



# **Amendments to the Sentencing Guidelines**

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**May 3, 2010**

This compilation contains unofficial text of amendments to the sentencing guidelines, policy statements, and commentary, and is provided only for the convenience of the user. Official text of the amendments can be found on the Commission's website at [www.ussc.gov](http://www.ussc.gov) and will appear in a forthcoming edition of the Federal Register.

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## 1. ALTERNATIVES TO INCARCERATION

**Reason for Amendment:** *This amendment is a two-part amendment expanding the availability of alternatives to incarceration. The amendment provides a greater range of sentencing options to courts with respect to certain offenders by expanding Zones B and C of the Sentencing Table by one level each and addresses cases in which a departure from imprisonment to an alternative to incarceration (such as intermittent confinement, community confinement, or home confinement) may be appropriate to accomplish a specific treatment purpose.*

*The amendment is a result of the Commission's continued multi-year study of alternatives to incarceration. The Commission initiated this study in recognition of increased interest in alternatives to incarceration by all three branches of government and renewed public debate about the size of the federal prison population and the need for greater availability of alternatives to incarceration for certain nonviolent first offenders. See generally 28 U.S.C. §§ 994(g), (j).*

*As part of the study, the Commission held a two-day national symposium at which the Commission heard from experts on alternatives to incarceration, including federal and state judges, congressional staff, professors of law and the social sciences, corrections and alternative sentencing practitioners and specialists, federal and state prosecutors and defense attorneys, prison officials, and others involved in criminal justice. See United States Sentencing Commission, Symposium on Alternatives to Incarceration (July 2008). In considering the amendment, the Commission also reviewed federal sentencing data, public comment and testimony, recent scholarly literature, current federal and state practices, and feedback in various forms from federal judges.*

*First, the amendment expands Zones B and C of the Sentencing Table in Chapter Five. Specifically, it expands Zone B by one level for each Criminal History Category (taking this area from Zone C), and expands Zone C by one level for each Criminal History Category (taking this area from Zone D). Accordingly, under the amendment, defendants in Zone C with an applicable guideline range of 8-14 months or 9-15 months are moved to Zone B, and defendants in Zone D with an applicable guideline range of 12-18 months are moved to Zone C. Conforming changes also are made to §§5B1.1 (Imposition of a Term of Probation) and 5C1.1. In considering this one-level expansion, the Commission observed that approximately 42 percent of the Zone C offenders covered by the amendment and approximately 52 percent of the Zone D offenders covered by the amendment already receive sentences below the applicable guideline range.*

*The Commission estimates that of the 71,054 offenders sentenced in fiscal year 2009 for which complete sentencing guideline application information is available, 1,565 offenders in Zone C, or 2.2 percent, would have been in Zone B of the Sentencing Table under the amendment, and 2,734 offenders in Zone D, or 3.8 percent, would have been in Zone C. Not all of these offenders would have been eligible for an alternative to incarceration, however, because many were non-citizens who may have been subject to an immigration detainer and some were statutorily prohibited from being sentenced to a term of probation, *see, e.g.*, 18 U.S.C. § 3561(a)(1) (prohibiting a defendant convicted of a Class A or Class B felony from being sentenced to a term of probation).*

*As a further reason for the zone expansion, Commission data indicate that courts often sentence offenders in Zone D with an applicable guideline range of 12-18 months to a term of imprisonment of 12 months and one day for the specific purpose of making such offenders eligible for credit for satisfactory behavior while in prison. See 18 U.S.C. § 3624(b). For such an offender, assuming the maximum "good time credit" is*

*earned, the sentence effectively becomes approximately ten and one-half months. Given that prior to the amendment the highest guideline range in Zone C was 10-16 months, the Commission determined that offenders in Zone D with an applicable guideline range of 12-18 months, many of whom effectively serve a sentence at the lower end of the highest Zone C sentencing range, should be included in Zone C.*

*Second, the amendment clarifies and illustrates certain cases in which a departure may be appropriate to accomplish a specific treatment purpose. Specifically, it amends an existing departure provision at §5C1.1 (Imposition of a Term of Imprisonment), Application Note 6. As amended, the application note states that a departure from the sentencing options authorized for Zone C of the Sentencing Table to accomplish a specific treatment purpose should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.*

*Under the application note as amended, the court may depart from the sentencing options authorized for Zone C (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) to accomplish a specific treatment purpose. The application note also provides that, in determining whether such a departure is appropriate, the court should consider, among other things, two factors relating to public safety: (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant. Some public comment, testimony, and research suggested that successful completion of treatment programs may reduce recidivism rates and that, for some defendants, confinement at home or in the community instead of imprisonment may better address both the defendant's need for treatment and the need to protect the public. Accordingly, the Commission amended the application note to clarify the criteria and to provide examples of such cases.*

*The amendment also makes two other changes to the Commentary to §5C1.1 regarding the factors to be considered in determining whether to impose an alternative to incarceration. The amendment adds an application note providing that, in a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the treatment program. The amendment also deletes as unnecessary the second sentence of Application Note 7.*

**Amendment:**

**Part A:**

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

- (a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.
- (b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.

- (c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by --
- (1) a sentence of imprisonment; or
  - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or
  - (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).
- (d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by --
- (1) a sentence of imprisonment; or
  - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.
- (e) Schedule of Substitute Punishments:
- (1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);
  - (2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;
  - (3) One day of home detention for one day of imprisonment.
- (f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Commentary

Application Notes:

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

*There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.*

*In determining whether such a departure is appropriate, the court should consider, among other considerations, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.*

*Examples: The following examples both assume the applicable guideline range is 12-18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (see §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.*

7. ~~The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above. Generally, such defendants have failed to reform despite the use of such alternatives.~~
8. *In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.*
89. *Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is twelve*

*months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).*

**Part B:**

Chapter Five, Part A, is amended in the Sentencing Table by redesignating Zones A, B, C, and D (as designated by Amendment 462, see USSG Appendix C, Amendment 462 (effective November 1, 1992)) as follows: Zone A (containing all guideline ranges having a minimum of zero months); Zone B (containing all guideline ranges having a minimum of at least one but not more than nine months); Zone C (containing all guideline ranges having a minimum of at least ten but not more than twelve months); and Zone D (containing all guideline ranges having a minimum of fifteen months or more).

The amendment to the Sentencing Table, as executed, is as follows (with the existing boundaries of Zones B and C marked with straight lines; the new lower boundary of Zone B **shaded**; and the new lower boundary of Zone C marked with a wavy line):

## SENTENCING TABLE (in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
<b>Zone A</b>	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
<b>Zone B</b>	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
<b>Zone C</b>	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
<b>Zone D</b>	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

\* \* \*

**§5B1.1. Imposition of a Term of Probation**

- (a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:
  - (1) the applicable guideline range is in Zone A of the Sentencing Table; or
  - (2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).
- (b) A sentence of probation may not be imposed in the event:
  - (1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);
  - (2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);
  - (3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

Commentary

Application Notes:

- 1. *Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:*
  - (a) Where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months). In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.
  - (b) Where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than ~~six~~nine months). In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement,

home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.

2. Where the applicable guideline range is in Zone C or D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is ~~eight~~ten months or more), the guidelines do not authorize a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).

Background: This section provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless (1) prohibited by statute, or (2) where a term of imprisonment is required under §5C1.1 (Imposition of a Term of Imprisonment). Under 18 U.S.C. § 3561(a)(3), the imposition of a sentence of probation is prohibited where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. Although this provision has effectively abolished the use of "split sentences" imposable pursuant to the former 18 U.S.C. § 3651, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be "achieved by a more direct and logically consistent route" by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89 (1983)). Section 5B1.1(a)(2) provides a transition between the circumstances under which a "straight" probationary term is authorized and those where probation is prohibited.

\* \* \*

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

\* \* \*

Commentary

Application Notes:

\* \* \*

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

\* \* \*

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

- (A) It may impose a sentence of imprisonment.
- (B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range

*must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is ~~8-14~~10-16 months, a sentence of ~~four~~five months imprisonment followed by a term of supervised release with a condition requiring ~~four~~five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.*

*The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is ~~8-14~~10-16 months, both a sentence of ~~four~~five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ~~five~~ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.*

\* \* \*

8. *Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is ~~twelve~~15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).*

## 2. SPECIFIC OFFENDER CHARACTERISTICS

**Reason for Amendment:** *This multi-part amendment revises the introductory commentary to Chapter Five, Part H (Specific Offender Characteristics), amends the policy statements relating to age, mental and emotional conditions, physical condition, and military service, and makes conforming changes to §5K2.0 (Grounds for Departure). The amendment is a result of a review of the departure provisions in the Guidelines Manual begun by the Commission this year. See 74 Fed. Reg. 46478, 46479 (September 9, 2009). The Commission undertook this review, in part, in response to an observed decrease in reliance on departure provisions in the Guidelines Manual in favor of an increased use of variances.*

*First, the amendment revises the introductory commentary to Chapter Five, Part H. As amended, the introductory commentary explains that the purpose of Part H is to provide sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner. Using such a framework in a uniform manner will help "secure nationwide consistency," Gall v. United States, 552 U.S. 38, 49 (2007), "avoid unwarranted sentencing disparities," 28 U.S.C. § 991(b)(1)(B), and "promote respect for the law," 18 U.S.C. § 3553(a)(2)(A).*

*Accordingly, the amended introductory commentary outlines three categories of specific offender characteristics described in the Sentencing Reform Act and the statutory and guideline standards that apply to consideration of each category. Courts must consider "the history and characteristics of the defendant" among other factors. See 18 U.S.C. § 3553(a). However, in order to avoid unwarranted sentencing disparities, see 18 U.S.C. § 3553(a)(6), 28 U.S.C. § 991(b)(1)(B), courts should not give specific offender characteristics excessive weight. The guideline range, which reflects the defendant's criminal conduct and the defendant's criminal history, should continue to be "the starting point and the initial benchmark." Gall, *supra*, at 49.*

*The amended introductory commentary also states that the Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as contemplated by the Sentencing Reform Act. See, e.g., 28 U.S.C. § 995(a)(12)(A). The Commission expects that providing such information on an ongoing basis will promote nationwide consistency in the consideration of specific offender characteristics by courts and help avoid unwarranted sentencing disparities.*

*Second, the amendment amends several policy statements that cover specific offender characteristics addressed in 28 U.S.C. § 994(d): §§5H1.1 (Age), 5H1.3 (Mental and Emotional Conditions), and 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction). As amended, these policy statements generally provide that age; mental and emotional conditions; and physical condition or appearance, including physique, "may be relevant in determining whether a departure is warranted, if [the offender characteristic], individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines." The Commission adopted this departure standard after reviewing recent federal sentencing data, trial and appellate court case law, scholarly literature, public comment and testimony, and feedback in various forms from federal judges.*

*The amendment also amends §§5H1.3 and 5H1.4 to provide that in certain cases described in Application Note 6 to §5C1.1 (Imposition of a Term of Imprisonment) a departure may be appropriate.*

*Third, the amendment amends §5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related*

*Contributions; Record of Prior Good Works) to draw a distinction between military service and the other circumstances covered by that policy statement. As amended, the policy statement provides that military service "may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines". The Commission determined that applying this departure standard to consideration of military service is appropriate because such service has been recognized as a traditional mitigating factor at sentencing. See, e.g., Porter v. McCollum, 130 S. Ct. 447, 455 (2009) ("Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines . . .").*

*Finally, the amendment makes conforming changes to §5K2.0 (Grounds for Departure).*

**Amendment:**

**(A) Introductory Commentary**

**PART H - SPECIFIC OFFENDER CHARACTERISTICS**

*Introductory Commentary*

~~*The following policy statements address the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range and, in certain cases, to the determination of a sentence within the applicable guideline range. Under 28 U.S.C. § 994(d), the Commission is directed to consider whether certain specific offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined to be relevant by the Commission.*~~

*This Part addresses the relevance of certain specific offender characteristics in sentencing. The Sentencing Reform Act (the "Act") contains several provisions regarding specific offender characteristics:*

*First, the Act directs the Commission to ensure that the guidelines and policy statements "are entirely neutral" as to five characteristics – race, sex, national origin, creed, and socioeconomic status. See 28 U.S.C. § 994(d).*

*Second, the Act directs the Commission to consider whether eleven specific offender characteristics, "among others", have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance. See 28 U.S.C. § 994(d).*

*Third, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the "general inappropriateness" of considering five of those characteristics – education; vocational skills; employment record; family ties and responsibilities; and community ties. See 28 U.S.C. § 994(e).*

*Fourth, the Act also directs the sentencing court, in determining the particular sentence to be*

*imposed, to consider, among other factors, "the history and characteristics of the defendant". See 18 U.S.C. § 3553(a)(1).*

*Specific offender characteristics are taken into account in the guidelines in several ways. One important specific offender characteristic is the defendant's criminal history, see 28 U.S.C. §994(d)(10), which is taken into account in the guidelines in Chapter Four (Criminal History and Criminal Livelihood). See §5H1.8 (Criminal History). Another specific offender characteristic in the guidelines is the degree of dependence upon criminal history for a livelihood, see 28 U.S.C. § 994(d)(11), which is taken into account in Chapter Four, Part B (Career Offenders and Criminal Livelihood). See §5H1.9 (Dependence upon Criminal Activity for a Livelihood). Other specific offender characteristics are accounted for elsewhere in this manual. See, e.g., §§2C1.1(a)(1) and 2C1.2(a)(1) (providing alternative base offense levels if the defendant was a public official); 3B1.3 (Abuse of Position of Trust or Use of Special Skill); and 3E1.1 (Acceptance of Responsibility).*

*The Supreme Court has emphasized that the advisory guideline system should "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." See United States v. Booker, 543 U.S. 220, 264-65 (2005). Although the court must consider "the history and characteristics of the defendant" among other factors, see 18 U.S.C. § 3553(a), in order to avoid unwarranted sentencing disparities the court should not give them excessive weight. Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence. To avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, see 18 U.S.C. § 3553(a)(6), 28 U.S.C. § 991(b)(1)(B), the guideline range, which reflects the defendant's criminal conduct and the defendant's criminal history, should continue to be "the starting point and the initial benchmark." Gall v. United States, 552 U.S. 38, 49 (2007).*

*Accordingly, the purpose of this Part is to provide sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner. Using such a framework in a uniform manner will help "secure nationwide consistency," see Gall v. United States, 552 U.S. 38, 49 (2007), "avoid unwarranted sentencing disparities," see 28 U.S.C. § 991(b)(1)(B), 18 U.S.C. § 3553(a)(6), "provide certainty and fairness," see 28 U.S.C. § 991(b)(1)(B), and "promote respect for the law," see 18 U.S.C. § 3553(a)(2)(A).*

*This Part allocates specific offender characteristics into three general categories.*

*In the first category are specific offender characteristics the consideration of which Congress has prohibited (e.g., §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status)) or that the Commission has determined should be prohibited.*

*In the second category are specific offender characteristics that Congress directed the Commission to take into account in the guidelines only to the extent that they have relevance to sentencing. See 28 U.S.C. § 994(d). For some of these, the policy statements indicate that these characteristics may be relevant in determining whether a sentence outside the applicable guideline range is warranted (e.g., age; mental and emotional condition; physical condition). These characteristics may warrant a sentence outside the*

*applicable guideline range if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. These specific offender characteristics also may be considered for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence.*

~~The Commission has determined that certain circumstances~~*In the third category are specific offender characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. See 28 U.S.C. § 994(e). The policy statements indicate that these characteristics are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, or to the determination of various other incidents aspects of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. See §5K2.0 (Grounds for Departure).*

~~In addition, 28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, and family ties and responsibilities in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment.~~

*As with the other provisions in this manual, these policy statements "are evolutionary in nature". See Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines); 28 U.S.C. § 994(o). The Commission expects, and the Sentencing Reform Act contemplates, that continuing research, experience, and analysis will result in modifications and revisions.*

*The nature, extent, and significance of specific offender characteristics can involve a range of considerations. The Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as the Sentencing Reform Act contemplates. See, e.g., 28 U.S.C. § 995(a)(12)(A) (the Commission serves as a "clearinghouse and information center" on federal sentencing). Among other things, this may include information on the use of specific offender characteristics, individually and in combination, in determining the sentence to be imposed (including, where available, information on rates of use, criteria for use, and reasons for use); the relationship, if any, between specific offender characteristics and (A) the "forbidden factors" specified in 28 U.S.C. § 994(d) and (B) the "discouraged factors" specified in 28 U.S.C. § 994(e); and the relationship, if any, between specific offender characteristics and the statutory purposes of sentencing.*

**(B) Chapter Five, Part H Policy Statements**

**§5H1.1. Age (Policy Statement)**

Age (including youth) ~~is not ordinarily relevant in determining whether a departure is warranted~~ **may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.** Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

\* \* \*

**§5H1.3. Mental and Emotional Conditions (Policy Statement)**

Mental and emotional conditions ~~are not ordinarily relevant in determining whether a departure is warranted~~ **may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. See also**, except as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

**In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. See §5C1.1, Application Note 6.**

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program (see §§5B1.3(d)(5) and 5D1.3(d)(5)).

\* \* \*

**§5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)**

Physical condition or appearance, including physique, ~~is not ordinarily relevant in determining whether a departure may be warranted~~ **may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. However, an** extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse **ordinarily** is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be

sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (see §5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the ~~supervisory body~~ **probation office** to judge the success of the program.

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. See §5C1.1, Application Note 6.

~~Similarly, where~~ **In a case in which** a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (see §5B1.3(d)(4)).

Addiction to gambling is not a reason for a downward departure.

\* \* \*

**§5H1.11. Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)**

Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.

~~Military, civic~~ **Civic**, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

**(C) §5K2.0**

**§5K2.0. Grounds for Departure (Policy Statement)**

\* \* \*

(d) **PROHIBITED DEPARTURES.**—Notwithstanding subsections (a) and (b) of this policy statement, or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances:

- (1) Any circumstance specifically prohibited as a ground for departure in §§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the ~~third and last sentences~~ **last sentence** of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts).

\* \* \*

### 3. CULTURAL ASSIMILATION

**Reason for Amendment:** *This amendment addresses when a downward departure may be appropriate in an illegal reentry case sentenced under §2L1.2 (Unlawfully Entering or Remaining in the United States) on the basis of the defendant's cultural assimilation to the United States.*

*Several circuits have upheld departures based on cultural assimilation. See, e.g., United States v. Rodriguez-Montelongo, 263 F.3d 429, 433 (5th Cir. 2001); United States v. Sanchez-Valencia, 148 F.3d 1273, 1274 (11th Cir. 1998); United States v. Lipman, 133 F.3d 726, 730 (9th Cir. 1998). Other circuits have declined to rule on whether such a departure may be warranted. See, e.g., United States v. Galarza-Payan, 441 F.3d 885, 889 (10th Cir. 2006) ("We need not address that debate in the altered post-Booker landscape."); United States v. Melendez-Torres, 420 F.3d 45, 51 n.3 (1st Cir. 2005); see also United States v. Ticas, 219 F. App'x 44, 45 (2d Cir. 2007) (acknowledging that the Second Circuit has never recognized cultural assimilation as a basis for a downward departure). Some circuits, though not foreclosing the possibility of cultural assimilation departures, have stated that district courts are within their discretion to deny such departures in light of a defendant's criminal past and society's increased interest in "keeping aliens who have committed crimes out of the United States following their deportation." United States v. Roche-Martinez, 467 F.3d 591, 595 (7th Cir. 2006); see also Galarza-Payan, *supra*, at 889-90 (stating that "in assessing the reasonableness of a sentence [] a particular defendant's cultural ties must be weighed against other factors such as (1) sentencing disparities among defendants with similar backgrounds and characteristics, and (2) the need for the sentence to reflect the seriousness of the crime and promote respect for the law").*

*In order to promote uniform consideration of cultural assimilation by courts, the amendment adds an application note to §2L1.2 providing that a downward departure may be appropriate on the basis of cultural assimilation. The application note provides that such a departure may be appropriate if (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant. The application note also provides a non-exhaustive list of factors the court should consider in determining whether such a departure is appropriate.*

#### **Amendment:**

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic
  - (1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

- (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels;
- (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels;
- (C) a conviction for an aggravated felony, increase by **8** levels;
- (D) a conviction for any other felony, increase by **4** levels; or
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

\* \* \*

7. Departure Consideration Based on Seriousness of a Prior Conviction.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.

8. Departure Based on Cultural Assimilation.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

*In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the*

*defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.*

#### 4. APPLICATION INSTRUCTIONS

**Reason for Amendment:** *This amendment amends §1B1.1 (Application Instructions) in light of United States v. Booker, 543 U.S. 220 (2005), and subsequent case law.*

*As explained more fully in Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines) of the Guidelines Manual, a district court is required to properly calculate and consider the guidelines when sentencing. See 18 U.S.C. § 3553(a)(4); Booker, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing."); Rita v. United States, 551 U.S. 338, 347-48 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); Gall v. United States, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").*

*After determining the guideline range, the district court should refer to the Guidelines Manual and consider whether the case warrants a departure. See 18 U.S.C. § 3553(a)(5). "'Departure' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." Irizarry v. United States, 128 S.Ct. 2198, 2202 (2008). A "variance" – i.e., a sentence outside the guideline range other than as provided for in the Guidelines Manual – is considered by the court only after departures have been considered.*

*Most circuits agree on a three-step approach, including the consideration of departure provisions in the Guidelines Manual, in determining the sentence to be imposed. See United States v. Dixon, 449 F.3d 194, 203-04 (1st Cir. 2006) (court must consider "any applicable departures"); United States v. Selioutsky, 409 F.3d 114, 118 (2d Cir. 2005) (court must consider "available departure authority"); United States v. Jackson, 467 F.3d 834, 838 (3d Cir. 2006) (same); United States v. Moreland, 437 F.3d 424, 433 (4th Cir. 2006) (departures "remain an important part of sentencing even after Booker"); United States v. Tzep-Mejia, 461 F.3d 522, 525 (5th Cir. 2006) ("Post-Booker case law recognizes three types of sentences under the new advisory sentencing regime: (1) a sentence within a properly calculated Guideline range; (2) a sentence that includes an upward or downward departure as allowed by the Guidelines, which sentence is also a Guideline sentence; or (3) a non-Guideline sentence which is either higher or lower than the relevant Guideline sentence." (internal footnote and citation omitted)); United States v. McBride, 434 F.3d 470, 476 (6th Cir. 2006) (district court "still required to consider . . . whether a Chapter 5 departure is appropriate"); United States v. Hawk Wing, 433 F.3d 622, 631 (8th Cir. 2006) ("the district court must decide if a traditional departure is appropriate", and after that must consider a variance (internal quotation omitted)); United States v. Robertson, 568 F.3d 1203, 1210 (10th Cir. 2009) (district courts must continue to apply departures); United States v. Jordi, 418 F.3d 1212, 1215 (11th Cir. 2005) (stating that "the application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered"). But see United States v. Johnson, 427 F.3d 423, 426 (7th Cir. 2006) (stating that departures are "obsolete").*

*The amendment resolves the circuit conflict and adopts the three-step approach followed by a majority of circuits in determining the sentence to be imposed. The amendment restructures §1B1.1 into three subsections to reflect the three-step process. As amended, subsection (a) addresses how to apply the provisions in the Guidelines Manual to properly determine the kinds of sentence and the guideline range. Subsection (b) addresses the need to consider the policy statements and commentary to determine whether a departure is warranted. Subsection (c) addresses the need to consider the applicable factors under 18 U.S.C. § 3553(a) taken as a whole in determining the appropriate sentence. The amendment also adds*

*background commentary referring to the statutory requirements of 18 U.S.C. § 3553(a) and defining the term "variance" as "a sentence that is outside the guidelines framework".*

**Amendment:**

**§1B1.1. Application Instructions**

- (a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (see 18 U.S.C. § 3553(a)(4)) by applying ~~Except as specifically directed,~~ the provisions of this manual ~~are to be applied~~ in the following order, **except as specifically directed:**
- (a1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See §1B1.2.
  - (b2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.
  - (c3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.
  - (d4) If there are multiple counts of conviction, repeat steps ~~(a)~~(1) through ~~(c)~~(3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.
  - (e5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.
  - (f6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.
  - (g7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.
  - (h8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.
- (ib) **The court shall then consider** ~~Refer to~~ Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and ~~to~~ any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. See 18 U.S.C. § 3553(a)(5).

- (c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. See 18 U.S.C. § 3553(a).

Commentary

Application Notes:

\* \* \*

*Background: The court must impose a sentence "sufficient, but not greater than necessary," to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). See 18 U.S.C. § 3553(a). Subsections (a), (b), and (c) are structured to reflect the three-step process used in determining the particular sentence to be imposed. If, after step (c), the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a "variance". See Irizarry v. United States, 128 S. Ct. 2198, 2200-03 (2008) (describing within-range sentences and departures as "sentences imposed under the framework set out in the Guidelines").*

## 5. RECENCY

**Reason for Amendment:** *This amendment addresses a factor included in the calculation of the criminal history score in Chapter Four of the Guidelines Manual. Specifically, this amendment eliminates the "recency" points provided in subsection (e) of §4A1.1 (Criminal History Category). Under §4A1.1(e), one or two points are added to the criminal history score if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under subsection (a) or (b) or while in imprisonment or escape status on such a sentence. In addition to recency, subsections (a), (b), (c), (d), and (f) add points to the criminal history score to account for the seriousness of the prior offense and the status of the defendant. These other factors remain included in the criminal history score after the amendment.*

*The amendment is a result of the Commission's continued review of criminal history issues. This multi-year review was prompted in part because criminal history issues are often cited by sentencing courts as reasons for imposing non-government sponsored below range sentences, particularly in cases in which recency points were added to the criminal history score under §4A1.1(e).*

*As part of its review, the Commission undertook analyses to determine the extent to which recency points contribute to the ability of the criminal history score to predict the defendant's risk of recidivism. See generally USSG Ch. 4, Pt. A, intro. comment ("To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered."). Recent research isolating the effect of §4A1.1(e) on the predictive ability of the criminal history score indicated that consideration of recency only minimally improves the predictive ability.*

*In addition, the Commission received public comment and testimony suggesting that the recency of the instant offense to the defendant's release from imprisonment does not necessarily reflect increased culpability. Public comment and testimony indicated that defendants who recidivate tend to do so relatively soon after being released from prison but suggested that, for many defendants, this may reflect the challenges to successful reentry after imprisonment rather than increased culpability.*

*Finally, Commission data indicated that many of the cases in which recency points apply are sentenced under Chapter Two guidelines that have provisions based on criminal history. The amendment responds to suggestions that recency points are not necessary to adequately account for criminal history in such cases.*

### **Amendment:**

#### **§4A1.1. Criminal History Category**

The total points from ~~items~~ **subsections** (a) through ~~(f)~~**(e)** 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~~subsection.

- (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.~~
- (fe) 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 counted as a single sentence, up to a total of 3 points for this ~~item~~subsection.

Commentary

\* \* \*

Application Notes:

1. §4A1.1(a). Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this ~~item~~subsection. The term "prior sentence" is defined at §4A1.2(a). The term "sentence of imprisonment" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see §4A1.2(k).

*Certain prior sentences are not counted or are counted only under certain conditions:*

*A sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted unless the defendant's incarceration extended into this fifteen-year period. See §4A1.2(e).*

*A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted under this ~~item~~subsection only if it resulted from an adult conviction. See §4A1.2(d).*

*A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. See §4A1.2(h) and (j) and the Commentary to §4A1.2.*

2. §4A1.1(b). Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this ~~item~~subsection. The term "prior sentence" is defined at §4A1.2(a). The term "sentence of imprisonment" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see §4A1.2(k).

\* \* \*

3. §4A1.1(c). One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this ~~item~~ **subsection**. The term "prior sentence" is defined at §4A1.2(a).

\* \* \*

4. §4A1.1(d). Two points are added if the defendant committed any part of the instant offense (*i.e.*, any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). For the purposes of this ~~item~~ **subsection**, a "criminal justice sentence" means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this ~~item~~ **subsection** to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. See §4A1.2(m).
- ~~5. §4A1.1(e). Two points are added if the defendant committed any part of the instant offense (*i.e.*, any relevant conduct) less than two years following release from confinement on a sentence counted under §4A1.1(a) or (b). This also applies if the defendant committed the instant offense while in imprisonment or escape status on such a sentence. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). However, if two points are added under §4A1.1(d), only one point is added under §4A1.1(e).~~
65. §4A1.1(fe). In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are counted as a single sentence (see §4A1.2(a)(2)), one point is added under §4A1.1(fe) 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(fe). 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). 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(fe) 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(fe) 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.*

*Background: Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. In recognition of the imperfection of this measure however, §4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances.*

*~~Subdivisions~~**Subsections** (a), (b), and (c) of §4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house.*

*Section 4A1.1(d) ~~implements one measure of recency by adding~~ **adds** two points if the defendant was under a criminal justice sentence during any part of the instant offense.*

*~~Section 4A1.1(e) implements another measure of recency by adding two points if the defendant committed any part of the instant offense less than two years immediately following his release from confinement on a sentence counted under §4A1.1(a) or (b). Because of the potential overlap of (d) and (e), their combined impact is limited to three points. However, a defendant who falls within both (d) and (e) is more likely to commit additional crimes; thus, (d) and (e) are not completely combined.~~*

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

### **(a) Prior Sentence**

- (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) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a 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 offenses 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)(e).

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.

\* \* \*

**(k) Revocations of Probation, Parole, Mandatory Release, or Supervised Release**

- (1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable.
- (2) ~~(A) — Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the points for §4A1.1(e) in respect to the recency of last release from confinement.~~  
~~(B)~~ Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in §4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (i) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (see §4A1.2(e)(1)); (ii) in the case of any other confinement sentence for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from confinement on such sentence (see §4A1.2(d)(2)(A)); and (iii) in any other case, the date of the original sentence (see §4A1.2(d)(2)(B) and (e)(2)).

**(l) Sentences on Appeal**

Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1(a), (b), (c), (d), and ~~(f)~~(e) shall apply as if the execution of such sentence had not been stayed; ~~§4A1.1(e) shall not apply.~~

\* \* \*

**(n) Failure to Report for Service of Sentence of Imprisonment**

For the purposes of §4A1.1(d) ~~and (e)~~, failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

\* \* \*

(p) **Crime of Violence Defined**

For the purposes of §4A1.1~~(f)~~(e), the definition of "crime of violence" is that set forth in §4B1.2(a).

Commentary

Application Notes:

\* \* \*

12. Application of Subsection (c).—

- (A) In General.—*In determining whether an unlisted offense is similar to an offense listed in ~~subdivision~~subsection (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.*

## 6. HATE CRIMES

**Reason for Amendment:** *This amendment responds to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (division E of Pub. L. 111–84) (the "Act"). The Act created two new offenses and amended a 1994 directive to the Commission regarding crimes motivated by hate.*

*The first new offense, 18 U.S.C. § 249 (Hate crime acts), makes it unlawful, whether or not acting under color of law, to willfully cause bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, to attempt to cause bodily injury to any person because of the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of any person. A person who violates 18 U.S.C. § 249 is subject to a term of imprisonment of up to 10 years or, if the offense includes kidnapping, aggravated sexual abuse, or an attempt to kill, or if death results from the offense, to imprisonment for any term of years or life. The amendment amends Appendix A (Statutory Index) to refer offenses under 18 U.S.C. § 249 to §2H1.1 (Offenses Involving Individual Rights) because that guideline covers similar offenses, e.g., 18 U.S.C. §§ 241 (Conspiracy against rights) and 242 (Deprivation of rights under color of law), and contains appropriate enhancements to account for aggravating circumstances that may be involved in a section 249 offense, e.g., subsection (b)(1), which provides a 6-level increase if the offense was committed under color of law.*

*The Act also amended section 280003 of the Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103–322; 28 U.S.C. § 994 note), which contains a directive to the Commission regarding hate crimes. The Commission implemented that directive by promulgating subsection (a) of §3A1.1 (Hate Crime Motivation or Vulnerable Victim). See USSG App. C, Amendment 521 (effective November 1, 1995). The Act broadened the definition of "hate crime" in section 280003(a) to include crimes motivated by actual or perceived "gender identity", which has the effect of expanding the scope of the directive in section 280003(b) so that it now requires the Commission to provide an enhancement for crimes motivated by actual or perceived "gender identity". To reflect the broadened definition, the amendment amends §3A1.1 so that the enhancement in subsection (a) covers crimes motivated by actual or perceived "gender identity" and makes conforming changes to §§2H1.1. The amendment also deletes as unnecessary the parenthetical in the Background to §3A1.1, which provided an example of "hate crime motivation".*

*The second new offense, 18 U.S.C. § 1389 (Prohibition on attacks on United States servicemen on account of service), makes it unlawful to knowingly assault or batter a United States serviceman or an immediate family member of a United States serviceman, or to knowingly destroy or injure the property of such serviceman or immediate family member, on the account of the military service of that serviceman or the status of that individual as a United States serviceman. A person who violates 18 U.S.C. § 1389 is subject to a term of imprisonment of not more than 2 years in the case of a simple assault, or damage of not more than \$500, of not more than 5 years in the case of damage of more than \$500, or of not less than 6 months nor more than 10 years in the case of a battery, or an assault resulting in bodily injury. The Commission determined that offenses under 18 U.S.C. § 1389 are similar to offenses involving assault or property damage that are already referenced to §§2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), and 2B1.1 (Theft, Property Destruction, and Fraud) and therefore amended Appendix A (Statutory Index) to refer the new offense to those guidelines.*

**Amendment:**

**§2H1.1. Offenses Involving Individual Rights**

- (a) Base Offense Level (Apply the Greatest):
  - (1) the offense level from the offense guideline applicable to any underlying offense;
  - (2) **12**, if the offense involved two or more participants;
  - (3) **10**, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or
  - (4) **6**, otherwise.
- (b) Specific Offense Characteristic
  - (1) If (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by **6** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 242, 245(b), 246, 247, 248, **249**, 1091; 42 U.S.C. § 3631.

Application Notes:

\* \* \*

- 4. *If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, **gender identity**, disability, or sexual orientation of any person, an additional 3-level enhancement from §3A1.1(a) will apply. An adjustment from §3A1.1(a) will not apply, however, if a 6-level adjustment from §2H1.1(b) applies. See §3A1.1(c).*

\* \* \*

**§3A1.1. Hate Crime Motivation or Vulnerable Victim**

- (a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, **gender identity**, disability, or sexual orientation of any person, increase by **3** levels.
- (b) (1) If the defendant knew or should have known that a victim of the offense

was a vulnerable victim, increase by 2 levels.

(2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by 2 additional levels.

(c) Special Instruction

(1) Subsection (a) shall not apply if an adjustment from §2H1.1(b)(1) applies.

Commentary

Application Notes:

\* \* \*

- 3. *The adjustments from subsections (a) and (b) are to be applied cumulatively. Do not, however, apply subsection (b) in a case in which subsection (a) applies unless a victim of the offense was unusually vulnerable for reasons unrelated to race, color, religion, national origin, ethnicity, gender, **gender identity**, disability, or sexual orientation.*
- 4. *If an enhancement from subsection (b) applies and the defendant’s criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted.*
- 5. *For purposes of this guideline, "gender identity" means actual or perceived gender-related characteristics. See 18 U.S.C. § 249(c)(4).*

Background: *Subsection (a) reflects the directive to the Commission, contained in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation (~~i.e., a primary motivation for the offense was the race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of the victim~~). To avoid unwarranted sentencing disparity based on the method of conviction, the Commission has broadened the application of this enhancement to include offenses that, in the case of a plea of guilty or nolo contendere, the court at sentencing determines are hate crimes. In section 4703(a) of Public Law 111–84, Congress broadened the scope of that directive to include gender identity; to reflect that congressional action, the Commission has broadened the scope of this enhancement to include gender identity.*

\* \* \*

**APPENDIX A - STATUTORY INDEX**

18 U.S.C. § 247	2H1.1
18 U.S.C. § 249	2H1.1
18 U.S.C. § 1369	2B1.1, 2B1.5
18 U.S.C. § 1389	2A2.2, 2A2.3, 2B1.1

## 7. ORGANIZATIONAL GUIDELINES

**Reason for Amendment:** *This amendment makes several changes to Chapter Eight of the Guidelines Manual regarding the sentencing of organizations.*

*First, the amendment amends the Commentary to §8B2.1 (Effective Compliance and Ethics Program) by adding an application note that clarifies the remediation efforts required to satisfy the seventh minimal requirement for an effective compliance and ethics program under subsection (b)(7). Subsection (b)(7) requires an organization, after criminal conduct has been detected, to take reasonable steps (1) to respond appropriately to the criminal conduct and (2) to prevent further similar criminal conduct.*

*The new application note describes the two aspects of subsection (b)(7). With respect to the first aspect, the application note provides that the organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. The application note further provides that such steps may include, where appropriate, providing restitution to identifiable victims, other forms of remediation, and self-reporting and cooperation with authorities. With respect to the second aspect, the application note provides that an organization should assess the compliance and ethics program and make modifications necessary to ensure the program is effective. The application note further provides that such steps should be consistent with §8B2.1(b)(5) and (c), which also require assessment and modification of the program, and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.*

*This application note was added in response to public comment and testimony suggesting that further guidance regarding subsection (b)(7) may encourage organizations to take reasonable steps upon discovery of criminal conduct. The steps outlined by the application note are consistent with factors considered by enforcement agencies in evaluating organizational compliance and ethics practices.*

*Second, the amendment amends subsection (f) of §8C2.5 (Culpability Score) to create a limited exception to the general prohibition against applying the 3-level decrease for having an effective compliance and ethics program when an organization's high-level or substantial authority personnel are involved in the offense. Specifically, the amendment adds subsection (f)(3)(C), which allows an organization to receive the decrease if the organization meets four criteria: (1) the individual or individuals with operational responsibility for the compliance and ethics program have direct reporting obligations to the organization's governing authority or appropriate subgroup thereof; (2) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely; (3) the organization promptly reported the offense to the appropriate governmental authorities; and (4) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.*

*The new subsection (f)(3)(C) responds to concerns expressed in public comment and testimony that the general prohibition in §8C2.5(f)(3) operates too broadly and that internal and external reporting of criminal conduct could be better encouraged by providing an exception to that general prohibition in appropriate cases.*

*The amendment also adds an application note that describes the "direct reporting obligations" necessary to meet the first criterion under §8C2.5(f)(3)(C). The application note provides that an individual has "direct reporting obligations" if the individual has express authority to communicate personally to the governing*

authority "promptly on any matter involving criminal conduct or potential criminal conduct" and "no less than annually on the implementation and effectiveness of the compliance and ethics program". The application note responds to public comment and testimony regarding the challenges operational compliance personnel may face when seeking to report criminal conduct to the governing authority of an organization and encourages compliance and ethics policies that provide operational compliance personnel with access to the governing authority when necessary.

Third, the amendment amends §8D1.4 (Recommended Conditions of Probation – Organizations (Policy Statement)) to augment and simplify the recommended conditions of probation for organizations. The amendment removes the distinction between conditions of probation imposed solely to enforce a monetary penalty and conditions of probation imposed for any other reason so that all conditional probation terms are available for consideration by the court in determining an appropriate sentence.

Finally, the amendment makes technical and conforming changes to various provisions in Chapter Eight.

**Amendment:**

**§8B2.1. Effective Compliance and Ethics Program**

- (a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—
- (1) exercise due diligence to prevent and detect criminal conduct; and
  - (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
- Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.
- (b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:
- (1) The organization shall establish standards and procedures to prevent and detect criminal conduct.
  - (2) (A) The organization’s governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

- (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.
  - (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.
- (3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.
- (4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in ~~subdivision~~ **subparagraph** (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.
- (B) The individuals referred to in ~~subdivision~~ **subparagraph** (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.
- (5) The organization shall take reasonable steps—
- (A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;
  - (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and
  - (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the

organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

- (6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.
  - (7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.
- (c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.

Commentary

Application Notes:

\* \* \*

2. Factors to Consider in Meeting Requirements of this Guideline.—

\* \* \*

- (D) Recurrence of Similar Misconduct.—*Recurrence of similar misconduct creates doubt regarding whether the organization took reasonable steps to meet the requirements of this guideline. For purposes of this subdivision***subparagraph***, "similar misconduct" has the meaning given that term in the Commentary to §8A1.2 (Application Instructions - Organizations).*

\* \* \*

6. Application of Subsection (b)(7).—*Subsection (b)(7) has two aspects.*

*First, the organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps to respond appropriately to the criminal conduct may include self-reporting and cooperation with authorities.*

*Second, the organization should act appropriately to prevent further similar criminal conduct, including assessing the compliance and ethics program and making modifications necessary to ensure the program is effective. The steps taken should be consistent with subsections (b)(5) and (c) and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.*

67. Application of Subsection (c).—To meet the requirements of subsection (c), an organization shall:

\* \* \*

- (B) *Prioritize periodically, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b), in order to focus on preventing and detecting the criminal conduct identified under ~~subdivision~~ **subparagraph** (A) of this note as most serious, and most likely, to occur.*
- (C) *Modify, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b) to reduce the risk of criminal conduct identified under ~~subdivision~~ **subparagraph** (A) of this note as most serious, and most likely, to occur.*

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

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

\* \* \*

**§8C2.5. Culpability Score**

(a) Start with 5 points and apply subsections (b) through (g) below.

(b) Involvement in or Tolerance of Criminal Activity

If more than one applies, use the greatest:

(1) If --

(A) the organization had 5,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

- (ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or
- (B) the unit of the organization within which the offense was committed had 5,000 or more employees and
  - (i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or
  - (ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **5** points; or

(2) If --

- (A) the organization had 1,000 or more employees and
  - (i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or
  - (ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or
- (B) the unit of the organization within which the offense was committed had 1,000 or more employees and
  - (i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or
  - (ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **4** points; or

(3) If --

- (A) the organization had 200 or more employees and
  - (i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or
  - (ii) tolerance of the offense by substantial authority personnel

was pervasive throughout the organization; or

- (B) the unit of the organization within which the offense was committed had 200 or more employees and
  - (i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or
  - (ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **3** points; or

- (4) If the organization had 50 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add **2** points; or
- (5) If the organization had 10 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add **1** point.

(c) Prior History

If more than one applies, use the greater:

- (1) If the organization (or separately managed line of business) committed any part of the instant offense less than 10 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add **1** point; or
- (2) If the organization (or separately managed line of business) committed any part of the instant offense less than 5 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add **2** points.

(d) Violation of an Order

If more than one applies, use the greater:

- (1) (A) If the commission of the instant offense violated a judicial order or injunction, other than a violation of a condition of probation; or (B) if the organization (or separately managed line of business) violated a condition of probation by engaging in similar misconduct, i.e., misconduct similar to that for which it was placed on probation, add **2** points; or

- (2) If the commission of the instant offense violated a condition of probation, add 1 point.

(e) Obstruction of Justice

If the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impedance, add 3 points.

(f) Effective Compliance and Ethics Program

- (1) If the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program, as provided in §8B2.1 (Effective Compliance and Ethics Program), subtract 3 points.

- (2) Subsection (f)(1) shall not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.

- (3) (A) Except as provided in ~~subdivision (B)~~ **subparagraphs (B) and (C)**, subsection (f)(1) shall not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual described in §8B2.1(b)(2)(B) or (C), participated in, condoned, or was willfully ignorant of the offense.

- (B) There is a rebuttable presumption, for purposes of subsection (f)(1), that the organization did not have an effective compliance and ethics program if an individual—

(i) within high-level personnel of a small organization; or

(ii) within substantial authority personnel, but not within high-level personnel, of any organization,

participated in, condoned, or was willfully ignorant of, the offense.

- (C) Subparagraphs (A) and (B) shall not apply if—**

**(i) the individual or individuals with operational responsibility for the compliance and ethics program (see §8B2.1(b)(2)(C)) have direct reporting obligations to the governing authority or an appropriate subgroup thereof**

(e.g., an audit committee of the board of directors);

- (ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;
- (iii) the organization promptly reported the offense to appropriate governmental authorities; and
- (iv) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.

(g) Self-Reporting, Cooperation, and Acceptance of Responsibility

If more than one applies, use the greatest:

- (1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **5** points; or
- (2) If the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **2** points; or
- (3) If the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **1** point.

Commentary

Application Notes:

\* \* \*

- 10. *Subsection (f)(2) contemplates that the organization will be allowed a reasonable period of time to conduct an internal investigation. In addition, no reporting is required by subsection (f)(2) or (f)(3)(C)(iii) if the organization reasonably concluded, based on the information then available, that no offense had been committed.*
- 11. *For purposes of subsection (f)(3)(C)(i), an individual has "direct reporting obligations" to the governing authority or an appropriate subgroup thereof if the individual has express authority to communicate personally to the governing authority or appropriate subgroup thereof (A) promptly*

*on any matter involving criminal conduct or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the compliance and ethics program.*

- ~~†12.~~ *"Appropriate governmental authorities," as used in subsections (f) and (g)(1), means the federal or state law enforcement, regulatory, or program officials having jurisdiction over such matter. To qualify for a reduction under subsection (g)(1), the report to appropriate governmental authorities must be made under the direction of the organization.*
- ~~†13.~~ *To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation.*
- ~~†14.~~ *Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct ordinarily will constitute significant evidence of affirmative acceptance of responsibility under subsection (g), unless outweighed by conduct of the organization that is inconsistent with such acceptance of responsibility. This adjustment is not intended to apply to an organization that puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude an organization from consideration for such a reduction. In rare situations, an organization may clearly demonstrate an acceptance of responsibility for its criminal conduct even though it exercises its constitutional right to a trial. This may occur, for example, where an organization goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to its conduct). In each such instance, however, a determination that an organization has accepted responsibility will be based primarily upon pretrial statements and conduct.*
- ~~†15.~~ *In making a determination with respect to subsection (g), the court may determine that the chief executive officer or highest ranking employee of an organization should appear at sentencing in order to signify that the organization has clearly demonstrated recognition and affirmative acceptance of responsibility.*

*Background:* *The increased culpability scores under subsection (b) are based on three interrelated principles. First, an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are willfully ignorant of criminal conduct. Second, as organizations become larger and their managements become more professional, participation in, condonation of, or willful ignorance of criminal conduct by such management is increasingly a breach of trust or abuse of position. Third, as organizations increase in size, the risk of*

*criminal conduct beyond that reflected in the instant offense also increases whenever management's tolerance of that offense is pervasive. Because of the continuum of sizes of organizations and professionalization of management, subsection (b) gradually increases the culpability score based upon the size of the organization and the level and extent of the substantial authority personnel involvement.*

\* \* \*

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

- (a) The court may order the organization, at its expense and in the format and media specified by the court, to publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses.
- (b) If probation is imposed under §8D1.1~~(a)(2)~~, the following conditions may be appropriate ~~to the extent they appear necessary to safeguard the organization's ability to pay any deferred portion of an order of restitution, fine, or assessment:~~
  - (1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.
  - (2) Upon approval by the court of a program referred to in paragraph (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in paragraph (1). Such notice shall be in a form prescribed by the court.
  - ~~(3)~~ The organization shall make periodic submissions to the court or probation officer, at intervals specified by the court, (A) reporting on the organization's financial condition and results of business operations, and accounting for the disposition of all funds received, and (B) reporting on the organization's progress in implementing the program referred to in paragraph (1). Among other things, reports under subparagraph (B) shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.
  - (4) The organization shall notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

- (25) The organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.
- ~~(3) The organization shall be required to notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.~~
- (46) The organization shall be required to make periodic payments, as specified by the court, in the following priority: (A) restitution; (B) fine; and (C) any other monetary sanction.
- ~~(c) If probation is ordered under §8D1.1(a)(3), (4), (5), or (6), the following conditions may be appropriate:~~
- ~~(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.~~
- ~~(2) Upon approval by the court of a program referred to in subdivision (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in subdivision (1). Such notice shall be in a form prescribed by the court.~~
- ~~(3) The organization shall make periodic reports to the court or probation officer, at intervals and in a form specified by the court, regarding the organization's progress in implementing the program referred to in subdivision (1). Among other things, such reports shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.~~
- ~~(4) In order to monitor whether the organization is following the program referred to in subdivision (1), the organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable~~

individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

Commentary

Application Note:

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

*Periodic reports submitted in accordance with subsection ~~(c)(3)~~(b)(3) should be provided to any governmental regulatory body that oversees conduct of the organization relating to the instant offense.*

## 8. MISCELLANEOUS

**Reason for Amendment:** *This multi-part amendment responds to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues.*

*First, the amendment responds to the Fraud Enforcement and Recovery Act of 2009, Pub. L. 111–21, which broadened 18 U.S.C. § 1348, a securities fraud statute, to cover commodities fraud. Offenses under 18 U.S.C. § 1348 are referenced in Appendix A (Statutory Index) to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). Section 2B1.1 includes an enhancement at subsection (b)(17)(B) that applies when specified persons who have fiduciary duties violate commodities law. "Commodities law" is defined in Application Note 14 to mean the Commodities Exchange Act (7 U.S.C. § 1 *et seq.*), including the rules, regulations, and orders issued by the Commodity Futures Trading Commission. The amendment adds 18 U.S.C. § 1348 to the definition of "commodities law" for purposes of subsection (b)(17)(B). The Commission determined that including 18 U.S.C. § 1348 within the scope of subsection (b)(17)(B) is appropriate to reflect the expanded scope of the statute.*

*Second, the amendment responds to the Omnibus Public Land Management Act of 2009, Pub. L. 111–11, which created a new offense at 16 U.S.C. § 470aaa-5 making it unlawful to remove, damage, alter, traffic in, or make a false record relating to a paleontological resource on federal land. The amendment amends Appendix A (Statutory Index) to refer offenses under 16 U.S.C. § 470aaa-5 to §§2B1.1 and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) because such offenses are similar either to offenses involving cultural heritage resources or, to the extent they involve false records, to fraud offenses. The amendment also makes technical and conforming changes to §§2B1.1 and 2B1.5.*

*Third, the amendment responds to the Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. 111–3, which created a new Class A misdemeanor offense at 42 U.S.C. § 1396w-2 regarding the unlawful disclosure of certain protected information related to social security eligibility. The amendment amends Appendix A (Statutory Index) to refer offenses under 42 U.S.C. § 1396w-2 to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) because such offenses involve invasions of privacy.*

*Fourth, the amendment responds to a regulatory change in which iodine was upgraded from a List II chemical to a List I chemical. Offenses involving listed chemicals are sentenced under §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy). Because the maximum base offense level for List I chemicals (level 30) is higher than that for List II chemicals (level 28), the amendment increases the maximum base offense level for offenses involving iodine to level 30 and specifies the amount of iodine needed (1.3 kilograms) for base offense level 30 to apply.*

**Amendment:**

**(A) Fraud Enforcement and Recovery Act of 2009**

**§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**

\* \* \*

(17) If the offense involved—

- (A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or
- (B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by 4 levels.

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

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

(A) Definitions.—For purposes of subsection (b)(17):

"Commodities law" means (i) the Commodity Exchange Act (7 U.S.C. § 1 *et seq.*) **and 18 U.S.C. § 1348**; and (ii) includes the rules, regulations, and orders issued by the Commodity Futures Trading Commission.

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

"Commodity trading advisor" has the meaning given that term in section 1a(6) of the Commodity Exchange Act (7 U.S.C. § 1a(6)).

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

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

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

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

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

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

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

\* \* \*

**(B) Omnibus Public Land Management Act of 2009**

**§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**

\* \* \*

(c) Cross References

\* \* \*

- (4) If the offense involved a cultural heritage resource **or a paleontological resource**, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources **or Paleontological Resources**; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources **or Paleontological Resources**), if the resulting offense level is greater than that determined above.

\* \* \*

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

\* \* \*

"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.

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

"Personal information" means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (A) medical records; (B) wills; (C) diaries; (D) private correspondence, including e-mail; (E) financial records; (F) photographs of a sensitive or private nature; or (G) similar information.

\* \* \*

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
  - (1) If the value of the cultural heritage resource **or paleontological resource** (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 a cultural heritage resource **or paleontological resource** from, or that, prior to the offense, was on, in, or in the custody of (A) the national park system; (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery or veterans' memorial; (F) a museum; or (G) the World Heritage List, increase by **2** levels.
  - (3) If the offense involved a cultural heritage resource constituting (A) human remains; (B) a funerary object; (C) cultural patrimony; (D) a sacred object; (E) cultural property; (F) designated archaeological or ethnological

material; or (G) a pre-Columbian monumental or architectural sculpture or mural, increase by 2 levels.

- (4) If the offense was committed for pecuniary gain or otherwise involved a commercial purpose, increase by 2 levels.
- (5) If the defendant engaged in a pattern of misconduct involving cultural heritage resources or paleontological resources, increase by 2 levels.
- (6) If a dangerous weapon was brandished or its use was threatened, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(c) Cross Reference

- (1) If the offense involved arson, or property damage by the use of any explosive, explosive material, or destructive device, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 16 U.S.C. §§ 470aaa–5, 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.

Application Notes:

1. "Cultural Heritage Resource" Defined.—For purposes of this guideline, "cultural heritage resource" means any of the following: Definitions.—For purposes of this guideline:

(A) "Cultural heritage resource" means any of the following:

- (Ai) A historic property, as defined in 16 U.S.C. § 470w(5) (see also section 16(l) of 36 C.F.R. pt. 800).
- (Bii) A historic resource, as defined in 16 U.S.C. § 470w(5).
- (Eiii) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 C.F.R. pt. 7; 36 C.F.R. pt. 296; 32 C.F.R. pt. 299; 18 C.F.R. pt. 1312).
- (Div) A cultural item, as defined in section 2(3) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3) (see also 43 C.F.R. § 10.2(d)).
- (Ev) A commemorative work. "Commemorative work" (AI) has the meaning given that term in section 2(c) of Public Law 99–652 (40 U.S.C. § 1002(c)); and (BII) includes any national monument or national memorial.

- (Fvi) An object of cultural heritage, as defined in 18 U.S.C. § 668(a)(2).
- (Fvii) Designated ethnological material, as described in 19 U.S.C. §§ 2601(2)(ii), 2601(7), and 2604.

(B) *"Paleontological resource" has the meaning given such term in 16 U.S.C. § 470aaa.*

2. Value of the ~~Cultural Heritage~~ Resource Under Subsection (b)(1).—This application note applies to the determination of the value of the ~~cultural heritage~~ resource under subsection (b)(1).

(A) General Rule.—For purposes of subsection (b)(1), the value of the ~~cultural heritage~~ resource shall include, as applicable to the particular resource involved, the following:

- (i) The archaeological value. (Archaeological value shall be included in the case of any ~~cultural heritage~~ resource that is an archaeological resource.)
- (ii) The commercial value.
- (iii) The cost of restoration and repair.

(B) Estimation of Value.—For purposes of subsection (b)(1), the court need only make a reasonable estimate of the value of the ~~cultural heritage~~ resource based on available information.

(C) Definitions.—For purposes of this application note:

- (i) "Archaeological value" of a ~~cultural heritage~~ resource means the cost of the retrieval of the scientific information which would have been obtainable prior to the offense, including the cost of preparing a research design, conducting field work, conducting laboratory analysis, and preparing reports, as would be necessary to realize the information potential. (See, e.g., 43 C.F.R. § 7.14(a); 36 C.F.R. § 296.14(a); 32 C.F.R. § 229.14(a); 18 C.F.R. § 1312.14(a).)
- (ii) "Commercial value" of a ~~cultural heritage~~ resource means the fair market value of the ~~cultural heritage~~ resource at the time of the offense. (See, e.g., 43 C.F.R. § 7.14(b); 36 C.F.R. § 296.14(b); 32 C.F.R. § 229.14(b); 18 C.F.R. § 1312.14(b).)
- (iii) "Cost of restoration and repair" includes all actual and projected costs of curation, disposition, and appropriate reburial of, and consultation with respect to, the ~~cultural heritage~~ resource; and any other actual and projected costs to complete restoration and repair of the ~~cultural heritage~~ resource, including (I) its reconstruction and stabilization; (II) reconstruction and stabilization of ground contour and surface; (III) research necessary to conduct reconstruction and stabilization; (IV) the construction of physical barriers and other protective devices; (V) examination and analysis of the ~~cultural heritage~~ resource as part of efforts to salvage remaining information about the resource; and (VI) preparation of reports. (See, e.g., 43 C.F.R. § 7.14(c); 36 C.F.R. § 296.14(c); 32 C.F.R. §

(D) Determination of Value in Cases Involving a Variety of Cultural Heritage Resources.—In a case involving a variety of ~~cultural heritage~~ resources, the value of the ~~cultural heritage~~ resources is the sum of all calculations made for those resources under this application note.

\* \* \*

5. Pecuniary Gain and Commercial Purpose Enhancement Under Subsection (b)(4).—

(A) "For Pecuniary Gain".—For purposes of subsection (b)(4), "for pecuniary gain" means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Therefore, offenses committed for pecuniary gain include both monetary and barter transactions, as well as activities designed to increase gross revenue.

(B) Commercial Purpose.—The acquisition of ~~cultural heritage~~ resources for display to the public, whether for a fee or donation and whether by an individual or an organization, including a governmental entity, a private non-profit organization, or a private for-profit organization, shall be considered to involve a "commercial purpose" for purposes of subsection (b)(4).

6. Pattern of Misconduct Enhancement Under Subsection (b)(5).—

(A) Definition.—For purposes of subsection (b)(5), "pattern of misconduct involving cultural heritage resources *or paleontological resources*" means two or more separate instances of offense conduct involving a ~~cultural heritage~~ resource that did not occur during the course of the offense (*i.e.*, that did not occur during the course of the instant offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct)). Offense conduct involving a ~~cultural heritage~~ resource may be considered for purposes of subsection (b)(5) regardless of whether the defendant was convicted of that conduct.

(B) Computation of Criminal History Points.—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

7. Dangerous Weapons Enhancement Under Subsection (b)(6).—For purposes of subsection (b)(6), "brandished" and "dangerous weapon" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

8. Multiple Counts.—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving ~~cultural heritage~~ offenses covered by this guideline are grouped together under subsection (d) of §3D1.2 (Groups of Closely Related Counts). Multiple counts involving ~~cultural heritage~~ offenses covered by this guideline and offenses covered by other guidelines are not to be grouped under §3D1.2(d).

9. Upward Departure Provision.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward

departure may be warranted. For example, an upward departure may be warranted if (A) in addition to cultural heritage resources *or paleontological resources*, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources) *or paleontological resources*; or (B) the offense involved a cultural heritage resource that has profound significance to cultural identity (e.g., the Statue of Liberty or the Liberty Bell).

\* \* \*

**APPENDIX A - STATUTORY INDEX**

\* \* \*

16 U.S.C. § 413	2B1.1
16 U.S.C. § 470aaa-5	2B1.1, 2B1.5

\* \* \*

**(C) Children's Health Insurance Program Reauthorization Act of 2009**

**APPENDIX A - STATUTORY INDEX**

\* \* \*

42 U.S.C. § 1396h(b)(2)	2B4.1
42 U.S.C. § 1396w-2	2H3.1

\* \* \*

**(D) Iodine**

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

\* \* \*

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

<b>Listed Chemicals and Quantity</b>	<b>Base Offense Level</b>
(1) <u>List I Chemicals</u> 890 G or more of Benzaldehyde; 20 KG or more of Benzyl Cyanide; 200 G or more of Ergonovine;	<b>Level 30</b>

400 G or more of Ergotamine;  
20 KG or more of Ethylamine;  
2.2 KG or more of Hydriodic Acid;  
**1.3 KG or more of Iodine;**  
320 KG or more of Isosafrole;  
200 G or more of Methylamine;  
500 KG or more of N-Methylephedrine;  
500 KG or more of N-Methylpseudoephedrine;  
625 G or more of Nitroethane;  
10 KG or more of Norpseudoephedrine;  
20 KG or more of Phenylacetic Acid;  
10 KG or more of Piperidine;  
320 KG or more of Piperonal;  
1.6 KG or more of Propionic Anhydride;  
320 KG or more of Safrole;  
400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;  
1135.5 L or more of Gamma-butyrolactone;  
714 G or more of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.

(2) List I Chemicals

**Level 28**

At least 267 G but less than 890 G of Benzaldehyde;  
At least 6 KG but less than 20 KG of Benzyl Cyanide;  
At least 60 G but less than 200 G of Ergonovine;  
At least 120 G but less than 400 G of Ergotamine;  
At least 6 KG but less than 20 KG of Ethylamine;  
At least 660 G but less than 2.2 KG of Hydriodic Acid;  
**At least 376.2 G but less than 1.3 KG of Iodine;**  
At least 96 KG but less than 320 KG of Isosafrole;  
At least 60 G but less than 200 G of Methylamine;  
At least 150 KG but less than 500 KG of N-Methylephedrine;  
At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;  
At least 187.5 G but less than 625 G of Nitroethane;  
At least 3 KG but less than 10 KG of Norpseudoephedrine;  
At least 6 KG but less than 20 KG of Phenylacetic Acid;  
At least 3 KG but less than 10 KG of Piperidine;  
At least 96 KG but less than 320 KG of Piperonal;  
At least 480 G but less than 1.6 KG of Propionic Anhydride;  
At least 96 KG but less than 320 KG of Safrole;  
At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 340.7 L but less than 1135.5 L of Gamma-butyrolactone;  
At least 214 G but less than 714 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

11 KG or more of Acetic Anhydride;  
1175 KG or more of Acetone;  
20 KG or more of Benzyl Chloride;

1075 KG or more of Ethyl Ether;  
1200 KG or more of Methyl Ethyl Ketone;  
10 KG or more of Potassium Permanganate;  
1300 KG or more of Toluene;  
~~376.2 G or more of Iodine.~~

(3) List I Chemicals

**Level 26**

At least 89 G but less than 267 G of Benzaldehyde;  
At least 2 KG but less than 6 KG of Benzyl Cyanide;  
At least 20 G but less than 60 G of Ergonovine;  
At least 40 G but less than 120 G of Ergotamine;  
At least 2 KG but less than 6 KG of Ethylamine;  
At least 220 G but less than 660 G of Hydriodic Acid;  
**At least 125.4 G but less than 376.2 G of Iodine;**  
At least 32 KG but less than 96 KG of Isosafrole;  
At least 20 G but less than 60 G of Methylamine;  
At least 50 KG but less than 150 KG of N-Methylephedrine;  
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;  
At least 62.5 G but less than 187.5 G of Nitroethane;  
At least 1 KG but less than 3 KG of Norpseudoephedrine;  
At least 2 KG but less than 6 KG of Phenylacetic Acid;  
At least 1 KG but less than 3 KG of Piperidine;  
At least 32 KG but less than 96 KG of Piperonal;  
At least 160 G but less than 480 G of Propionic Anhydride;  
At least 32 KG but less than 96 KG of Safrole;  
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 113.6 L but less than 340.7 L of Gamma-butyrolactone;  
At least 71 G but less than 214 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 3.3 KG but less than 11 KG of Acetic Anhydride;  
At least 352.5 KG but less than 1175 KG of Acetone;  
At least 6 KG but less than 20 KG of Benzyl Chloride;  
At least 322.5 KG but less than 1075 KG of Ethyl Ether;  
At least 360 KG but less than 1200 KG of Methyl Ethyl Ketone;  
At least 3 KG but less than 10 KG of Potassium Permanganate;  
At least 390 KG but less than 1300 KG of Toluene;  
~~At least 125.4 G but less than 376.2 G of Iodine.~~

(4) List I Chemicals

**Level 24**

At least 62.3 G but less than 89 G of Benzaldehyde;  
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;  
At least 14 G but less than 20 G of Ergonovine;  
At least 28 G but less than 40 G of Ergotamine;  
At least 1.4 KG but less than 2 KG of Ethylamine;  
At least 154 G but less than 220 G of Hydriodic Acid;

**At least 87.8 G but less than 125.4 G of Iodine;**

At least 22.4 KG but less than 32 KG of Isosafrole;

At least 14 G but less than 20 G of Methylamine;

At least 35 KG but less than 50 KG of N-Methylephedrine;

At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;

At least 43.8 G but less than 62.5 G of Nitroethane;

At least 700 G but less than 1 KG of Norpseudoephedrine;

At least 1.4 KG but less than 2 KG of Phenylacetic Acid;

At least 700 G but less than 1 KG of Piperidine;

At least 22.4 KG but less than 32 KG of Piperonal;

At least 112 G but less than 160 G of Propionic Anhydride;

At least 22.4 KG but less than 32 KG of Safrole;

At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

At least 79.5 L but less than 113.6 L of Gamma-butyrolactone;

At least 50 G but less than 71 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

#### List II Chemicals

At least 1.1 KG but less than 3.3 KG of Acetic Anhydride;

At least 117.5 KG but less than 352.5 KG of Acetone;

At least 2 KG but less than 6 KG of Benzyl Chloride;

At least 107.5 KG but less than 322.5 KG of Ethyl Ether;

At least 120 KG but less than 360 KG of Methyl Ethyl Ketone;

At least 1 KG but less than 3 KG of Potassium Permanganate;

At least 130 KG but less than 390 KG of Toluene;

~~At least 87.8 G but less than 125.4 G of Iodine.~~

(5) List I Chemicals

**Level 22**

At least 35.6 G but less than 62.3 G of Benzaldehyde;

At least 800 G but less than 1.4 KG of Benzyl Cyanide;

At least 8 G but less than 14 G of Ergonovine;

At least 16 G but less than 28 G of Ergotamine;

At least 800 G but less than 1.4 KG of Ethylamine;

At least 88 G but less than 154 G of Hydriodic Acid;

**At least 50.2 G but less than 87.8 G of Iodine;**

At least 12.8 KG but less than 22.4 KG of Isosafrole;

At least 8 G but less than 14 G of Methylamine;

At least 20 KG but less than 35 KG of N-Methylephedrine;

At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;

At least 25 G but less than 43.8 G of Nitroethane;

At least 400 G but less than 700 G of Norpseudoephedrine;

At least 800 G but less than 1.4 KG of Phenylacetic Acid;

At least 400 G but less than 700 G of Piperidine;

At least 12.8 KG but less than 22.4 KG of Piperonal;

At least 64 G but less than 112 G of Propionic Anhydride;

At least 12.8 KG but less than 22.4 KG of Safrole;

At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

At least 45.4 L but less than 79.5 L of Gamma-butyrolactone;  
At least 29 G but less than 50 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 726 G but less than 1.1 KG of Acetic Anhydride;  
At least 82.25 KG but less than 117.5 KG of Acetone;  
At least 1.4 KG but less than 2 KG of Benzyl Chloride;  
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;  
At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;  
At least 700 G but less than 1 KG of Potassium Permanganate;  
At least 91 KG but less than 130 KG of Toluene;  
~~At least 50.2 G but less than 87.8 G of Iodine.~~

(6) List I Chemicals

**Level 20**

At least 8.9 G but less than 35.6 G of Benzaldehyde;  
At least 200 G but less than 800 G of Benzyl Cyanide;  
At least 2 G but less than 8 G of Ergonovine;  
At least 4 G but less than 16 G of Ergotamine;  
At least 200 G but less than 800 G of Ethylamine;  
At least 22 G but less than 88 G of Hydriodic Acid;  
**At least 12.5 G but less than 50.2 G of Iodine;**  
At least 3.2 KG but less than 12.8 KG of Isosafrole;  
At least 2 G but less than 8 G of Methylamine;  
At least 5 KG but less than 20 KG of N-Methylephedrine;  
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;  
At least 6.3 G but less than 25 G of Nitroethane;  
At least 100 G but less than 400 of Norpseudoephedrine;  
At least 200 G but less than 800 G of Phenylacetic Acid;  
At least 100 G but less than 400 G of Piperidine;  
At least 3.2 KG but less than 12.8 KG of Piperonal;  
At least 16 G but less than 64 G of Propionic Anhydride;  
At least 3.2 KG but less than 12.8 KG of Safrole;  
At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 11.4 L but less than 45.4 L of Gamma-butyrolactone;  
At least 7 G but less than 29 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 440 G but less than 726 G of Acetic Anhydride;  
At least 47 KG but less than 82.25 KG of Acetone;  
At least 800 G but less than 1.4 KG of Benzyl Chloride;  
At least 43 KG but less than 75.25 KG of Ethyl Ether;  
At least 48 KG but less than 84 KG of Methyl Ethyl Ketone;  
At least 400 G but less than 700 G of Potassium Permanganate;  
At least 52 KG but less than 91 KG of Toluene;  
~~At least 12.5 G but less than 50.2 G of Iodine.~~

(7)

List I Chemicals

**Level 18**

At least 7.1 G but less than 8.9 G of Benzaldehyde;  
At least 160 G but less than 200 G of Benzyl Cyanide;  
At least 1.6 G but less than 2 G of Ergonovine;  
At least 3.2 G but less than 4 G of Ergotamine;  
At least 160 G but less than 200 G of Ethylamine;  
At least 17.6 G but less than 22 G of Hydriodic Acid;  
**At least 10 G but less than 12.5 G of Iodine;**  
At least 2.56 KG but less than 3.2 KG of Isosafrole;  
At least 1.6 G but less than 2 G of Methylamine;  
At least 4 KG but less than 5 KG of N-Methylephedrine;  
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;  
At least 5 G but less than 6.3 G of Nitroethane;  
At least 80 G but less than 100 G of Norpseudoephedrine;  
At least 160 G but less than 200 G of Phenylacetic Acid;  
At least 80 G but less than 100 G of Piperidine;  
At least 2.56 KG but less than 3.2 KG of Piperonal;  
At least 12.8 G but less than 16 G of Propionic Anhydride;  
At least 2.56 KG but less than 3.2 KG of Safrole;  
At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 9.1 L but less than 11.4 L of Gamma-butyrolactone;  
At least 6 G but less than 7 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 110 G but less than 440 G of Acetic Anhydride;  
At least 11.75 KG but less than 47 KG of Acetone;  
At least 200 G but less than 800 G of Benzyl Chloride;  
At least 10.75 KG but less than 43 KG of Ethyl Ether;  
At least 12 KG but less than 48 KG of Methyl Ethyl Ketone;  
At least 100 G but less than 400 G of Potassium Permanganate;  
At least 13 KG but less than 52 KG of Toluene;  
~~At least 10 G but less than 12.5 G of Iodine.~~

(8)

List I Chemicals

**Level 16**

3.6 KG or more of Anthranilic Acid;  
At least 5.3 G but less than 7.1 G of Benzaldehyde;  
At least 120 G but less than 160 G of Benzyl Cyanide;  
At least 1.2 G but less than 1.6 G of Ergonovine;  
At least 2.4 G but less than 3.2 G of Ergotamine;  
At least 120 G but less than 160 G of Ethylamine;  
At least 13.2 G but less than 17.6 G of Hydriodic Acid;  
**At least 7.5 G but less than 10 G of Iodine;**  
At least 1.92 KG but less than 2.56 KG of Isosafrole;  
At least 1.2 G but less than 1.6 G of Methylamine;  
4.8 KG or more of N-Acetylanthranilic Acid;  
At least 3 KG but less than 4 KG of N-Methylephedrine;  
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;

At least 3.8 G but less than 5 G of Nitroethane;  
At least 60 G but less than 80 G of Norpseudoephedrine;  
At least 120 G but less than 160 G of Phenylacetic Acid;  
At least 60 G but less than 80 G of Piperidine;  
At least 1.92 KG but less than 2.56 KG of Piperonal;  
At least 9.6 G but less than 12.8 G of Propionic Anhydride;  
At least 1.92 KG but less than 2.56 KG of Safrole;  
At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 6.8 L but less than 9.1 L of Gamma-butyrolactone;  
At least 4 G but less than 6 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 88 G but less than 110 G of Acetic Anhydride;  
At least 9.4 KG but less than 11.75 KG of Acetone;  
At least 160 G but less than 200 G of Benzyl Chloride;  
At least 8.6 KG but less than 10.75 KG of Ethyl Ether;  
At least 9.6 KG but less than 12 KG of Methyl Ethyl Ketone;  
At least 80 G but less than 100 G of Potassium Permanganate;  
At least 10.4 KG but less than 13 KG of Toluene;  
~~At least 7.5 G but less than 10 G of Iodine.~~

(9) List I Chemicals

**Level 14**

At least 2.7 KG but less than 3.6 KG of Anthranilic Acid;  
At least 3.6 G but less than 5.3 G of Benzaldehyde;  
At least 80 G but less than 120 G of Benzyl Cyanide;  
At least 800 MG but less than 1.2 G of Ergonovine;  
At least 1.6 G but less than 2.4 G of Ergotamine;  
At least 80 G but less than 120 G of Ethylamine;  
At least 8.8 G but less than 13.2 G of Hydriodic Acid;  
**At least 5 G but less than 7.5 G of Iodine;**  
At least 1.44 KG but less than 1.92 KG of Isosafrole;  
At least 800 MG but less than 1.2 G of Methylamine;  
At least 3.6 KG but less than 4.8 KG of N-Acetylanthranilic Acid;  
At least 2.25 KG but less than 3 KG of N-Methylephedrine;  
At least 2.25 KG but less than 3 KG of N-Methylpseudoephedrine;  
At least 2.5 G but less than 3.8 G of Nitroethane;  
At least 40 G but less than 60 G of Norpseudoephedrine;  
At least 80 G but less than 120 G of Phenylacetic Acid;  
At least 40 G but less than 60 G of Piperidine;  
At least 1.44 KG but less than 1.92 KG of Piperonal;  
At least 7.2 G but less than 9.6 G of Propionic Anhydride;  
At least 1.44 KG but less than 1.92 KG of Safrole;  
At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
At least 4.5 L but less than 6.8 L of Gamma-butyrolactone;  
At least 3 G but less than 4 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 66 G but less than 88 G of Acetic Anhydride;  
At least 7.05 KG but less than 9.4 KG of Acetone;  
At least 120 G but less than 160 G of Benzyl Chloride;  
At least 6.45 KG but less than 8.6 KG of Ethyl Ether;  
At least 7.2 KG but less than 9.6 KG of Methyl Ethyl Ketone;  
At least 60 G but less than 80 G of Potassium Permanganate;  
At least 7.8 KG but less than 10.4 KG of Toluene;  
~~At least 5 G but less than 7.5 G of Iodine.~~

(10) List I Chemicals

**Level 12**

Less than 2.7 KG of Anthranilic Acid;  
Less than 3.6 G of Benzaldehyde;  
Less than 80 G of Benzyl Cyanide;  
Less than 800 MG of Ergonovine;  
Less than 1.6 G of Ergotamine;  
Less than 80 G of Ethylamine;  
Less than 8.8 G of Hydriodic Acid;  
**Less than 5 G of Iodine;**  
Less than 1.44 KG of Isosafrole;  
Less than 800 MG of Methylamine;  
Less than 3.6 KG of N-Acetylanthranilic Acid;  
Less than 2.25 KG of N-Methylephedrine;  
Less than 2.25 KG of N-Methylpseudoephedrine;  
Less than 2.5 G of Nitroethane;  
Less than 40 G of Norpseudoephedrine;  
Less than 80 G of Phenylacetic Acid;  
Less than 40 G of Piperidine;  
Less than 1.44 KG of Piperonal;  
Less than 7.2 G of Propionic Anhydride;  
Less than 1.44 KG of Safrole;  
Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;  
Less than 4.5 L of Gamma-butyrolactone;  
Less than 3 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

Less than 66 G of Acetic Anhydride;  
Less than 7.05 KG of Acetone;  
Less than 120 G of Benzyl Chloride;  
Less than 6.45 KG of Ethyl Ether;  
Less than 7.2 KG of Methyl Ethyl Ketone;  
Less than 60 G of Potassium Permanganate;  
Less than 7.8 KG of Toluene;  
~~Less than 5 G of Iodine.~~

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\*Notes:

- (A) Except as provided in Note (B), to calculate the base offense level in an offense that involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (i.e., list I or list II) under subsection (d) or (e) of this guideline, as appropriate.
- (B) To calculate the base offense level in an offense that involves two or more chemicals each of which is set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) aggregate the quantities of all such chemicals, and (ii) determine the base offense level corresponding to the aggregate quantity.
- (C) 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.

\* \* \*

## 9. TECHNICAL AMENDMENT

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

*First, the amendment makes changes to the Guidelines Manual to promote accuracy and completeness. For example, it corrects typographical errors, and it addresses cases in which the Guidelines Manual provides information (such as a reference to a guideline, statute, or regulation) that has become incorrect or obsolete. Specifically, it amends:*

- (1) *§1B1.3 (Relevant Conduct), Application Note 6, to ensure that two quotations contained in that note are accurate;*
- (2) *§1B1.8 (Use of Certain Information), Application Note 2, to revise a reference to the "Probation Service";*
- (3) *§1B1.9 (Class B or C Misdemeanors and Infractions), Application Note 1, to reflect that some infractions do not have any authorized term of imprisonment;*
- (4) *§1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), Application Note 2, to correct a typographical error;*
- (5) *§2A1.1 (First Degree Murder), Application Note 1, to provide specific citations for the examples given;*
- (6) *§2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), Application Note 5, to correct typographical errors;*
- (7) *§2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), Application Note 1, to correct a typographical error;*
- (8) *§2A3.5 (Failure to Register as a Sex Offender), Application Note 1, to ensure that the statutory definitions referred to in that note are accurately cited;*
- (9) *§2B1.4 (Insider Trading), Application Note 1, to correct a typographical error;*
- (10) *§2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources), Application Note 1, to provide updated citations to statutes and regulations;*
- (11) *§2B3.1 (Robbery), Application Note 2, to correct a typographical error;*
- (12) *§2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), Background, to provide an updated description and reference to the statute criminalizing bribery in connection with Medicare and Medicaid referrals;*
- (13) *§2B6.1 (Altering or Removing Motor Vehicle Identification Numbers), Background, to update the statutory maximum term of imprisonment for violations of 18 U.S.C. § 553(a)(2);*

- (14) *§2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe), Application Note 3, to ensure that the subsection relating to "loss" is accurately cited;*
- (15) *§2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), Application Note 4, to correct a typographical error;*
- (16) *§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking), in the Notes to the Drug Quantity Table, to provide updated citations to regulations;*
- (17) *both §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical), Application Note 6, and §2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material), Application Note 3, to provide a more accurate statutory citation and description;*
- (18) *§2D1.14 (Narco-Terrorism), subsection (a)(1), to provide an updated guideline reference;*
- (19) *§2D2.1 (Unlawful Possession), Commentary, to provide updated statutory references;*
- (20) *§2G3.1 (Importing, Mailing, or Transporting Obscene Matter), Application Note 1, to make the definition of "distribution" in that guideline consistent with the definition of "distribution" in the child pornography guidelines;*
- (21) *§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), Application Notes 2 and 10, to ensure that a quotation contained in Note 2 is accurate and that a citation in Note 10 is accurate;*
- (22) *§2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone), Application Notes 2 and 3, to provide updated statutory references;*
- (23) *both §2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport), Statutory Provisions, and §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use), Statutory Provisions, to provide updated statutory references;*
- (24) *§2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government), Application Note 1, to provide an updated reference to an executive order;*
- (25) *§2M3.3 (Transmitting National Defense Information), to provide an updated statutory reference;*
- (26) *§2M3.9 (Disclosure of Information Identifying a Covert Agent), Application Note 3, to provide an updated statutory reference;*
- (27) *§2M6.1 (Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass*

*Destruction), Application Note 1, to provide updated statutory references;*

- (28) *§2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides), Background, to provide updated guideline references;*
- (29) *§2Q1.6 (Hazardous or Injurious Devices on Federal Lands), subsection (a)(1), to correct a typographical error;*
- (30) *§2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), Application Note 3, to provide a more complete reference to regulations;*
- (31) *Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes), Introductory Commentary, to provide a more complete statutory reference;*
- (32) *§2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)), to strike an erroneous statutory reference;*
- (33) *Appendix A (Statutory Index), to provide updated statutory references and strike an erroneous statutory reference.*

*Second, the amendment makes a series of changes to the Guidelines Manual to promote stylistic consistency in how subdivisions are designated. When dividing guideline sections into subdivisions, the guidelines generally follow the structure used by Congress to divide statutory sections into subdivisions. Thus, a section is broken into subsections (starting with "(a)"), which are broken into paragraphs (starting with "(1)"), which are broken into subparagraphs (starting with "(A)"), which are broken into clauses (starting with "(i)"), which are broken into subclauses (starting with "(I)"). For a generic term, "subdivision" is also used. When dividing application notes into subdivisions, the guidelines generally follow the same structure, except that subsections and paragraphs are not used; the first subdivisions used are subparagraphs (starting with "(A)"). The amendment identifies places in the Guidelines Manual where these principles are not followed and brings them into conformity.*

**Amendment:**

**(A) Changes to Promote Accuracy and Completeness**

**§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**

\* \* \*

Commentary

Application Notes:

\* \* \*

- 6. *A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant "is was*

convicted under 18 U.S.C. § 1956". Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) ("if the offense was committed by the means set forth in *involved conduct described in* 18 U.S.C. § 2242").

\* \* \*

**§1B1.8. Use of Certain Information**

\* \* \*

Commentary

Application Notes:

\* \* \*

2. Subsection (b)(2) prohibits any cooperation agreement from restricting the use of information as to the existence of prior convictions and sentences in determining adjustments under §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender). The ~~Probation Service~~ *probation office* generally will secure information relevant to the defendant's criminal history independent of information the defendant provides as part of his cooperation agreement.

\* \* \*

**§1B1.9. Class B or C Misdemeanors and Infractions**

\* \* \*

Commentary

Application Notes:

\* \* \*

1. Notwithstanding any other provision of the guidelines, the court may impose any sentence authorized by statute for each count that is a Class B or C misdemeanor or an infraction. A Class B misdemeanor is any offense for which the maximum authorized term of imprisonment is more than thirty days but not more than six months; a Class C misdemeanor is any offense for which the maximum authorized term of imprisonment is more than five days but not more than thirty days; an infraction is any offense for which the maximum authorized term of imprisonment is not more than five days *or for which no imprisonment is authorized*. See 18 U.S.C. § 3559.

\* \* \*

**§1B1.11. Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)**

\* \* \*

Commentary

Application Notes:

\* \* \*

- 2. *Under subsection (b)(1), the last date of the offense of conviction is the controlling date for ex post facto purposes. For example, if the offense of conviction (i.e., the conduct charged in the count of the indictment or information of which the defendant was convicted) was determined by the court to have been committed between October 15, 1991 and October 28, 1991, the date of October 28, 1991 is the controlling date for ex post facto purposes. This is true even if the defendant’s conduct relevant to the determination of the guideline range under §1B1.3 (Relevant Conduct) included an act that occurred on November 2, 1991 (after a revised Guidelines Manual took effect).*

\* \* \*

**§2A1.1. First Degree Murder**

\* \* \*

Commentary

\* \* \*

Application Notes:

- 1. *Applicability of Guideline.—This guideline applies in cases of premeditated killing. This guideline also applies when death results from the commission of certain felonies. For example, this guideline may be applied as a result of a cross reference (e.g., a kidnapping in which death occurs, see §2A4.1(c)(1)), or in cases in which the offense level of a guideline is calculated using the underlying crime (e.g., murder in aid of racketeering, see §2E1.3(a)(2)).*

\* \* \*

**§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts**

\* \* \*

Commentary

Application Notes:

\* \* \*

- 5. *Cross Reference.— Subsection (c)(1) provides a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. § 2241 or § 2242. For example, the cross reference to §2A3.1 shall apply if (A) the victim had not attained the age of 12 years (see 18 U.S.C. § 2241(c)); (B) the victim had attained the age of 12 years but not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnapping (see 18 U.S.C. § 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnapping (see 18 U.S.C. § 2242(1)).*

\* \* \*

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

\* \* \*

Commentary

\* \* \*

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.*

\* \* \*

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

\* \* \*

Commentary

\* \* \*

Application Notes:

1. Definitions.—For purposes of this guideline:

\* \* \*

*"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~~ the terms "tier I sex offender", "tier II sex offender", and "tier III sex offender", respectively, in 42 U.S.C. § 16911.*

\* \* \*

**§2B1.4. Insider Trading**

\* \* \*

Commentary

\* \* \*

Application Note:

1. *Application of ~~Subsection of §3B1.3.~~—Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should be applied only if the defendant occupied and abused a position of special trust. Examples might include a corporate president or an attorney who misused information regarding a planned but unannounced takeover attempt. It typically would not apply to an ordinary "tippee".*

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

\* \* \*

Commentary

\* \* \*

Application Notes:

1. *"Cultural Heritage Resource" Defined.—For purposes of this guideline, "cultural heritage resource" means any of the following:*

\* \* \*

- (C) *An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 C.F.R. pt. 7; 36 C.F.R. pt. 296; 32 C.F.R. pt. ~~299~~229; 18 C.F.R. pt. 1312).*

\* \* \*

- (E) *A commemorative work. "Commemorative work" (A) has the meaning given that term in ~~section 2(c) of Public Law 99-652 (40 U.S.C. § 1002(c))~~40 U.S.C. § 8902(a)(1); and (B) includes any national monument or national memorial.*

\* \* \*

**§2B3.1. Robbery**

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

2. Consistent with Application Note 1(~~d~~D)(ii) of §1B1.1 (Application Instructions), an object shall be considered to be a dangerous weapon for purposes of subsection (b)(2)(E) if (A) the object closely resembles an instrument capable of inflicting death or serious bodily injury; or (B) the defendant used the object in a manner that created the impression that the object was an instrument capable of inflicting death or serious bodily injury (e.g., a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

\* \* \*

**§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery**

\* \* \*

Commentary

Background:

\* \* \*

*This guideline also applies to making prohibited payments to induce the award of subcontracts on federal projects for which the maximum term of imprisonment authorized was recently increased from two to is ten years. 41 U.S.C. §§ 51, 53-54. ~~Violations of 42 U.S.C. §§ 1395nn(b)(1) and (b)(2), involve the offer or acceptance of a payment to refer an individual for services or items paid for under the Medicare program. Similar provisions in 42 U.S.C. §§ 1396h(b)(1) and (b)(2) cover the offer or acceptance of a payment for referral to the Medicaid program. Violations of 42 U.S.C. § 1320a-7b involve the offer or acceptance of a payment to refer an individual for services or items paid for under a federal health care program (e.g., the Medicare and Medicaid programs).~~*

\* \* \*

**§2B6.1. Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers**

\* \* \*

Background: *The statutes covered in this guideline prohibit altering or removing motor vehicle identification numbers, importing or exporting, or trafficking in motor vehicles or parts knowing that the identification numbers have been removed, altered, tampered with, or obliterated. Violations of 18 U.S.C. §§ 511 and 553(a)(2) carry a maximum of five years imprisonment. Violations of 18 U.S.C. §§ 553(a)(2) and 2321 carry a maximum of ten years imprisonment.*

\* \* \*

**§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

\* \* \*

Application Notes:

\* \* \*

3. Application of Subsection (b)(2).—“Loss”, for purposes of subsection (b)(2)(A), shall be determined in accordance with Application Note 3 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud). The value of “the benefit received or to be received” means the net value of such benefit. Examples: (A) A government employee, in return for a \$500 bribe, reduces the price of a piece of surplus property offered for sale by the government from \$10,000 to \$2,000; the value of the benefit received is \$8,000. (B) A \$150,000 contract on which \$20,000 profit was made was awarded in return for a bribe; the value of the benefit received is \$20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the preceding examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.

\* \* \*

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

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

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

\* \* \*

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

\* \* \*

**(c) DRUG QUANTITY TABLE**

\* \* \*

\*Notes to Drug Quantity Table:

\* \* \*

- (H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(~~25~~30)), (ii) at least two of the following: cannabiniol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
- (I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(~~25~~30)), (ii) at least two of the following: cannabiniol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

\* \* \*

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

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

- 6. *Subsection (b)(3) 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), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ ~~5124~~, 9603(b), and 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)(3) may not adequately account 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, any costs of environmental cleanup and harm to persons or property should be considered by the court in*

determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).

\* \* \*

**§2D1.12. Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy**

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

3. *Subsection (b)(2) 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), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ ~~5124~~, 9603(b), and 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)(2) may not adequately account 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, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).*

\* \* \*

**§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~~5)(A), (a)(~~3~~5)(B), and (b)(11) shall not apply.

\* \* \*

**§2D2.1. Unlawful Possession; Attempt or Conspiracy**

\* \* \*

Commentary

\* \* \*

*Section 2D2.1(b)(1) provides a cross reference to §2D1.1 for possession of more than five grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty under ~~Section 6371 of the Anti-Drug Abuse Act of 1988~~ **21 U.S.C. § 844(a)**. Other cases for which enhanced penalties are provided under ~~Section 6371 of the Anti-Drug Abuse Act of 1988~~ **21 U.S.C. § 844(a)** (e.g., for a person with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base; for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with §5G1.1(b).*

\* \* \*

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

\* \* \*

Commentary

\* \* \*

Application Notes:

1. Definitions.—For purposes of this guideline:

\* \* \*

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

\* \* \*

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

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

2. Semiautomatic Firearm **That Is** Capable of Accepting a Large Capacity Magazine.—For purposes of subsections (a)(1), (a)(3), and (a)(4), a "semiautomatic firearm **that is** capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

\* \* \*

10. Prior Felony Convictions.—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). See §4A1.2(a)(2); ~~§4A1.2, comment. (n.3).~~

\* \* \*

**§2K2.5. Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone**

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

2. "Federal court facility" includes the courtroom; judges' chambers; witness rooms; jury deliberation rooms; attorney conference rooms; prisoner holding cells; offices and parking facilities of the court clerks, the United States attorney, and the United States marshal; probation and parole offices; and adjoining corridors and parking facilities of any court of the United States. See 18 U.S.C. § 930(f)(3).
3. "School zone" is defined at 18 U.S.C. § 922(q). A sentence of imprisonment under 18 U.S.C. § 922(q) must run consecutively to any sentence of imprisonment imposed for any other offense. See 18 U.S.C. § 924(a)(4). In order to comply with the statute, when the guideline range is based on the underlying offense, and the defendant is convicted both of the underlying offense and 18 U.S.C. § 922(q), the court should apportion the sentence between the count for the underlying offense and the count under 18 U.S.C. § 922(q). For example, if the guideline range is 30-37 months and the court determines "total punishment" of 36 months is appropriate, a sentence of 30 months for the

underlying offense, plus 6 months under 18 U.S.C. § 922(q) would satisfy this requirement.

\* \* \*

**§2L2.1. Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law**

\* \* \*

Commentary

*Statutory Provisions:* 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (4), 1325(b),(c), (d); 18 U.S.C. §§ 1015, 1028, 1425-1427, 1542, 1544, 1546. For additional statutory provision(s), see Appendix A (Statutory Index).

\* \* \*

**§2L2.2. Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport**

\* \* \*

Commentary

*Statutory Provisions:* 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (5), 1325(b),(c), (d); 18 U.S.C. §§ 911, 1015, 1028, 1423-1426, 1542-1544, 1546.

\* \* \*

**§2M3.1. Gathering or Transmitting National Defense Information to Aid a Foreign Government**

\* \* \*

Commentary

\* \* \*

Application Notes:

1. "Top secret information" is information that, if disclosed, "reasonably could be expected to cause exceptionally grave damage to the national security." Executive Order ~~12356~~12958 (50 U.S.C. § 435 note).

\* \* \*

§2M3.3. **Transmitting National Defense Information; Disclosure of Classified Cryptographic Information; Unauthorized Disclosure to a Foreign Government or a Communist Organization of Classified Information by Government Employee; Unauthorized Receipt of Classified Information**

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ 793(d), (e), (g), 798; 50 U.S.C. § 783 ~~(b), (c)~~.

\* \* \*

§2M3.9. **Disclosure of Information Identifying a Covert Agent**

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

3. A term of imprisonment imposed for a conviction under 50 U.S.C. § 421 shall be imposed consecutively to any other term of imprisonment. *See 50 U.S.C. § 421(d).*

\* \* \*

§2M6.1. **Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy**

\* \* \*

Commentary

\* \* \*

Application Notes:

1. Definitions.—For purposes of this guideline:

\* \* \*

"Foreign terrorist organization" (A) means an organization that engages in terrorist activity that threatens

the security of a national of the United States or the national security of the United States; and (B) includes an organization designated by the Secretary of State as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. § ~~1189~~1189). "National of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(22)).

\* \* \*

"Restricted person" has the meaning given that term in 18 U.S.C. § 175b(b)(2).

\* \* \*

**§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce**

\* \* \*

Commentary

\* \* \*

*Background:* This section applies both to substantive violations of the statute governing the handling of pesticides and toxic and hazardous substances and to recordkeeping offenses. The first four specific offense characteristics provide enhancements when the offense involved a substantive violation. The ~~last two~~ *fifth and sixth* specific offense characteristics apply to recordkeeping offenses. Although other sections of the guidelines generally prescribe a base offense level of 6 for regulatory violations, §2Q1.2 prescribes a base offense level of 8 because of the inherently dangerous nature of hazardous and toxic substances and pesticides. A decrease of 2 levels is provided, however, for "simple recordkeeping or reporting violations" under §2Q1.2(b)(6).

\* \* \*

**§2Q1.6. Hazardous or Injurious Devices on Federal Lands**

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

- (1) If the intent was to violate the Controlled Substances Act, apply §2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy);

\* \* \*

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

\* \* \*

Commentary

Application Notes:

\* \* \*

3. For purposes of subsection (b)(2), the quarantine requirements include those set forth in 9 C.F.R. Part 92, and 7 C.F.R., *Subtitle B*, Chapter III. State quarantine laws are included as well.

\* \* \*

**PART T - OFFENSES INVOLVING TAXATION**

\* \* \*

**2. ALCOHOL AND TOBACCO TAXES**

Introductory Commentary

*This ~~section~~subpart deals with offenses contained in Parts I-IV of Subchapter J of Chapter 51 of Subtitle E of Title 26 of Title 26, chiefly 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, and 5762, where the essence of the conduct is tax evasion or a regulatory violation. Because these offenses are no longer a major enforcement priority, no effort has been made to provide a section-by-section set of guidelines. Rather, the conduct is dealt with by dividing offenses into two broad categories: tax evasion offenses and regulatory offenses.*

\* \* \*

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

- (a) Base Offense Level: **6**

Commentary

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

\* \* \*

**APPENDIX A - STATUTORY INDEX**

\* \* \*

7 U.S.C. § 13( <del>e</del> )	2B1.4	* * *
8 U.S.C. § 1325( <del>b</del> c)	2L2.1, 2L2.2	* * *

8 U.S.C. § 1325( <del>cd</del> )	2L2.1, 2L2.2	* * *
18 U.S.C. § 247	2H1.1	
<b>18 U.S.C. § 248</b>	<b>2H1.1</b>	* * *
<del>18 U.S.C. § 1129(a)</del>	<del>2X5.2</del>	* * *
42 U.S.C. § 1320a-7b	2B1.1, 2B4.1	
<b>42 U.S.C. § 1320a-8b</b>	<b>2X5.1, 2X5.2</b>	* * *
50 U.S.C. § 783( <del>b</del> )	2M3.3	
<del>50 U.S.C. § 783(c)</del>	<del>2M3.3</del>	* * *

**(B) Changes to Promote Stylistic Consistency**

**§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**

\* \* \*

Commentary

Application Notes:

\* \* \*

2. *A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.*

*In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:*

*(iA) in furtherance of the jointly undertaken criminal activity; and*

*(iiB) reasonably foreseeable in connection with that criminal activity.*

\* \* \*

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

\* \* \*

Commentary

Application Notes:

1. Application of ~~Subsection~~ *Subdivision* (1)(A).—

\* \* \*

**§2H4.2. Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act**

\* \* \*

(b) Specific Offense Characteristics

(1) If the offense involved (†A) serious bodily injury, increase by 4 levels; or (‡B) bodily injury, increase by 2 levels.

\* \* \*

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

\* \* \*

Commentary

Application Notes:

\* \* \*

10. *An upward departure may be warranted in any of the following circumstances: (†A) the quantity of explosive materials significantly exceeded 1000 pounds; (‡B) the explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder explosives (e.g., plastic explosives); (‡C) the defendant knowingly distributed explosive materials to a person under twenty-one years of age; or (‡D) the offense posed a substantial risk of death or bodily injury to multiple individuals.*

\* \* \*

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

\* \* \*

Commentary

Application Notes:

\* \* \*

11. Upward Departure Provisions.—An upward departure may be warranted in any of the following circumstances: (1A) the number of firearms substantially exceeded 200; (2B) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (3C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (4D) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 7).

\* \* \*

**§3C1.1. Obstructing or Impeding the Administration of Justice**

\* \* \*

Commentary

Application Notes:

\* \* \*

4. Examples of Covered Conduct.—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:
- (1A) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;
  - (2B) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction;
  - (3C) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;
  - (4D) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;
  - (5E) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;
  - (6F) providing materially false information to a judge or magistrate;
  - (7G) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

- (~~h~~H) *providing materially false information to a probation officer in respect to a presentence or other investigation for the court;*
- (~~i~~I) *other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511);*
- (~~j~~J) *failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p);*
- (~~k~~K) *threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.*

\* \* \*

5.

\* \* \*

*The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:*

- (~~a~~A) *providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;*
- (~~b~~B) *making false statements, not under oath, to law enforcement officers, unless Application Note 4(g) above applies;*
- (~~c~~C) *providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;*
- (~~d~~D) *avoiding or fleeing from arrest (see, however, §3C1.2 (Reckless Endangerment During Flight));*
- (~~e~~E) *lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under §3E1.1 (Acceptance of Responsibility).*

\* \* \*

**§3E1.1. Acceptance of Responsibility**

\* \* \*

Commentary

Application Notes:

1. *In determining whether a defendant qualifies under subsection (a), appropriate considerations*

include, but are not limited to, the following:

- (~~α~~A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;
- (~~β~~B) voluntary termination or withdrawal from criminal conduct or associations;
- (~~ε~~C) voluntary payment of restitution prior to adjudication of guilt;
- (~~δ~~D) voluntary surrender to authorities promptly after commission of the offense;
- (~~ε~~E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
- (~~φ~~F) voluntary resignation from the office or position held during the commission of the offense;
- (~~g~~G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and
- (~~η~~H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

\* \* \*

**§5K2.17. Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)**

\* \* \*

If the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A "semiautomatic firearm capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (~~A~~1) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (~~B~~2) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.

\* \* \*