - At least 300 G but less than 1 KG of a Fentanyl Analogue;
 - At least 3,000 KG but less than 10,000 KG of Marihuana;
 - At least 600 KG but less than 2,000 KG of Hashish;
 - At least 60 KG but less than 200 KG of Hashish Oil;
 - At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
 - At least 187,500 but less than 625,000 units of Flunitrazepam.

Level 34

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

Level 32

- At least 62,500 but less than 187,500 units of Flunitrazepam.

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

Level 30

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

Level 28

- (7)
- At least 100 G but less than 400 G of Heroin;
 - At least 500 G but less than 2 KG of Cocaine;
 - At least ~~5~~20 G but less than ~~20~~35 G of Cocaine Base;
 - At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
 - At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
 - At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
 - At least 1 G but less than 4 G of LSD;
 - At least 40 G but less than 160 G of Fentanyl;
 - At least 10 G but less than 40 G of a Fentanyl Analogue;
 - At least 100 KG but less than 400 KG of Marijuana;
 - At least 20 KG but less than 80 KG of Hashish;
 - At least 2 KG but less than 8 KG of Hashish Oil;

Level 26

- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- At least 6,250 but less than 25,000 units of Flunitrazepam.

- (8) ● At least 80 G but less than 100 G of Heroin;
 ● At least 400 G but less than 500 G of Cocaine;
 ● At least ~~45~~ G but less than ~~520~~ G of Cocaine Base;
 ● At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
 ● At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
 ● At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
 ● At least 800 MG but less than 1 G of LSD;
 ● At least 32 G but less than 40 G of Fentanyl;
 ● At least 8 G but less than 10 G of a Fentanyl Analogue;
 ● At least 80 KG but less than 100 KG of Marihuana;
 ● At least 16 KG but less than 20 KG of Hashish;
 ● At least 1.6 KG but less than 2 KG of Hashish Oil;
 ● At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
 ● At least 5,000 but less than 6,250 units of Flunitrazepam.

Level 24

- (9) ● At least 60 G but less than 80 G of Heroin;
 ● At least 300 G but less than 400 G of Cocaine;
 ● At least ~~34~~ G but less than ~~45~~ G of Cocaine Base;
 ● At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
 ● At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";
 ● At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
 ● At least 600 MG but less than 800 MG of LSD;
 ● At least 24 G but less than 32 G of Fentanyl;
 ● At least 6 G but less than 8 G of a Fentanyl Analogue;
 ● At least 60 KG but less than 80 KG of Marihuana;
 ● At least 12 KG but less than 16 KG of Hashish;
 ● At least 1.2 KG but less than 1.6 KG of Hashish Oil;
 ● At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
 ● At least 3,750 but less than 5,000 units of Flunitrazepam.

Level 22

- (10) ● At least 40 G but less than 60 G of Heroin;
 ● At least 200 G but less than 300 G of Cocaine;
 ● At least ~~23~~ G but less than ~~34~~ G of Cocaine Base;
 ● At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
 ● At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
 ● At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
 ● At least 400 MG but less than 600 MG of LSD;
 ● At least 16 G but less than 24 G of Fentanyl;
 ● At least 4 G but less than 6 G of a Fentanyl Analogue;
 ● At least 40 KG but less than 60 KG of Marihuana;
 ● At least 8 KG but less than 12 KG of Hashish;

Level 20

- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- 40,000 or more units of Schedule III substances;
- At least 2,500 but less than 3,750 units of Flunitrazepam.

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

Level 18

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

Level 16

- (13) ● At least 5 G but less than 10 G of Heroin;
- At least 25 G but less than 50 G of Cocaine;
 - At least ~~250~~ 500 MG but less than ~~500 MG~~ 1 G of Cocaine Base;
 - At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
 - At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
 - At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
 - At least 50 MG but less than 100 MG of LSD;

Level 14

- At least 2 G but less than 4 G of Fentanyl;
- At least 500 MG but less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 10,000 units of Schedule III substances;
- At least 312 but less than 625 units of Flunitrazepam.

- (14) ● Less than 5 G of Heroin; **Level 12**
- Less than 25 G of Cocaine;
 - Less than ~~250~~500 MG of Cocaine Base;
 - Less than 5 G of PCP, or less than 500 MG of PCP (actual);
 - Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
 - Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
 - Less than 50 MG of LSD;
 - Less than 2 G of Fentanyl;
 - Less than 500 MG of a Fentanyl Analogue;
 - At least 2.5 KG but less than 5 KG of Marihuana;
 - At least 500 G but less than 1 KG of Hashish;
 - At least 50 G but less than 100 G of Hashish Oil;
 - At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
 - At least 2,500 but less than 5,000 units of Schedule III substances;
 - At least 156 but less than 312 units of Flunitrazepam;
 - 40,000 or more units of Schedule IV substances (except Flunitrazepam).

- (15) ● At least 1 KG but less than 2.5 KG of Marihuana; **Level 10**
- At least 200 G but less than 500 G of Hashish;
 - At least 20 G but less than 50 G of Hashish Oil;
 - At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
 - At least 1,000 but less than 2,500 units of Schedule III substances;
 - At least 62 but less than 156 units of Flunitrazepam;
 - At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).

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

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

* * *

Commentary

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

Application Notes:

* * *

PLEASE NOTE THAT APPLICATION NOTE 10 AS IT APPEARS IN THIS READER FRIENDLY VERSION WAS SUBSEQUENTLY MODIFIED BY THE COMMISSION ON AUGUST 29, 2007. THIS MODIFICATION TO APPLICATION NOTE 10 IS INCLUDED IN THE FEDERAL REGISTER NOTICE OF FINAL ACTION REGARDING TECHNICAL AND CONFORMING AMENDMENTS TO FEDERAL SENTENCING GUIDELINES EFFECTIVE NOVEMBER 1, 2007, BELOW.

THE READER SHOULD NOT USE APPLICATION NOTE 10 AS IT APPEARS HERE FOR PURPOSES OF MAKING GUIDELINE COMPUTATIONS AND, INSTEAD, SHOULD USE THE FEDERAL SENTENCING GUIDELINES MANUAL EFFECTIVE NOVEMBER 1, 2007.

10. Use of Drug Equivalency Tables.—

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

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

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

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

(See also Application Note 5.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kg of marihuana. In a case involving 100 gm of oxymorphone, the equivalent quantity of marihuana would be 500 kg, which corresponds to a base offense level of 28 in the Drug Quantity Table.

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

cocaine base and other controlled substances, see subdivision (D) of this note.

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

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

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

- α.(i) The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 24.*
- β.(ii) The defendant is convicted of selling 500 grams of marihuana (Level 8) and five kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 10 in the Drug Quantity Table.*
- γ.(iii) The defendant is convicted of selling 80 grams of cocaine (Level 16) and five kilograms of marihuana (Level 14). The cocaine is equivalent to 16 kilograms of marihuana. The total is therefore equivalent to 21 kilograms of marihuana, which has an offense level of 18 in the Drug Quantity Table.*
- δ.(iv) The defendant is convicted of selling 56,000 units of a Schedule III substance, 100,000 units of a Schedule IV substance, and 200,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 56 kilograms of marihuana (below the cap of 59.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 4.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 6.25 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 999 grams of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 1.25 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 59.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 61.99 (56 + 4.99 + .999) kilograms.*

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

(i) In General.—If the offense involves cocaine base ("crack") and one or more other controlled substance, determine the base offense level as follows:

(I) Determine the combined base offense level for the other controlled substance or controlled substances as provided in subdivision (B) of this note.

(II) Use the combined base offense level determined under subdivision (B) of this note to obtain the appropriate marihuana equivalency for the cocaine base involved in the offense using the following table:

<u>Base Offense Level</u>	<u>Marihuana Equivalency</u>
38	6.7 kg of marihuana
36	6.7 kg of marihuana
34	6 kg of marihuana
32	6.7 kg of marihuana
30	14 kg of marihuana
28	11.4 kg of marihuana
26	5 kg of marihuana
24	16 kg of marihuana
22	15 kg of marihuana
20	13.3 kg of marihuana
18	10 kg of marihuana
16	10 kg of marihuana
14	10 kg of marihuana
12	10 kg of marihuana.

(III) Using the marihuana equivalency obtained from the table in subdivision (II), convert the quantity of cocaine base involved in the offense to its equivalent quantity of marihuana.

(IV) Add the quantity of marihuana determined under subdivisions (I) and (III), and look up the total in the Drug Quantity Table to obtain the combined base offense level for all the controlled substances involved in the offense.

(ii) Example.—The case involves 1.5 kg of cocaine, 10 kg of marihuana, and 20 g of cocaine base. Pursuant to subdivision (B), the equivalent quantity of marihuana for the cocaine and the marihuana is 310 kg. (The cocaine converts to an equivalent of 300 kg of marihuana ($1.5 \text{ kg} \times 200 \text{ g} = 300 \text{ kg}$), which when added to the quantity of marihuana involved in the offense, results in an equivalent quantity of 310 kg of marihuana.) This corresponds to a base offense level 26. Pursuant to the table in subdivision (II), the base offense level of 26 results in a marihuana equivalency of 5 kg for the cocaine base. Using this marihuana equivalency for the cocaine base results in a marihuana equivalency of 100 kg ($20 \text{ g} \times 5 \text{ kg} = 100 \text{ kg}$). Adding the quantities of marihuana of all three drug types results in a combined quantity of 410 kg of marihuana, which corresponds to a combined base offense level of 28 in the Drug Quantity Table.

DRUG EQUIVALENCY TABLES

(E) Drug Equivalency Tables.—

* * *

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

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylamine =	40 gm of marihuana
1 gm of Amphetamine =	2 kg of marihuana
1 gm of Amphetamine (Actual) =	20 kg of marihuana
1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	20 kg of marihuana
1 gm of "Ice" =	20 kg of marihuana
1 gm of Khat =	.01 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria")=	100 gm of marihuana
1 gm of Methylphenidate (Ritalin)=	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P ₂ P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P ₂ P (in any other case) =	75 gm of marihuana
1 gm of Cocaine Base ("Crack") =	20 kg of marihuana
1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana

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

* * *

10. Technical Amendments

Reason for Amendment: *This amendment makes various technical and conforming changes to the guidelines.*

First, the amendment corrects typographical errors in subsection (a) of §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) and Application Note 14 of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).

Second, the amendment addresses application of the grouping rules when a defendant is sentenced on multiple counts contained in different indictments as, for example, when a case is transferred to another district for purposes of sentencing, pursuant to Fed. R. Crim. P. 20(a).

The amendment adopts the reasoning of recent case law and clarifies that the grouping rules apply not only to multiple counts in the same indictment, but also to multiple counts contained in different indictments when a defendant is sentenced on the indictments simultaneously. The amendment provides clarifying language in the Introductory Commentary of Chapter Three, Part D, as well as in §3D1.1 (Procedure for Determining Offense Level on Multiple Counts). The language is the same as that provided in §5G1.2 (Sentencing on Multiple Counts of Conviction).

Amendment:

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

- (a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e), as appropriate, except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection ~~(e)~~(d) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels.

* * *

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

* * *

Commentary

* * *

Application Notes:

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14. "In Connection With".—

- (A) In General.—Subsections (b)(6) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.
- (B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds

and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(1)(6) and (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

* * *

Chapter 3, Part D - Multiple Counts

Introductory Commentary

This part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. *These rules apply to multiple counts of conviction (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.* The single, "combined" offense level that results from applying these rules is used, after adjustment pursuant to the guidelines in subsequent parts, to determine the sentence. These rules have been designed primarily with the more commonly prosecuted federal offenses in mind.

* * *

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

* * *

Commentary

Application Notes:

1. *In General.*—For purposes of sentencing multiple counts of conviction, counts can be (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.

~~2.~~

* * *

Appendix A (Statutory Index)

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18 U.S.C. § 930 2K2.5
18 U.S.C. § 931 2K2.6

* * *

~~18 U.S.C. § 3147~~ — 2J1.7

11. Repromulgation of Emergency Amendment on Pretexting

Reason for Amendment: *This amendment addresses several offenses that pertain to unauthorized access or disclosure of private or protected information. Specifically, this amendment pertains to (A) the re-promulgation of the emergency amendment that implemented the directive in section 4 of the Telephone Records and Privacy Protection Act of 2006, Pub. L. 109–476 (the "Telephone Records Act"); (B) offenses involving improper use of a child’s fingerprints under 42 U.S.C. §§ 16984 and 16962; and (C) various other offenses related to private or protected information.*

This amendment re-promulgates as permanent the temporary emergency amendment (effective May 1, 2007) that implemented the directive in section 4 of the Telephone Records Act. The amendment refers the new offense at 18 U.S.C. § 1039 to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Information). The Commission concluded that disclosure of telephone records is similar to the types of privacy offenses referenced to this guideline. In addition, this guideline includes a cross reference, instructing that if the purpose of the 18 U.S.C. § 1039 offense was to facilitate another offense, the guideline applicable to an attempt to commit the other offense should be applied, if the resulting offense level is higher. The Commission concluded that operation of the cross reference would capture the harms associated with the aggravated forms of this offense referenced at 18 U.S.C. § 1039(d) or (e). The amendment also expands the scope of the existing three-level enhancement in the guideline to include cases in which the defendant is convicted under 18 U.S.C. § 1039(d) or (e). Thus, in a case in which the cross reference does not apply, application of the enhancement will capture the increased harms associated with the aggravated offenses. Finally, the amendment expands the upward departure note to include tax return information of a substantial number of individuals.

Section 153 of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109–248 (the "Adam Walsh Act"), added a new offense at 42 U.S.C. § 16962, which provides a statutory maximum term of imprisonment of 10 years for the improper release of information obtained in fingerprint-based checks for the background check of either foster or adoptive parents or of individuals employed by, or considering employment with, a private or public educational agency. Additionally, section 627 of the Adam Walsh Act added a new Class A Misdemeanor offense at 42 U.S.C. § 16984 prohibiting the use of a child’s fingerprints for any purpose other than providing those fingerprints to the child’s parent or legal guardian. This amendment references both offenses to §2H3.1, providing a base offense level of 9 under §2H3.1(a)(1) if the defendant was convicted of violating 42 U.S.C. § 16962, and a base offense level of 6 if the defendant was convicted of violating 42 U.S.C. § 16984.

Finally, this amendment implements the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162 ("VAWA"). VAWA included the International Marriage Broker Regulation Act of 2005 ("IMBRA"), which requires marriage brokers to keep private information gathered in the course of their business confidential. New offenses at 8 U.S.C. §§ 1375a(d)(3)(C) and 1375a(d)(5)(B) involve invasions of protected privacy interests and, as such, are referenced to §2H3.1.

The Commission concluded that referencing these new offenses to §2H3.1 was appropriate because each of the new offenses is similar to the types of privacy offenses referenced to this guideline.

Amendment:

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

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

(1) **9**; or

(2) **6**, if the defendant was convicted of 26 U.S.C. § 7213A or 26 U.S.C. § 7216 **the offense of conviction has a statutory maximum term of**

imprisonment of one year or less but more than six months.

- (b) Specific Offense Characteristic
 - (1) If (A) the defendant is convicted under 18 U.S.C. § 1039(d) or (e); or (B) the purpose of the offense was to obtain direct or indirect commercial advantage or economic gain, increase by 3 levels.
- (c) Cross Reference
 - (1) If the purpose of the offense was to facilitate another offense, apply the guideline applicable to an attempt to commit that other offense, if the resulting offense level is greater than that determined above.

Commentary

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

Application Notes:

- ~~1. Definitions.—For purposes of this guideline, "tax return" and "tax return information" have the meaning given the terms "return" and "return information" in 26 U.S.C. § 6103(b)(1) and (2), respectively.~~
- ~~2.1. Satellite Cable Transmissions.—If the offense involved interception of satellite cable transmissions for purposes of commercial advantage or private financial gain (including avoiding payment of fees), apply §2B5.3 (Criminal Infringement of Copyright) rather than this guideline.~~
2. Imposition of Sentence for 18 U.S.C. § 1039(d) and (e).—Subsections 1039(d) and (e) of title 18, United States Code, require a term of imprisonment of not more than 5 years to be imposed in addition to any sentence imposed for a conviction under 18 U.S.C. § 1039(a), (b), or (c). In order to comply with the statute, the court should determine the appropriate "total punishment" and divide the sentence on the judgment form between the sentence attributable to the conviction under 18 U.S.C. § 1039(d) or (e) and the sentence attributable to the conviction under 18 U.S.C. § 1039(a), (b), or (c), specifying the number of months to be served for the conviction under 18 U.S.C. § 1039(d) or (e). For example, if the applicable adjusted guideline range is 15-21 months and the court determines a "total punishment" of 21 months is appropriate, a sentence of 9 months for conduct under 18 U.S.C. § 1039(a) plus 12 months for 18 U.S.C. § 1039(d) conduct would achieve the "total punishment" in a manner that satisfies the statutory requirement.
3. Upward Departure.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. The following are examples of cases in which an upward departure may be warranted:
 - (i) The offense involved confidential phone records information or tax return information of a substantial number of individuals.
 - (ii) The offense caused or risked substantial non-monetary harm (e.g. physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.

12. Criminal History

Reason for Amendment: *This amendment addresses two areas of the Chapter Four criminal history rules: the counting of multiple prior sentences and the use of misdemeanor and petty offenses in determining a defendant's criminal history score. In November 2006 the Commission hosted round-table discussions to receive input on criminal history issues from federal judges, prosecutors, defense attorneys, probation officers, and members of academia. In addition, the Commission gathered information through its training programs, the public comment process, and comments received during a public hearing of the Commission in March 2007. This amendment addresses two issues that were raised during this process.*

First, the amendment addresses the counting of multiple prior sentences. The Commission has heard from a number of practitioners throughout the criminal justice system that the "related cases" rules at subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History) and Application Note 3 of §4A1.2 are too complex and lead to confusion. Moreover, a significant amount of litigation has arisen concerning application of the rules, and circuit conflicts have developed over the meaning of terms in the commentary that define when prior sentences may be considered "related." For example, the commentary provides that prior sentences for offenses not separated by an intervening arrest are to be considered related if the sentences resulted from offenses that were consolidated for sentencing. In determining whether offenses were consolidated for sentencing, some courts have required that the record reflect a formal order of consolidation, while others have not. Compare, e.g., United States v. Correa, 114 F.3d 314, 317 (1st Cir. 1997) (order required) with United States v. Huskey, 137 F.3d 283, 288 (5th Cir. 1998) (order not required).

The amendment simplifies the rules for counting multiple prior sentences and promotes consistency in the application of the guideline. The amendment eliminates use of the term "related cases" at §4A1.2(a)(2) and instead uses the terms "single" and "separate" sentences. This change in terminology was made because some have misunderstood the term "related cases" to suggest a relationship between the prior sentences and the instant offense. Prior sentences for conduct that is part of the instant offense are separately addressed at §4A1.2(a)(1) and Application Note 1 of that guideline.

Under the amendment, the initial inquiry will be whether the prior sentences were for offenses that were separated by an intervening arrest (i.e., the defendant was arrested for the first offense prior to committing the second offense). If so, they are to be considered separate sentences, counted separately, and no further inquiry is required.

If the prior sentences were for offenses that were not separated by an intervening arrest, the sentences are to be counted as separate sentences unless the sentences (1) were for offenses that were named in the same charging document, or (2) were imposed on the same day. In either of these situations they are treated as a single sentence.

The amendment further provides that in the case of a single sentence that comprises multiple concurrent sentences of varying lengths, the longest sentence is to be used for purposes of applying subsection (a), (b) and (c) of §4A1.1 (Criminal History Category). In the case of a single sentence that comprises multiple sentences that include one or more consecutive sentences, the aggregate sentence is to be used for purposes of applying §4A1.1(a), (b), and (c).

Instances may arise in which a single sentence comprises multiple prior sentences for crimes of violence. In such a case, §4A1.1(f) will apply. Consistent with §4A1.1(f) and Application Note 6 to §4A1.1, additional criminal history points will be awarded for certain sentences that otherwise do not receive points because they have been determined to be part of a single sentence. For example, if a defendant's criminal history contains two robbery convictions for which the defendant received concurrent five-year sentences of imprisonment and the sentences are considered a single sentence because the offenses were

not separated by an intervening arrest and were imposed on the same day, a total of 3 points would be added under §4A1.1(a). An additional point would be added under §4A1.1(f) because the second sentence was for a crime of violence that did not receive any points under §4A1.1(a), (b), or (c).

The amendment also provides for an upward departure at Application Note 12(A) to §4A1.1 if counting multiple prior sentences as a single sentence would underrepresent the seriousness of the defendant's criminal history and the danger that the defendant presents to the public.

Second, the amendment addresses the use of misdemeanor and petty offenses in determining a defendant's criminal history score. Sections 4A1.2(c)(1) and (2) govern whether and when certain misdemeanor and petty offenses are counted. Section 4A1.2(c)(1) lists offenses that are counted only when the prior sentence was a term of probation of at least one year or a term of imprisonment of at least 30 days. Section 4A1.2(c)(2) lists offenses that are never counted toward the defendant's criminal history score. The amendment responds to concerns that (1) some misdemeanor and petty offenses counted under the guidelines involve conduct that is not serious enough to warrant increased punishment upon sentencing for a subsequent offense; (2) the presence of a prior misdemeanor or petty offense in a rare case can affect the sentence in the instant offense in a way that is greatly disproportionate to the seriousness of the prior offense (such as when such a prior offense alone disqualifies a defendant from safety valve eligibility); and (3) jurisdictional differences in defining misdemeanor and petty offenses can result in inconsistent application of criminal history points for substantially similar conduct.

To evaluate these concerns, the Commission conducted a study of misdemeanor and petty offenses and the criminal history rules that govern them, particularly §4A1.2(c)(1). The Commission examined a sample of 11,300 offenders sentenced in fiscal year 2006 to determine the type of misdemeanor and petty offenses counted in the criminal history score, the frequency with which they occurred, and the particular guideline provisions that caused them to be counted. In addition, the Commission examined a sample of offenders sentenced in 1992 who were subsequently released from imprisonment and monitored for two years for evidence of recidivism. (See U.S. Sentencing Commission *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (2004) for additional information concerning this sample.) Furthermore, the Commission examined how state guidelines treat minor offenses.

The results of these analyses led the Commission to make three modifications to §4A1.2(c)(1) and (2). First, the amendment moves from §4A1.2(c)(1) to §4A1.2(c)(2) two classes of offenses: fish and game violations and local ordinance violations (except those violations that are also violations under state criminal law). Second, the amendment changes the probation criterion at §4A1.2(c)(1) from a term of "at least" one year to a term of "more than" one year. Finally, the amendment resolves a circuit conflict over the manner in which a non-listed offense is determined to be "similar to" an offense listed at §4A1.2(c)(1) and (2).

Fish and game violations were moved from §4A1.2(c)(1) to §4A1.2(c)(2) so that they will not be counted in a defendant's criminal history score. Fish and game violations generally do not involve criminal conduct that is more serious than the offense of conviction, and the relatively minor sentences received by fish and game offenders in the fiscal year 2006 study suggest that these offenses are not considered to be among the more serious offenses listed at §4A1.2(c)(1).

In addition, local ordinance violations (except those that are also violations of state law) were moved from §4A1.2(c)(1) to §4A1.2(c)(2) so that they also will not be counted in a defendant's criminal history score. Similar to fish and game violations, local ordinance violations generally do not represent conduct criminalized under state law. Moreover, these offenses also frequently received minor sentences. The exception in this amendment for violations that are also criminal violations under state law will ensure that only the more serious prior criminal conduct will continue to be included in the criminal history score.

Section 4A1.2(c)(1)(A) is amended to provide that the offenses listed at §4A1.2(c)(1) will be counted "only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to the instant offense" (emphasis added). The Commission received comment that some sentences of a one-year term of probation constitute a default punishment summarily imposed by the state sentencing authority, particularly in those instances in which the probation imposed lacked a supervision component or was imposed in lieu of a fine or to enable the payment of a fine. The Commission determined that prior misdemeanor and petty offenses that receive such a relatively minor default sentence should not be counted for criminal history purposes.

The amendment resolves a circuit conflict over the manner in which a court should determine whether a non-listed offense is "similar to" an offense listed at §4A1.2(c)(1) or (2). Some courts have adopted a "common sense approach," first articulated by the Fifth Circuit in United States v. Hardeman, 933 F.2d 278, 281 (5th Cir. 1991). This common sense approach includes consideration of all relevant factors of similarity such as "punishments imposed for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the level of punishment, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct." *Id.* See also United States v. Martinez-Santos, 184 F.3d 196, 205-06 (2d Cir. 1999) (adopting Hardeman approach); United States v. Booker, 71 F.3d 685, 689 (7th Cir. 1995) (same). Other courts have adopted a strict "elements" test, which involves solely a comparison between the elements of the two offenses to determine whether or not the offenses are similar. See United States v. Elmore, 108 F.3d 23, 27 (3d Cir. 1997); United States v. Tigney, 367 F.3d 200, 201-02 (4th Cir. 2004); United States v. Borer, 412 F.3d 987, 992 (8th Cir. 2005). This amendment, at Application Note 12(A), adopts the Hardeman "common sense approach" as a means of ensuring that courts are guided by a number of relevant factors that may help them determine whether a non-listed offense is similar to a listed one.

Amendment:

§4A1.1. Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

- (a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.
- (b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this item.
- (d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
- (e) Add **2** points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If **2** points are added for item (d), add only **1** point for this item.
- (f) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such

sentence was considered related to another sentence resulting from a conviction of a crime of violence **was counted as a single sentence**, up to a total of 3 points for this item. *Provided*, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

Commentary

The total criminal history points from §4A1.1 determine the criminal history category (I-VI) in the Sentencing Table in Chapter Five, Part A. The definitions and instructions in §4A1.2 govern the computation of the criminal history points. Therefore, §§4A1.1 and 4A1.2 must be read together. The following notes highlight the interaction of §§4A1.1 and 4A1.2.

Application Notes:

* * *

6. §4A1.1(f). ~~Where~~ **In a case in which** the defendant received two or more prior sentences as a result of convictions for crimes of violence that are ~~treated as related cases~~ **counted as a single sentence** but did not arise from the same occasion (*i.e.*, offenses committed on different occasions that were part of a single common scheme or plan or were consolidated for trial or sentencing; ~~(see Application Note 3 of the Commentary to §4A1.2(a)(2))~~, one point is added under §4A1.1(f) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(f). "Crime of violence" is defined in ~~§4B1.2(a); see §4A1.2(p)~~. **For purposes of this guideline, "crime of violence" has the meaning given that term in §4B1.2(a). See §4A1.2(p).**

For example, a defendant's criminal history includes two robbery convictions for offenses committed on different occasions. **The sentences for these offenses were imposed on the same day and are counted as a single prior sentence. See §4A1.2(a)(2).** ~~that were consolidated for sentencing and therefore are treated as related.~~ If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(f) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(f) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second sentence, the defendant would only have received two points under §4A1.1(b) for the one-year sentence of imprisonment.

* * *

§4A1.2. Definitions and Instructions for Computing Criminal History

(a) Prior Sentence Defined

- (1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.
- (2) ~~Prior sentences imposed in unrelated cases are to be counted separately.~~

Prior sentences imposed in related cases are to be treated as one sentence for purposes of §4A1.1(a), (b), and (c). Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.

- (2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offense contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. See also §4A1.1(f).

For purposes of applying §4A1.1(a), (b), and (c), if prior sentences are counted as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

* * *

(c) **Sentences Counted and Excluded**

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

- (1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of ~~at least~~ **more than** one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

- Careless or reckless driving
- Contempt of court
- Disorderly conduct or disturbing the peace
- Driving without a license or with a revoked or suspended license
- False information to a police officer
- ~~Fish and game violations~~
- Gambling
- Hindering or failure to obey a police officer
- Insufficient funds check
- Leaving the scene of an accident
- ~~Local ordinance violations (excluding local ordinance violations that are also criminal offenses under state law)~~
- Non-support
- Prostitution
- Resisting arrest
- Trespassing.

- (2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Fish and game violations
Hitchhiking
Juvenile status offenses and truancy
Local ordinance violations (except those violations that are also violations under state criminal law)
Loitering
Minor traffic infractions (e.g., speeding)
Public intoxication
Vagrancy.

* * *

Commentary

Application Notes:

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3. ~~*Related Cases.* Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing. The court should be aware that there may be instances in which this definition is overly broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that he presents to the public. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as related because the cases were consolidated for sentencing, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which he has committed crimes. In such circumstances, an upward departure may be warranted. Note that the above example refers to serious non-violent offenses. Where prior related sentences result from convictions of crimes of violence, §4A1.1(f) will apply.~~

3. *Upward Departure Provision.*—Counting multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were counted as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which the defendant has committed crimes.

* * *

12. Application of Subsection (c).—

(A) *In General.*—In determining whether an unlisted offense is similar to an offense listed in subdivision (c)(1) or (c)(2), the court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability

involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

(B) Local Ordinance Violations.—A number of local jurisdictions have enacted ordinances covering certain offenses (e.g., larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (e.g., a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.2(c)(+2) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.

+3: (C) Insufficient Funds Check.—"Insufficient funds check," as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account.

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

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Commentary

Application Notes:

1. For purposes of this guideline—

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A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as related cases counted as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

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§2L1.2. Unlawfully Entering or Remaining in the United States

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Commentary

Application Notes:

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4. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):

- (A) "Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.
- (B) "Three or more convictions" means at least three convictions for offenses that are not considered "related cases", as that term is defined in *counted as a single sentence pursuant to Application Note 3 subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History)*.

* * *