



# **Amendments to the Sentencing Guidelines**

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**April 28, 2011**

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. FRAUD

**Reason for Amendment:** *This amendment responds to the directive in section 10606(a)(2) of the Patient Protection and Affordable Care Act of 2010, Pub. L. 111–148 (the "Patient Protection Act"), and addresses certain new offenses created by the Patient Protection Act and by the Dodd-Frank Wall Street and Consumer Protection Act, Pub. L. 111–203 (the "Dodd-Frank Act").*

### Response to Directive

*Section 10606(a)(2)(B) of the Patient Protection Act directed the Commission to—*

*amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses involving Government health care programs to provide that the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss by the defendant[.]*

*Section 10606(a)(2)(C) directed the Commission to amend the guidelines to provide—*

- (i) a 2-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than \$1,000,000 and less than \$7,000,000;*
- (ii) a 3-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than \$7,000,000 and less than \$20,000,000;*
- (iii) a 4-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than \$20,000,000; and*
- (iv) if appropriate, otherwise amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses involving Government health care programs.*

*Section 10606(a)(3) required the Commission, in carrying out the directive, to "ensure reasonable consistency with other relevant directives and with other guidelines" and to "account for any aggravating or mitigating circumstances that might justify exceptions," among other requirements.*

*The amendment implements the directive by adding two provisions to §2B1.1 (Theft, Property Destruction, and Fraud), both of which apply to cases in which "the defendant was convicted of a Federal health care offense involving a Government health care program".*

*The first provision is a new tiered enhancement at subsection (b)(8) that applies in such cases (i.e., Federal health care offenses involving a Government health care program) if the loss is more than \$1,000,000. The enhancement is 2 levels if the loss is more than \$1,000,000, 3 levels if the loss is more than \$7,000,000, and 4 levels if the loss is more than \$20,000,000. The tiers of the enhancement apply to loss amounts "more than" the specified dollar amounts rather than to loss amounts "not less than" the specified dollar amounts to "ensure reasonable consistency" as required by the directive. The consistent practice in the Guidelines Manual is to apply enhancements to loss amounts "more than" specified dollar amounts.*

*The second provision is a new special rule in Application Note 3(F) for determining intended loss in a case in which the defendant is convicted of a Federal health care offense involving a Government health care program. The special rule provides that, in such a case, "the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, i.e., is evidence sufficient to establish the amount of the intended loss, if not rebutted". The special rule includes language making clear that the government's proof of intended loss may be rebutted by the defendant.*

*The amendment also adds definitions to the commentary in §2B1.1 for the terms "Federal health care offense" and "Government health care program". "Federal health care offense" is defined to have the meaning given that term in 18 U.S.C. § 24, as required by section 10606(a)(1) of the Patient Protection Act. "Government health care program" is defined to mean "any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government." The amendment lists the Medicare program, the Medicaid program, and the CHIP program as examples of such programs. The Commission adopted this definition because health care fraud involving federally funded programs and health care fraud involving state-funded programs are similar offenses, committed in similar ways and posing similar harms to the taxpaying public. In addition, defining "Government health care program" in this manner avoids application difficulties likely to arise from a narrower definition that would require the disaggregation of losses program by program in cases in which the defendant defrauded both federal and state health care programs. Finally, the statutory language in the directive indicates congressional concern with health care fraud that adversely affects the public fisc beyond health care programs funded solely with federal funds.*

*Finally, the amendment amends Application Note 3(A) to §3B1.2 (Mitigating Role) to make clear that a defendant who is accountable under §1B1.3 (Relevant Conduct) for a loss amount under §2B1.1 that greatly exceeds the defendant's personal gain from a fraud offense, and who had limited knowledge of the scope of the scheme, is not precluded from consideration for a mitigating role adjustment. The amended commentary provides as an example "a defendant in a health care fraud scheme, whose role in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount". This part of the amendment is consistent with the directive in section 10606(a)(3)(D) of the Patient Protection Act that the Commission should "account for any aggravating or mitigating circumstances that might justify exceptions" to the new tiered enhancement.*

### New Offenses

*In addition to responding to the directives, the amendment amends Appendix A (Statutory Index) to include offenses created by both the Patient Protection Act and the Dodd-Frank Act.*

*The Patient Protection Act created a new offense at 29 U.S.C. § 1149 that prohibits making a false statement in connection with the marketing or sale of a multiple employer welfare arrangement under the Employee Retirement Income Security Act. Pursuant to 29 U.S.C. § 1131(b), a person who commits this new offense is subject to a term of imprisonment of not more than 10 years. The amendment references the new offense at 29 U.S.C. § 1149 to §2B1.1 because the offense has fraud or misrepresentation as a element of the offense. As a clerical change, the amendment also amends Appendix A (Statutory Index) to make clear that 29 U.S.C. § 1131(a), not the new § 1131(b), is referenced to §2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act; Destruction and*

*Failure to Maintain Corporate Audit Records).*

*The Dodd-Frank Act created two new offenses, 12 U.S.C. § 5382 and 15 U.S.C. § 78jjj(d). With regard to 12 U.S.C. § 5382, under authority granted by sections 202-203 of the Dodd-Frank Act, the Secretary of the Treasury may make a "systemic risk determination" concerning a financial company and, if the company fails the determination, may commence the orderly liquidation of the company by appointing the Federal Deposit Insurance Corporation as receiver. Before making the appointment, the Secretary must either obtain the consent of the company or petition under seal for approval by a federal district court. The Dodd-Frank Act makes it a crime, codified at 12 U.S.C. § 5382, to recklessly disclose a systemic risk determination or the pendency of court proceedings on such a petition. A person who violates 12 U.S.C. § 5382 is subject to imprisonment for not more than five years. The amendment references 12 U.S.C. § 5382 to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). Section 2H3.1 covers several criminal statutes with similar elements and the same maximum term of imprisonment.*

*The second new offense, 15 U.S.C. § 78jjj(d), makes it a crime for a person to falsely represent that he or she is a member of the Security Investor Protection Corporation or that any person or account is protected or eligible for protection under the Security Investor Protection Act. See Dodd-Frank Act, Pub. L. 111-203, § 929V. Section 78jjj also contains two other offenses, at subsections (c)(1) and (c)(2), that are not referenced in Appendix A (Statutory Index). All three subsections are subject to the same maximum term of imprisonment of five years. In addition, all three concern fraud and deceit: the newly created 15 U.S.C. § 78jjj(d) involves false representation; 15 U.S.C. § 78jjj(c)(1) involves fraud in connection with or in contemplation of a liquidation proceeding; and 15 U.S.C. § 78jjj(c)(2) involves fraudulent conversion of assets of the Security Investor Protection Corporation. The amendment references these offenses to §2B1.1 because the elements of the offenses involve fraud and deceit.*

**Amendment:**

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

- (a) Base Offense Level:
  - (1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
  - (2) 6, otherwise.
- (b) Specific Offense Characteristics
  - (1) If the loss exceeded \$5,000, increase the offense level as follows:

<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A) \$5,000 or less	no increase
(B) More than \$5,000	add <b>2</b>
(C) More than \$10,000	add <b>4</b>
(D) More than \$30,000	add <b>6</b>
(E) More than \$70,000	add <b>8</b>
(F) More than \$120,000	add <b>10</b>
(G) More than \$200,000	add <b>12</b>
(H) More than \$400,000	add <b>14</b>
(I) More than \$1,000,000	add <b>16</b>
(J) More than \$2,500,000	add <b>18</b>
(K) More than \$7,000,000	add <b>20</b>
(L) More than \$20,000,000	add <b>22</b>
(M) More than \$50,000,000	add <b>24</b>
(N) More than \$100,000,000	add <b>26</b>
(O) More than \$200,000,000	add <b>28</b>
(P) More than \$400,000,000	add <b>30</b> .

- (2) (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2** levels;
  - (B) involved 50 or more victims, increase by **4** levels; or
  - (C) involved 250 or more victims, increase by **6** levels.
- (3) If the offense involved a theft from the person of another, increase by **2** levels.
- (4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.
- (5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **2** levels.
- (6) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.
- (7) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.

- (8) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than \$1,000,000, increase by 2 levels; (ii) more than \$7,000,000, increase by 3 levels; or (iii) more than \$20,000,000, increase by 4 levels.
- (89) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.
- (910) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
- (1011) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
- (1112) If the offense involved conduct described in 18 U.S.C. § 1040, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
- (1213) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.
- (1314) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

~~(14)~~**15** (Apply the greater) If—

- (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or
- (B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by **4** levels.
- (C) The cumulative adjustments from application of both subsections (b)(2) and (b)~~(14)~~**15**(B) shall not exceed **8** levels, except as provided in subdivision (D).
- (D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

~~(15)~~**16** If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.

~~(16)~~**17** (A) (Apply the greatest) If the defendant was convicted of an offense under:

- (i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.
- (ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.
- (iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.

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

~~(17)~~**18** If the offense involved—

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



with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

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

increase by 4 levels.

(c) Cross References

- (1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.
- (2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.
- (3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.
- (4) If the offense involved a cultural heritage resource 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

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6,

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

"Federal health care offense" has the meaning given that term in 18 U.S.C. § 24.

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

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

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

"Government health care program" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government. Examples of such programs are the Medicare program, the Medicaid program, and the CHIP program.

"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the

defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).

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

"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.

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

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

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

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

"Victim" means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

\* \* \*

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

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that was intended

to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

- (iii) Pecuniary Harm.—“Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.
- (iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, “reasonably foreseeable pecuniary harm” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.
- (v) Rules of Construction in Certain Cases.—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:
  - (I) Product Substitution Cases.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim’s business operations caused by the product substitution.
  - (II) Procurement Fraud Cases.—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.
  - (III) Offenses Under 18 U.S.C. § 1030.—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.
- (B) Gain.—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.
- (C) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court’s loss determination is entitled to

appropriate deference. See 18 U.S.C. § 3742(e) and (f).

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

- (i) *The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.*
- (ii) *In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.*
- (iii) *The cost of repairs to damaged property.*
- (iv) *The approximate number of victims multiplied by the average loss to each victim.*
- (v) *The reduction that resulted from the offense in the value of equity securities or other corporate assets.*
- (vi) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*

(D) Exclusions from Loss.—Loss shall not include the following:

- (i) *Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.*
- (ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.*

(E) Credits Against Loss.—Loss shall be reduced by the following:

- (i) *The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.*
- (ii) *In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.*

(F) Special Rules.—Notwithstanding subdivision (A), the following special rules shall be used

to assist in determining loss in the cases indicated:

- (i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 9(A).
- (ii) Government Benefits.—In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, loss is \$50.
- (iii) Davis-Bacon Act Violations.—In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 3142, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.
- (iv) Ponzi and Other Fraudulent Investment Schemes.—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).
- (v) Certain Other Unlawful Misrepresentation Schemes.—In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.
- (vi) Value of Controlled Substances.—In a case involving controlled substances, loss is the estimated street value of the controlled substances.
- (vii) Value of Cultural Heritage Resources or Paleontological Resources.—In a case

*involving a cultural heritage resource or paleontological resource, loss attributable to that resource shall be determined in accordance with the rules for determining the "value of the resource" set forth in Application Note 2 of the Commentary to §2B1.5.*

*(viii) Federal Health Care Offenses Involving Government Health Care Programs.—In a case in which the defendant is convicted of a Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, i.e., is evidence sufficient to establish the amount of the intended loss, if not rebutted.*

\* \* \*

7. Application of Subsection (b)(89).—

- (A) In General.—*The adjustments in subsection (b)(89) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.*
- (B) Misrepresentations Regarding Charitable and Other Institutions.—*Subsection (b)(89)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable, educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant's personal gain). Subsection (b)(89)(A) applies, for example, to the following:*
- (i) *A defendant who solicited contributions for a non-existent famine relief organization.*
  - (ii) *A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.*
  - (iii) *A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant's personal benefit.*
- (C) Fraud in Contravention of Prior Judicial Order.—*Subsection (b)(89)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement*

applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §3C1.3 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).

(D) College Scholarship Fraud.—For purposes of subsection (b)(89)(D):

\* \* \*

(E) Non-Applicability of Chapter Three Adjustments.—

(i) Subsection (b)(89)(A).—If the conduct that forms the basis for an enhancement under subsection (b)(89)(A) is the only conduct that forms the basis for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under §3B1.3.

(ii) Subsection (b)(89)(B) and (C).—If the conduct that forms the basis for an enhancement under subsection (b)(89)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under §3C1.1.

8. Sophisticated Means Enhancement under Subsection (b)(910).—

(A) Definition of United States.—For purposes of subsection (b)(910)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

(B) Sophisticated Means Enhancement.—For purposes of subsection (b)(910)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

(C) Non-Applicability of Chapter Three Adjustment.—If the conduct that forms the basis for an enhancement under subsection (b)(910) is the only conduct that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.

9. Application of Subsection (b)(1011).—

(A) Definitions.—For purposes of subsection (b)(1011):

\* \* \*



(C) Application of Subsection (b)(~~1011~~)(C)(i).—

(i) In General.—Subsection (b)(~~1011~~)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

(ii) Examples.—Examples of conduct to which subsection (b)(~~1011~~)(C)(i) applies are as follows:

\* \* \*

(iii) Non-Applicability of Subsection (b)(~~1011~~)(C)(i).—Examples of conduct to which subsection (b)(~~1011~~)(C)(i) does not apply are as follows:

\* \* \*

(D) Application of Subsection (b)(~~1011~~)(C)(ii).—Subsection (b)(~~1011~~)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.

10. Application of Subsection (b)(~~1213~~).—Subsection (b)(~~1213~~) provides a minimum offense level in the case of an ongoing, sophisticated operation (e.g., an auto theft ring or "chop shop") to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, "vehicle" means motor vehicle, vessel, or aircraft. A "cargo shipment" includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.

11. Gross Receipts Enhancement under Subsection (b)(~~1415~~)(A).—

(A) In General.—For purposes of subsection (b)(~~1415~~)(A), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.

\* \* \*

12. Application of Subsection (b)(~~1415~~)(B).—

(A) Application of Subsection (b)(~~1415~~)(B)(i).—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:

\* \* \*

(B) Application of Subsection (b)(~~1415~~)(B)(ii).—

\* \* \*

13. Application of Subsection (b)(~~617~~).—

(A) Definitions.—For purposes of subsection (b)(~~617~~):

\* \* \*

(B) Subsection (b)(~~617~~)(A)(iii).—If the same conduct that forms the basis for an enhancement under subsection (b)(~~617~~)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(~~415~~)(B), do not apply the enhancement under subsection (b)(~~415~~)(B).

14. Application of Subsection (b)(~~718~~).—

(A) Definitions.—For purposes of subsection (b)(~~718~~):

\* \* \*

(B) In General.—A conviction under a securities law or commodities law is not required in order for subsection (b)(~~718~~) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.

(C) Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)(~~718~~) applies, do not apply §3B1.3.

\* \* \*

19. Departure Considerations.—

\* \* \*

(B) Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)(~~617~~)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.

(C) Downward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

(D) Downward Departure for Major Disaster or Emergency Victims.—If (i) the minimum offense level of level 12 in subsection (b)(~~112~~) applies; (ii) the defendant sustained

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

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

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

*The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.*

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

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

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

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

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

*Subsection (b)(8) implements the directive to the Commission in section 10606 of Public Law 111–148.*

*Subsection (b)(9)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106–420.*

*Subsection (b)(10) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.*

*Subsections (b)(11)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.*

*Subsection (b)(11)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding", in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification", the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (i.e., produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.*

*Subsection (b)(12) implements the directive in section 5 of Public Law 110–179.*

*Subsection (b)(14)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.*

*Subsection (b)(15)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.*

*Subsection (b)(15)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.*

*Subsection (b)(16) implements the directive in section 209 of Public Law 110–326.*

*Subsection (b)(17) implements the directive in section 225(b) of Public Law 107–296. The*

minimum offense level of level 24 provided in subsection (b)(1617)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.

\* \* \*

**§3B1.2. Mitigating Role**

\* \* \*

Commentary

Application Notes:

\* \* \*

3. Applicability of Adjustment.—

- (A) Substantially Less Culpable than Average Participant.—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.

*A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.*

*Likewise, a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense and who had limited knowledge of the scope of the scheme is not precluded from consideration for an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose role in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, is not precluded from consideration for an adjustment under this guideline.*

\* \* \*

**APPENDIX A - STATUTORY INDEX**

\* \* \*

12 U.S.C. § 4641                      2J1.1, 2J1.5

12 U.S.C. § 5382                      2H3.1

\* \* \*

15 U.S.C. § 78u(c)                      2J1.1, 2J1.5

15 U.S.C. § 78jjj(c)(1),(2)              2B1.1

15 U.S.C. § 78jjj(d)                      2B1.1

\* \* \*

29 U.S.C. § 1131(a)                      2E5.3

29 U.S.C. § 1141                      2B1.1, 2B3.2

29 U.S.C. § 1149                      2B1.1

## 2. FAIR SENTENCING ACT

**Reason for Amendment:** *This multi-part amendment re-promulgates as permanent the temporary, emergency amendment (effective Nov. 1, 2010) that implemented the emergency directive in section 8 of the Fair Sentencing Act of 2010, Pub. L. 111–220 (the "Act"). The Act reduced the statutory penalties for cocaine base ("crack cocaine") offenses, eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine, and contained directives to the Commission to review and amend the guidelines to account for specified aggravating and mitigating circumstances in certain drug cases.*

*The emergency amendment authority provided in section 8 of the Act required the Commission to promulgate the guidelines, policy statements, or amendments provided for in the Act, and to make such conforming changes to the guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law, not later than 90 days after the date of enactment of the Act. Pursuant to this emergency directive, the Commission promulgated an amendment effective November 1, 2010, that made temporary, emergency revisions to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and §2D2.1 (Unlawful Possession; Attempt or Conspiracy). Conforming changes to certain other guidelines were also promulgated on a temporary, emergency basis. See USSG App. C, Amendment 748 (effective November 1, 2010).*

*This amendment re-promulgates the temporary, emergency amendment. Part A re-promulgates the revisions to the crack cocaine quantity levels in the Drug Quantity Table in §2D1.1 without change. Part B re-promulgates the various aggravating and mitigating provisions in §2D1.1 without change, except for a revision to the new Application Note 28 (relating to the new enhancement for maintaining premises). Part C re-promulgates the revision to §2D2.1 accounting for the reduction in the statutory penalties for simple possession of crack cocaine without change.*

### Part A. Changes to the Drug Quantity Table for Offenses Involving Crack Cocaine

*Part A re-promulgates without change the emergency, temporary revisions to the Drug Quantity Table in §2D1.1 and related revisions to Application Note 10 to account for the changes in the statutory penalties made in section 2 of the Act. Section 2 of the Act reduced the statutory penalties for offenses involving manufacturing or trafficking in crack cocaine by increasing the quantity thresholds required to trigger a mandatory minimum term of imprisonment. The quantity threshold required to trigger the 5-year mandatory minimum term of imprisonment was increased from 5 grams to 28 grams, and the quantity threshold required to trigger the 10-year mandatory minimum term of imprisonment was increased from 50 grams to 280 grams. See 21 U.S.C. §§ 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3). The new mandatory minimum quantity threshold levels for crack cocaine offenses are consistent with the Commission's 2007 report to Congress, Cocaine and Federal Sentencing Policy, in which the Commission, based on available information, defined crack cocaine offenders who deal in quantities of one ounce (approximately 28 grams) or more in a single transaction as wholesalers.*

*To account for these statutory changes, the amendment conforms the guideline penalty structure for crack cocaine offenses to the approach followed for other drugs, i.e., the base offense levels for crack cocaine are set in the Drug Quantity Table so that the statutory minimum penalties correspond to levels 26 and 32, which was the approach used for crack cocaine offenses prior to November 1, 2007. See §2D1.1, comment. (backg'd.); USSG App. C, Amendment 706 (effective November 1, 2007). Accordingly, using the new drug*

quantities established by the Act, offenses involving 28 grams or more of crack cocaine are assigned a base offense level of 26, offenses involving 280 grams or more of crack cocaine are assigned a base offense level of 32, and other offense levels are established by extrapolating proportionally upward and downward on the Drug Quantity Table. Conforming the guideline penalty structure for crack cocaine offenses to the approach followed for all other drugs ensures that the quantity-based relationship established by statute between crack cocaine offenses and offenses involving all other drugs is consistently and proportionally reflected throughout the Drug Quantity Table at all drug quantities.

Estimating the likely future sentencing impact of the amendment to the Drug Quantity Table is difficult because the reductions in the statutory penalties for crack cocaine offenses may result in changes in prosecutorial and other practices. With that important caveat, the Commission estimates that approximately 63 percent of crack cocaine offenders sentenced after November 1, 2011, will receive a lower sentence as a result of the change to the Drug Quantity Table, with an average sentence decrease of approximately 26 percent. For example, under the Drug Quantity Table in effect from November 1, 2007 through October 31, 2010, an offense involving 5 grams of crack cocaine was assigned a base offense level of 24, which corresponds to a guideline sentencing range of 51 to 63 months. Under the Drug Quantity Table as amended, 5 grams of crack cocaine is assigned a base offense level of 16, which corresponds to a guideline sentencing range of 21 to 27 months. Similarly, under the Drug Quantity Table in effect from November 1, 2007 through October 31, 2010, an offense involving 50 grams of crack cocaine was assigned a base offense level of 30, which corresponds to a guideline sentencing range of 97 to 121 months. Under the Drug Quantity Table as amended, 50 grams of crack cocaine is assigned a base offense level of 26, which corresponds to a guideline sentencing range of 63 to 78 months.

It is important to note that no crack cocaine offender will receive an increased sentence as a result of the amendment to the Drug Quantity Table. As indicated above, not all crack cocaine offenders sentenced after November 1, 2011, will receive a lower sentence as a result of the change to the Drug Quantity Table. This is the case for a variety of reasons. Among the reasons, compared to the Drug Quantity Table in effect from November 1, 2007 through October 31, 2010, the amendment does not lower the base offense levels, and therefore does not lower the sentences, for offenses involving the following quantities of crack cocaine: less than 500 milligrams; at least 28 grams but less than 35 grams; at least 280 grams but less than 500 grams; at least 840 grams but less than 1.5 kilograms; at least 2.8 kilograms but less than 4.5 kilograms; and 8.5 kilograms or more. In addition, some offenders are sentenced at the statutory mandatory minimum and therefore cannot have their sentences lowered by an amendment to the guidelines. See §5G1.1(b) (Sentencing on a Single Count of Conviction). Other offenders are sentenced pursuant to §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal), which result in sentencing guideline ranges that are unaffected by a reduction in the Drug Quantity Table.

To provide a means of obtaining a single offense level in cases involving crack cocaine and one or more other controlled substances, the amendment also establishes a marijuana equivalency for crack cocaine under which 1 gram of crack cocaine is equivalent to 3,571 grams of marijuana. (The marijuana equivalency for any controlled substance is a constant that can be calculated using any threshold in the Drug Quantity Table by dividing the amount of marijuana corresponding to that threshold by the amount of the other controlled substance corresponding to that threshold. For example, the threshold quantities at base offense level 26 are 100,000 grams of marijuana and 28 grams of crack cocaine; 100,000 grams divided by 28 is 3,571 grams.) In the commentary to §2D1.1, the amendment makes a conforming change to the rules for cases involving both crack cocaine and one or more other controlled substances. The amendment deletes the special rules in Note 10(D) for cases involving crack cocaine and one or more other controlled



substances, and revises Note 10(C) so that it provides an example of such a case.

*Part B. Aggravating and Mitigating Factors in Drug Trafficking Cases*

*Part B re-promulgates the temporary, emergency revisions to §2D1.1 and accompanying commentary that account for certain aggravating and mitigating factors in drug trafficking cases. These changes implement directives to the Commission in sections 5, 6, and 7 of the Act. The emergency revisions are re-promulgated without change, except for the new Application Note 28 (relating to the new enhancement for maintaining a premises), as explained below.*

*First, Part B amends §2D1.1 to add a sentence at the end of subsection (a)(5) (often referred to as the "mitigating role cap"). The new provision provides that if the offense level otherwise resulting from subsection (a)(5) is greater than level 32, and the defendant receives the 4-level ("minimal participant") reduction in subsection (a) of §3B1.2 (Mitigating Role), the base offense level shall be decreased to level 32. This provision responds to section 7(1) of the Act, which directed the Commission to ensure that "if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32".*

*Second, Part B amends §2D1.1 to create a new specific offense characteristic at subsection (b)(2) providing an enhancement of 2 levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence. The new specific offense characteristic responds to section 5 of the Act, which directed the Commission to "ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense."*

*The amendment also revises the commentary to §2D1.1 to clarify how this new specific offense characteristic interacts with subsection (b)(1), which provides an enhancement of 2 levels if a dangerous weapon (including a firearm) was possessed. Specifically, Application Note 3 is amended to provide that the enhancements in subsections (b)(1) and (b)(2) may be applied cumulatively. However, in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply.*

*In addition, the amendment makes a conforming change to the commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to address cases in which the defendant is sentenced under both §2D1.1 (for a drug trafficking offense) and §2K2.4 (for an offense under 18 U.S.C. § 924(c)). In such a case, the sentence under §2K2.4 accounts for any weapon enhancement; therefore, in determining the sentence under §2D1.1, the weapon enhancement in §2D1.1(b)(1) does not apply. See §2K2.4, comment. (n. 4). The amendment amends this commentary to similarly provide that, in a case in which the defendant is sentenced under both §§2D1.1 and 2K2.4, the new enhancement at §2D1.1(b)(2) also is accounted for by §2K2.4 and, therefore, does not apply.*

*Third, Part B amends §2D1.1 to create a new specific offense characteristic at subsection (b)(11) providing an enhancement of 2 levels if the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense. The new specific offense characteristic responds to section 6(1) of the Act, which directed the Commission "to ensure an additional increase of at least 2 offense levels if . . . the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense".*

The amendment also revises the commentary to §2D1.1 to clarify how this new specific offense characteristic interacts with the adjustment at §3C1.1 (Obstructing or Impeding the Administration of Justice). Specifically, new Application Note 27 provides that subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant because such conduct is covered by §3C1.1.

Fourth, Part B amends §2D1.1 to create a new specific offense characteristic at subsection (b)(12) providing an enhancement of 2 levels if the defendant maintained premises for the purpose of manufacturing or distributing a controlled substance. The new specific offense characteristic responds to section 6(2) of the Act, which directed the Commission to "ensure an additional increase of at least 2 offense levels if . . . the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856)".

The amendment also adds commentary in §2D1.1 at Application Note 28 providing that the enhancement applies to a defendant who knowingly maintains premises (*i.e.*, a building, room, or enclosure) for the purpose of maintaining or distributing a controlled substance. The new amendment differs from the temporary, emergency revisions in clarifying that distribution includes storage of a controlled substance for the purpose of distribution.

Application Note 28 also provides that among the factors the court should consider in determining whether the defendant "maintained" the premises are (A) whether the defendant held a possessory interest in (*e.g.*, owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises. Application Note 28 also provides that manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses of the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

Fifth, Part B amends §2D1.1 to create a new specific offense characteristic at subsection (b)(14) providing an enhancement of 2 levels if the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved one or more of five specified factors. The new specific offense characteristic responds to section 6(3) of the Act, which directed the Commission "to ensure an additional increase of at least 2 offense levels if . . . (A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and (B) the offense involved 1 or more of the following super-aggravating factors:

- (i) The defendant—
  - (I) used another person to purchase, sell, transport, or store controlled substances;
  - (II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and
  - (III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction.
- (ii) The defendant—
  - (I) knowingly distributed a controlled substance to a person under the age of

- (II) 18 years, a person over the age of 64 years, or a pregnant individual; knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;
  - (III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or
  - (IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.
- (iii) The defendant was involved in the importation into the United States of a controlled substance.
  - (iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.
  - (v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood."

The amendment also revises the commentary to §2D1.1 to provide guidance in applying the new specific offense characteristic at §2D1.1(b)(14). Specifically, new Application Note 29 provides that if the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(14)(B), the individual is not a "vulnerable victim" for purposes of subsection (b) of §3A1.1 (Hate Crime Motivation or Vulnerable Victim). Application Note 29 also provides that subsection (b)(14)(C) applies if the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance. Subsection (b)(14)(C), however, does not apply if subsection (b)(3) or (b)(5) (as redesignated by the amendment) applies because the defendant's involvement in importation is adequately accounted for by those subsections. In addition, Application Note 29 defines "pattern of criminal conduct" and "engaged in as a livelihood" for purposes of subsection (b)(14)(E) as those terms are defined in §4B1.3 (Criminal Livelihood).

The amendment also revises the commentary in §3B1.4 (Using a Minor To Commit a Crime) and §3C1.1 (Obstructing or Impeding the Administration of Justice) to specify how those adjustments interact with §2D1.1(b)(14)(B) and (D), respectively. Specifically, Application Note 2 to §3B1.4 is amended to clarify that the increase of two levels under this section would not apply if the defendant receives an enhancement under §2D1.1(b)(14)(B). Similarly, Application Note 7 to §3C1.1 is amended to clarify that the increase of two levels under this section would not apply if the defendant receives an enhancement under §2D1.1(b)(14)(D).

Sixth, Part B amends §2D1.1 to create a new specific offense characteristic at subsection (b)(15) providing a 2-level downward adjustment if the defendant receives the 4-level ("minimal participant") reduction in subsection (a) of §3B1.2 (Mitigating Role) and the offense involved each of three additional specified factors: namely, the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense when the defendant was otherwise unlikely to commit such an offense; was to receive no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and had minimal knowledge of the scope and structure of the enterprise. The specific offense characteristic responds to section 7(2) of the Act, which directed the Commission to ensure that "there is an additional

reduction of 2 offense levels if the defendant—

- (A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;
- (B) was to receive no monetary compensation from the illegal transaction; and
- (C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense."

Seventh, to reflect the renumbering of specific offense characteristics in §2D1.1(b) by the amendment, technical and conforming changes are made to the commentary to §2D1.1 and to §2D1.14 (Narco-Terrorism).

*Part C. Simple Possession of Crack Cocaine*

*Part C re-promulgates without change the temporary, emergency revisions to §2D2.1 to account for the changes in the statutory penalties for simple possession of crack cocaine made in section 3 of the Act. Section 3 of the Act amended 21 U.S.C. § 844(a) to eliminate the 5-year mandatory minimum term of imprisonment (and 20-year statutory maximum) for simple possession of more than 5 grams of crack cocaine (or, for certain repeat offenders, more than 1 gram of crack cocaine). Accordingly, the statutory penalty for simple possession of crack cocaine is now the same as for simple possession of most other controlled substances: for a first offender, a maximum term of imprisonment of one year; for repeat offenders, maximum terms of 2 years or 3 years, and minimum terms of 15 days or 90 days, depending on the prior convictions. See 21 U.S.C. § 844(a). To account for this statutory change, the amendment deletes the cross reference at §2D2.1(b)(1) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under the drug trafficking guideline, §2D1.1.*

**Amendment:**

**(A) Changes to Drug Quantity Table for Offenses Involving Cocaine Base ("Crack" Cocaine)**

[for formatting reasons, the changes to the Drug Quantity Table begin at the top of the following page]

## (c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
(1) ● 30 KG or more of Heroin; ● 150 KG or more of Cocaine; ● 4.58.4 KG or more of Cocaine Base; ● 30 KG or more of PCP, or 3 KG or more of PCP (actual); ● 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice"; ● 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual); ● 300 G or more of LSD; ● 12 KG or more of Fentanyl; ● 3 KG or more of a Fentanyl Analogue; ● 30,000 KG or more of Marihuana; ● 6,000 KG or more of Hashish; ● 600 KG or more of Hashish Oil; ● 30,000,000 units or more of Ketamine; ● 30,000,000 units or more of Schedule I or II Depressants; ● 1,875,000 units or more of Flunitrazepam.	<b>Level 38</b>
(2) ● At least 10 KG but less than 30 KG of Heroin; ● At least 50 KG but less than 150 KG of Cocaine; ● At least 1.52.8 KG but less than 4.58.4 KG of Cocaine Base; ● At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); ● At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice"; ● At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual); ● At least 100 G but less than 300 G of LSD; ● At least 4 KG but less than 12 KG of Fentanyl; ● At least 1 KG but less than 3 KG of a Fentanyl Analogue; ● At least 10,000 KG but less than 30,000 KG of Marihuana; ● At least 2,000 KG but less than 6,000 KG of Hashish; ● At least 200 KG but less than 600 KG of Hashish Oil; ● At least 10,000,000 but less than 30,000,000 units of Ketamine; ● At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants; ● At least 625,000 but less than 1,875,000 units of Flunitrazepam.	<b>Level 36</b>
(3) ● At least 3 KG but less than 10 KG of Heroin; ● At least 15 KG but less than 50 KG of Cocaine; ● At least 500840 G but less than 1.52.8 KG of Cocaine Base; ● At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual); ● At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than	<b>Level 34</b>

500 G of "Ice";

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

- (4) ● At least 1 KG but less than 3 KG of Heroin;
- At least 5 KG but less than 15 KG of Cocaine;
- At least ~~150280~~ G but less than ~~500840~~ G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
- At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
- At least 10 G but less than 30 G of LSD;
- At least 400 G but less than 1.2 KG of Fentanyl;
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Ketamine;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam.

**Level 32**

- (5) ● At least 700 G but less than 1 KG of Heroin;
- At least 3.5 KG but less than 5 KG of Cocaine;
- At least ~~50196~~ G but less than ~~150280~~ G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
- At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD;
- At least 280 G but less than 400 G of Fentanyl;
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;

**Level 30**

- At least 700,000 but less than 1,000,000 units of Ketamine;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- 700,000 or more units of Schedule III Hydrocodone;
- At least 43,750 but less than 62,500 units of Flunitrazepam.

- (6)
- At least 400 G but less than 700 G of Heroin;
  - At least 2 KG but less than 3.5 KG of Cocaine;
  - At least ~~35~~<sup>112</sup> G but less than ~~50~~<sup>196</sup> G of Cocaine Base;
  - At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
  - At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";
  - At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
  - At least 4 G but less than 7 G of LSD;
  - At least 160 G but less than 280 G of Fentanyl;
  - At least 40 G but less than 70 G of a Fentanyl Analogue;
  - At least 400 KG but less than 700 KG of Marihuana;
  - At least 80 KG but less than 140 KG of Hashish;
  - At least 8 KG but less than 14 KG of Hashish Oil;
  - At least 400,000 but less than 700,000 units of Ketamine;
  - At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
  - At least 400,000 but less than 700,000 units of Schedule III Hydrocodone;
  - At least 25,000 but less than 43,750 units of Flunitrazepam.

**Level 28**

- (7)
- At least 100 G but less than 400 G of Heroin;
  - At least 500 G but less than 2 KG of Cocaine;
  - At least ~~20~~<sup>28</sup> G but less than ~~35~~<sup>112</sup> G of Cocaine Base;
  - At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
  - At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
  - At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
  - At least 1 G but less than 4 G of LSD;
  - At least 40 G but less than 160 G of Fentanyl;
  - At least 10 G but less than 40 G of a Fentanyl Analogue;
  - At least 100 KG but less than 400 KG of Marihuana;
  - At least 20 KG but less than 80 KG of Hashish;
  - At least 2 KG but less than 8 KG of Hashish Oil;
  - At least 100,000 but less than 400,000 units of Ketamine;
  - At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
  - At least 100,000 but less than 400,000 units of Schedule III Hydrocodone;
  - At least 6,250 but less than 25,000 units of Flunitrazepam.

**Level 26**

- (8)
- At least 80 G but less than 100 G of Heroin;
  - At least 400 G but less than 500 G of Cocaine;

**Level 24**

- At least 522.4 G but less than 2028 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
- At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
- At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
- At least 800 MG but less than 1 G of LSD;
- At least 32 G but less than 40 G of Fentanyl;
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
- At least 80,000 but less than 100,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 6,250 units of Flunitrazepam.

- (9) ● At least 60 G but less than 80 G of Heroin;
- At least 300 G but less than 400 G of Cocaine;
- At least 416.8 G but less than 522.4 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
- At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";
- At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
- At least 600 MG but less than 800 MG of LSD;
- At least 24 G but less than 32 G of Fentanyl;
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Ketamine;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- At least 60,000 but less than 80,000 units of Schedule III Hydrocodone;
- At least 3,750 but less than 5,000 units of Flunitrazepam.

**Level 22**

- (10) ● At least 40 G but less than 60 G of Heroin;
- At least 200 G but less than 300 G of Cocaine;
- At least 311.2 G but less than 416.8 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
- At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than

**Level 20**



3 G of Amphetamine (actual);

- At least 400 MG but less than 600 MG of LSD;
- At least 16 G but less than 24 G of Fentanyl;
- At least 4 G but less than 6 G of a Fentanyl Analogue;
- At least 40 KG but less than 60 KG of Marijuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Ketamine;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- At least 40,000 but less than 60,000 units of Schedule III Hydrocodone;
- 40,000 or more units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 2,500 but less than 3,750 units of Flunitrazepam.

- (11) ● At least 20 G but less than 40 G of Heroin;
- At least 100 G but less than 200 G of Cocaine;
  - At least ~~25.6~~ 11.2 G but less than ~~311.2~~ 11.2 G of Cocaine Base;
  - At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
  - At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
  - At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
  - At least 200 MG but less than 400 MG of LSD;
  - At least 8 G but less than 16 G of Fentanyl;
  - At least 2 G but less than 4 G of a Fentanyl Analogue;
  - At least 20 KG but less than 40 KG of Marijuana;
  - At least 5 KG but less than 8 KG of Hashish;
  - At least 500 G but less than 800 G of Hashish Oil;
  - At least 20,000 but less than 40,000 units of Ketamine;
  - At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
  - At least 20,000 but less than 40,000 units of Schedule III Hydrocodone;
  - At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine or Hydrocodone);
  - At least 1,250 but less than 2,500 units of Flunitrazepam.

**Level 18**

- (12) ● At least 10 G but less than 20 G of Heroin;
- At least 50 G but less than 100 G of Cocaine;
  - At least ~~12.8~~ 2.8 G but less than ~~25.6~~ 2.8 G of Cocaine Base;
  - At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
  - At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";
  - At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
  - At least 100 MG but less than 200 MG of LSD;
  - At least 4 G but less than 8 G of Fentanyl;

**Level 16**

- At least 1 G but less than 2 G of a Fentanyl Analogue;
- At least 10 KG but less than 20 KG of Marihuana;
- At least 2 KG but less than 5 KG of Hashish;
- At least 200 G but less than 500 G of Hashish Oil;
- At least 10,000 but less than 20,000 units of Ketamine;
- At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
- At least 10,000 but less than 20,000 units of Schedule III Hydrocodone;
- At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 625 but less than 1,250 units of Flunitrazepam.

- (13) ● At least 5 G but less than 10 G of Heroin; **Level 14**
- At least 25 G but less than 50 G of Cocaine;
  - At least ~~500 MG~~ 1.4 G but less than ~~±2.8~~ G of Cocaine Base;
  - At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
  - At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
  - At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
  - At least 50 MG but less than 100 MG of LSD;
  - At least 2 G but less than 4 G of Fentanyl;
  - At least 500 MG but less than 1 G of a Fentanyl Analogue;
  - At least 5 KG but less than 10 KG of Marihuana;
  - At least 1 KG but less than 2 KG of Hashish;
  - At least 100 G but less than 200 G of Hashish Oil;
  - At least 5,000 but less than 10,000 units of Ketamine;
  - At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
  - At least 5,000 but less than 10,000 units of Schedule III Hydrocodone;
  - At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine or Hydrocodone);
  - At least 312 but less than 625 units of Flunitrazepam.

- (14) ● Less than 5 G of Heroin; **Level 12**
- Less than 25 G of Cocaine;
  - Less than ~~500 MG~~ 1.4 G of Cocaine Base;
  - Less than 5 G of PCP, or less than 500 MG of PCP (actual);
  - Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
  - Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
  - Less than 50 MG of LSD;
  - Less than 2 G of Fentanyl;
  - Less than 500 MG of a Fentanyl Analogue;
  - At least 2.5 KG but less than 5 KG of Marihuana;
  - At least 500 G but less than 1 KG of Hashish;
  - At least 50 G but less than 100 G of Hashish Oil;
  - At least 2,500 but less than 5,000 units of Ketamine;

- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III Hydrocodone;
- At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 156 but less than 312 units of Flunitrazepam;
- 40,000 or more units of Schedule IV substances (except Flunitrazepam).

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

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

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

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\*Notes to Drug Quantity Table:

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

level.

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

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

- (C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.
- (D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.
- (F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (e.g., patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of an anabolic steroid is one "unit".
- (G) In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.
- (H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(30)), (ii) at least two of the following: 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)(30)), (ii) at least two of the following: 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.

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Commentary

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Application Notes:

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10. Use of Drug Equivalency Tables.—

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

- (i) Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana.
- (ii) Find the equivalent quantity of marihuana in the Drug Quantity Table.
- (iii) Use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.

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

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

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

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

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

- (i) *The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 24.*
- (ii) *The defendant is convicted of selling 500 grams of marihuana (Level 8) and five kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 10 in the Drug Quantity Table.*
- (iii) *The defendant is convicted of selling 80 grams of cocaine (Level 16) and ~~five kilograms of marihuana~~ 2 grams of cocaine base (Level 14). The cocaine is equivalent to 16 kilograms of marihuana, and the cocaine base is equivalent to 7.142 kilograms of marihuana. The total is therefore equivalent to ~~23.142~~ 23.142 kilograms of marihuana, which has an offense level of 18 in the Drug Quantity Table.*
- (iv) *The defendant is convicted of selling 56,000 units of a Schedule III substance, 100,000 units of a Schedule IV substance, and 200,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 56 kilograms of marihuana (below the cap of 59.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 4.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 6.25 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 999 grams of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 1.25 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 59.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 61.99 (56 + 4.99 + .999) kilograms.*

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

- ~~(i) In General.—Except as provided in subdivision (ii), if the offense involves cocaine base ("crack") and one or more other controlled substance, determine the combined offense level as provided by subdivision (B) of this note, and reduce the combined offense level by 2 levels.~~
- ~~(ii) Exceptions to 2-level Reduction.—The 2-level reduction provided in subdivision (i) shall not apply in a case in which:~~

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

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

~~(iii) Examples.—~~

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

~~(II) The case involves 5 gm of cocaine base and 6 kg of heroin. Under the Drug Equivalency Tables in subdivision (E) of this note, 5 gm of cocaine base converts to 100 kg of marihuana (5 gm x 20 kg = 100 kg), and 6 kg of heroin converts to 6,000 kg of marihuana (6,000 gm x 1 kg = 6,000 kg), which, when added together results in a combined equivalent quantity of 6,100 kg of marihuana. Under the Drug Quantity Table, 6,100 kg of marihuana corresponds to a combined offense level of 34, which is reduced by two levels to 32. For the heroin, the 6,000 kg of marihuana corresponds to an offense level 34 under the Drug Quantity Table. Because the combined offense level for the two drug types after the 2-level reduction is less than the offense level for the heroin, the reduction does not apply and the combined offense level for the two drugs remains level 34.~~

~~(ED) Drug Equivalency Tables.—~~

Schedule I or II Opiates\*

1 gm of Heroin =	1 kg of marihuana
1 gm of Alpha-Methylfentanyl =	10 kg of marihuana
1 gm of Dextromoramide =	670 gm of marihuana
1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana

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

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

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

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylamine =	40 gm of marihuana
1 gm of Amphetamine =	2 kg of marihuana
1 gm of Amphetamine (Actual) =	20 kg of marihuana
1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	20 kg of marihuana
1 gm of "Ice" =	20 kg of marihuana
1 gm of Khat =	.01 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria")=	100 gm of marihuana
1 gm of Methylphenidate (Ritalin)=	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P <sub>2</sub> P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P <sub>2</sub> P (in any other case) =	75 gm of marihuana
1 gm Cocaine Base ('Crack') =	<del>20 kg</del> 3,571 gm of marihuana
1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana



1 gm of N-N-Dimethylamphetamine = 40 gm of marihuana

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

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

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

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

Schedule I Marihuana

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

Flunitrazepam \*\*

1 unit of Flunitrazepam = 16 gm of marihuana

*\*\*Provided*, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

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

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

Gamma-hydroxybutyric Acid

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

Schedule III Substances (except ketamine and hydrocodone)\*\*\*

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

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

Schedule III Hydrocodone\*\*\*\*

1 unit of Schedule III hydrocodone = 1 gm of marihuana

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

Ketamine

1 unit of ketamine = 1 gm of marihuana

Schedule IV Substances (except flunitrazepam)\*\*\*\*\*

1 unit of a Schedule IV Substance  
(except Flunitrazepam)= 0.0625 gm of marihuana

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

Schedule V Substances\*\*\*\*\*

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

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

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

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

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

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

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

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

MEASUREMENT CONVERSION TABLE

*1 oz = 28.35 gm  
1 lb = 453.6 gm  
1 lb = 0.4536 kg  
1 gal = 3.785 liters  
1 qt = 0.946 liters  
1 gm = 1 ml (liquid)  
1 liter = 1,000 ml  
1 kg = 1,000 gm  
1 gm = 1,000 mg  
1 grain = 64.8 mg.*

**(B) Aggravating and Mitigating Factors in Drug Trafficking Cases**

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

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

- (1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the

use of the substance; or

- (3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. **If the resulting offense level is greater than level 32 and the defendant receives the 4-level ("minimal participant") reduction in §3B1.2(a), decrease to level 32.**

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
- (2) **If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels.**
- (~~23~~) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.
- (~~34~~) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.
- (~~45~~) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.

- (56) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.
- (67) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.
- (78) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.
- (89) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.
- (910) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.
- (11) **If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by **2** levels.**
- (12) **If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.**
- (13) (Apply the greatest):
  - (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
  - (B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
  - (C) If—
    - (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or
    - (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

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

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

(14) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

(A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

(B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;

(C) the defendant was directly involved in the importation of a controlled substance;

(D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,

increase by **2** levels.

(15) If the defendant receives the **4**-level ("minimal participant") reduction in §3B1.2(a) and the offense involved all of the following factors:

(A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) the defendant had minimal knowledge of the scope and structure of the enterprise,

decrease by 2 levels.

(H16) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

[Subsection (c) (Drug Quantity Table) was set forth in Part A, above.]

(d) Cross References

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

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

(e) Special Instruction

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

Commentary

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

Application Notes:

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3. Application of Subsections (b)(1) and (b)(2).—

(A) Application of Subsection (b)(1).—Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession in subsection (b)(1) reflects the increased danger of violence when drug traffickers possess weapons. The adjustment enhancement should be applied if the weapon

was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at ~~his~~ the defendant's residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1; see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(c)(1), and 2D2.1(b)(1).

**(B)** *Interaction of Subsections (b)(1) and (b)(2).—The enhancements in subsections (b)(1) and (b)(2) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. See §1B1.1 (Application Instructions), Application Note 4(A). However, in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply.*

\* \* \*

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

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

\* \* \*

18. *If the offense involved importation of amphetamine or methamphetamine, and an adjustment from subsection (b)(2) applies, do not apply subsection (b)(4).*
19. *Hazardous or Toxic Substances.—Subsection (b)(1)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(1)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases*



*involving the manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).*

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

(A) Factors to Consider.—*In determining, for purposes of subsection (b)(~~1013~~)(C)(ii) or (D), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:*

\* \* \*

(B) Definitions.—*For purposes of subsection (b)(~~1013~~)(D):*

\* \* \*

21. Applicability of Subsection (b)(~~1116~~).—*The applicability of subsection (b)(~~1116~~) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(~~1116~~) applies.*

\* \* \*

23. Application of Subsection (b)(~~67~~).—*For purposes of subsection (b)(~~67~~), "mass-marketing by means of an interactive computer service" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(~~67~~) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "Interactive computer service", for purposes of subsection (b)(~~67~~) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).*

\* \* \*

25. Application of Subsection (b)(~~78~~).—*For purposes of subsection (b)(~~78~~), "masking agent" means a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual's body.*

26. Application of Subsection (b)(~~89~~).—*For purposes of subsection (b)(~~89~~), "athlete" means an individual who participates in an athletic activity conducted by (i) an intercollegiate athletic association or interscholastic athletic association; (ii) a professional athletic association; or (iii) an amateur athletic organization.*

27. Application of Subsection (b)(11).—*Subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant. Such conduct is covered by §3C1.1 (Obstructing or Impeding the Administration of Justice) and, if*

applicable, §2D1.1(b)(14)(D).

28. *Application of Subsection (b)(12).—Subsection (b)(12) applies to a defendant who knowingly maintains a premises (i.e., a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance, including storage of a controlled substance for the purpose of distribution.*

*Among the factors the court should consider in determining whether the defendant "maintained" the premises are (A) whether the defendant held a possessory interest in (e.g., owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.*

*Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.*

29. *Application of Subsection (b)(14).—*

(A) *Distributing to a Specified Individual or Involving Such an Individual in the Offense (Subsection (b)(14)(B)).—If the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(14)(B), the individual is not a "vulnerable victim" for purposes of §3A1.1(b).*

(B) *Directly Involved in the Importation of a Controlled Substance (Subsection (b)(14)(C)).—Subsection (b)(14)(C) applies if the defendant is accountable for the importation of a controlled substance under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), i.e., the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance.*

*If subsection (b)(3) or (b)(5) applies, do not apply subsection (b)(14)(C).*

(C) *Pattern of Criminal Conduct Engaged in as a Livelihood (Subsection (b)(14)(E)).—For purposes of subsection (b)(14)(E), "pattern of criminal conduct" and "engaged in as a livelihood" have the meaning given such terms in §4B1.3 (Criminal Livelihood).*

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

*The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 32 and 26 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To*

determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.

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

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

*The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.*

*Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.*

~~Specific Offense Characteristic~~ *Subsection (b)(23) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.*

\* \* \*

*Subsection (b)(11) implements the directive to the Commission in section 6(1) of Public Law 111–220.*

*Subsection (b)(12) implements the directive to the Commission in section 6(2) of Public Law 111–220.*

*Subsection (b)(~~13~~)(A) implements the instruction to the Commission in section 303 of Public Law 103–237.*

*Subsections (b)(~~13~~)(C)(ii) and (D) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.*

*Subsection (b)(14) implements the directive to the Commission in section 6(3) of Public Law 111–220.*

*Subsection (b)(15) implements the directive to the Commission in section 7(2) of Public Law 111–220.*

\* \* \*

**§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)(5)(A), (a)(5)(B), and (b)(~~H~~16) shall not apply.
- (b) Specific Offense Characteristic
  - (1) If §3A1.4 (Terrorism) does not apply, increase by 6 levels.

*Commentary*

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

\* \* \*

**§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes**

- (a) If the defendant, whether or not convicted of another crime, was convicted of violating section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.
- (b) Except as provided in subsection (c), if the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.
- (c) If the defendant (1) was convicted of violating section 924(c) or section 929(a) of title 18, United States Code; and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). Except for §§3E1.1 (Acceptance of Responsibility), 4B1.1, and 4B1.2 (Definitions of Terms Used in Section 4B1.1), Chapters Three and Four shall not apply to that count of conviction.
- (d) Special Instructions for Fines
  - (1) Where there is a federal conviction for the underlying offense, the fine

guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section.

Commentary

Statutory Provisions: 18 U.S.C. §§ 844(h), 924(c), 929(a).

Application Notes:

1. Application of Subsection (a).—Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 844(h) is the term required by that statute. Section 844(h) of title 18, United State Code, also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.
2. Application of Subsection (b).—
  - (A) In General.—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. § 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.
  - (B) Upward Departure Provision.—In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant’s criminal history in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense but is not determined to be a career offender under §4B1.1.
3. Application of Subsection (c).—In a case in which the defendant (A) was convicted of violating 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a); and (B) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction).
4. Weapon Enhancement.— If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if

(A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.

*A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under §2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.*

*If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under §2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or §2K2.1(b)(6) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under §2K2.1(b)(6) would not apply.*

*In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (i.e., the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).*

\* \* \*

*Background: Section 844(h) of title 18, United States Code, provides a mandatory term of imprisonment. Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment. A sentence imposed pursuant to any of these statutes must be imposed to run consecutively to any other term of imprisonment. To avoid double counting, when a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for explosive or firearm discharge, use, brandishing, or possession is not applied in respect to such underlying offense.*

\* \* \*

**§3B1.4. Using a Minor To Commit a Crime**

If the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by **2** levels.

Commentary

Application Notes:

1. *"Used or attempted to use" includes directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting.*
2. *Do not apply this adjustment if the Chapter Two offense guideline incorporates this factor. For example, if the defendant receives an enhancement under §2D1.1(b)(14)(B) for involving an individual less than 18 years of age in the offense, do not apply this adjustment.*
3. *If the defendant used or attempted to use more than one person less than eighteen years of age, an upward departure may be warranted.*

\* \* \*

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

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by **2** levels.

Commentary

Application Notes:

1. *In General.—This adjustment applies if the defendant's obstructive conduct (A) occurred with respect to the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant.*

*Obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction.*

2. *Limitations on Applicability of Adjustment.—This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation*

*officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.*

3. *Covered Conduct Generally.*—*Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 4 sets forth examples of the types of conduct to which this adjustment is intended to apply. Application Note 5 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this adjustment applies is not subject to precise definition, comparison of the examples set forth in Application Notes 4 and 5 should assist the court in determining whether application of this adjustment is warranted in a particular case.*
4. *Examples of Covered Conduct.*—*The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:*
  - (A) *threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;*
  - (B) *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;*
  - (C) *producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;*
  - (D) *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;*
  - (E) *escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;*
  - (F) *providing materially false information to a judge or magistrate judge;*
  - (G) *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) *providing materially false information to a probation officer in respect to a presentence or other investigation for the court;*



- (I) *other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511);*
- (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) *threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.*

*This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.*

5. *Examples of Conduct Ordinarily Not Covered.*—*Some types of conduct ordinarily do not warrant application of this adjustment but may warrant a greater sentence within the otherwise applicable guideline range or affect the determination of whether other guideline adjustments apply (e.g., §3E1.1 (Acceptance of Responsibility)). However, if the defendant is convicted of a separate count for such conduct, this adjustment will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 8, below.*

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

- (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) *making false statements, not under oath, to law enforcement officers, unless Application Note 4(G) above applies;*
- (C) *providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;*
- (D) *avoiding or fleeing from arrest (see, however, §3C1.2 (Reckless Endangerment During Flight));*
- (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).*

6. *"Material" Evidence Defined.*—*"Material" evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.*

7. *Inapplicability of Adjustment in Certain Circumstances.*—*If the defendant is convicted of an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury or Subornation of*

*Perjury; Bribery of Witness), §2J1.5 (Failure to Appear by Material Witness), §2J1.6 (Failure to Appear by Defendant), §2J1.9 (Payment to Witness), §2X3.1 (Accessory After the Fact), or §2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense).*

*Similarly, if the defendant receives an enhancement under §2D1.1(b)(14)(D), do not apply this adjustment.*

\* \* \*

**(C) Simple Possession of Crack Cocaine**

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

(a) Base Offense Level:

- (1) **8**, if the substance is heroin or any Schedule I or II opiate, an analogue of these, or cocaine base; or
- (2) **6**, if the substance is cocaine, flunitrazepam, LSD, or PCP; or
- (3) **4**, if the substance is any other controlled substance or a list I chemical.

(b) Cross References

- ~~(1) If the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) as if the defendant had been convicted of possession of that mixture or substance with intent to distribute.~~
- (2)** If the offense involved possession of a controlled substance in a prison, correctional facility, or detention facility, apply §2P1.2 (Providing or Possessing Contraband in Prison).

Commentary

Statutory Provision: 21 U.S.C. § 844(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant's own consumption. Where the circumstances establish intended

*consumption by a person other than the defendant, an upward departure may be warranted.*

*Background: Mandatory (statutory) minimum penalties for several categories of cases, ranging from fifteen days' to ~~five~~three years' imprisonment, are set forth in 21 U.S.C. § 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. See §5G1.1(b). Note, however, that 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).*

*~~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 21 U.S.C. § 844(a). Other cases for which enhanced penalties are provided under 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).~~*

### 3. DRUG DISPOSAL ACT

**Reason for Amendment:** *This amendment makes changes to the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) in response to the Secure and Responsible Drug Disposal Act of 2010, Pub. L. 111–273 (the "Act"). Section 3 of the Act amended 21 U.S.C. § 822 (Persons required to register) to authorize certain persons in possession of controlled substances (i.e., ultimate users and long-term care facilities) to deliver the controlled substances for the purpose of disposal. Section 4 of the Act contained a directive to the Commission to "review and, if appropriate, amend" the guidelines to ensure that the guidelines provide "an appropriate penalty increase of up to 2 offense levels above the sentence otherwise applicable in Part D of the Guidelines Manual if a person is convicted of a drug offense resulting from the authorization of that person to receive scheduled substances from an ultimate user or long-term care facility as set forth in the amendments made by section 3."*

*The amendment implements the directive by amending Application Note 8 to §2D1.1 to provide that an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility. The amendment reflects the likelihood that in such a case the offender abused a position of trust (i.e., the authority provided by 21 U.S.C. § 822 to receive controlled substances for the purpose of disposal) to facilitate the commission or concealment of the offense.*

#### **Amendment:**

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

\* \* \*

#### Commentary

\* \* \*

#### Application Notes:

\* \* \*

8. *Interaction with §3B1.3.—A defendant who used special skills in the commission of the offense may be subject to an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. Additionally, an enhancement under §3B1.3 ordinarily would apply in a case in which the defendant used his or her position as a coach to influence an athlete to use an anabolic steroid. Likewise, an adjustment under §3B1.3 ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility. See 21 U.S.C. § 822(g).*

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

#### 4. CHILD SUPPORT

**Reason for Amendment:** *This amendment addresses a circuit conflict on whether the specific offense characteristic at subsection (b)(8)(C) of §2B1.1 (Theft, Property Destruction, and Fraud) applies to a defendant convicted of an offense involving the willful failure to pay court-ordered child support (i.e., a violation of 18 U.S.C. § 228). The specific offense characteristic in §2B1.1(b)(8)(C) applies if the offense involved "a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines".*

*It provides an enhancement of 2 levels and a minimum offense level of level 10.*

*Offenses under section 228 are referenced in Appendix A (Statutory Index) to §2J1.1 (Contempt), which directs the court to apply §2X5.1 (Other Offenses), which in turn directs the court to apply the most analogous offense guideline. The commentary to §2J1.1 provides that, in a case involving a violation of section 228, the most analogous offense guideline is §2B1.1. See §2J1.1, comment. (n.2).*

*Some circuits have disagreed over whether to apply §2B1.1(b)(8)(C) in a case involving a violation of section 228. The Second and Eleventh Circuits have held that applying §2B1.1(b)(8)(C) in a section 228 case is permissible because the failure to pay the child support and the violation of the order are distinct harms. See United States v. Maloney, 406 F.3d 149, 153-54 (2d Cir. 2005); United States v. Phillips, 363 F.3d 1167, 1169 (11th Cir. 2004). However, the Seventh Circuit has held that applying §2B1.1(b)(8)(C) in a section 228 case is impermissible double counting. See United States v. Bell, 598 F.3d 366 (7th Cir. 2010) ("apply[ing] both the cross-reference for § 228 and the enhancement for violation of a court or administrative order is impermissible double counting").*

*The amendment resolves the conflict by amending the commentary to §2J1.1 to specify that, in a case involving a violation of section 228, §2B1.1(b)(8)(C) does not apply. The Commission determined that in a section 228 case the fact that the offense involved a violation of a court order is adequately accounted for by the base offense level.*

#### **Amendment:**

##### **§2J1.1. Contempt**

Apply §2X5.1 (Other Offenses).

#### Commentary

Statutory Provisions: 18 U.S.C. §§ 401, 228. For additional statutory provision(s), see Appendix A (Statutory Index).

#### Application Notes:

1. In General.—*Because misconduct constituting contempt varies significantly and the nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court*

are highly context-dependent, the Commission has not provided a specific guideline for this offense. In certain cases, the offense conduct will be sufficiently analogous to §2J1.2 (Obstruction of Justice) for that guideline to apply.

2. Willful Failure to Pay Court-Ordered Child Support.—For offenses involving the willful failure to pay court-ordered child support (violations of 18 U.S.C. § 228), the most analogous guideline is §2B1.1 (Theft, Property Destruction, and Fraud). The amount of the loss is the amount of child support that the defendant willfully failed to pay. In such a case, do not apply §2B1.1(b)(8)(C) (pertaining to a violation of a prior, specific judicial order). Note: This guideline applies to second and subsequent offenses under 18 U.S.C. § 228(a)(1) and to any offense under 18 U.S.C. § 228(a)(2) and (3). A first offense under 18 U.S.C. § 228(a)(1) is not covered by this guideline because it is a Class B misdemeanor.
  
3. Violation of Judicial Order Enjoining Fraudulent Behavior.—In a case involving a violation of a judicial order enjoining fraudulent behavior, the most analogous guideline is §2B1.1. In such a case, §2B1.1(b)(8)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply.

## 5. FIREARMS

**Reason for Amendment:** *This multi-part amendment is a result of the Commission's review of offenses involving firearms crossing the border. The Commission undertook this review in response to concerns that the illegal flow of firearms across the southwestern border of the United States is contributing to violence along the border and ultimately harming the national security of the United States. The Commission has considered sentencing data, heard testimony, and received comment on the general concern of firearms crossing the border illegally and a specific concern that "straw purchasers" (i.e., individuals who buy firearms on behalf of others, typically "prohibited persons" who are not allowed to buy or possess firearms themselves) are contributing to this illegal flow of firearms to a significant degree.*

*The amendment amends the primary firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), to address the general concern of firearms crossing the border and the specific concern about straw purchasers. The amendment also amends the guideline for arms export violations, §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), to provide greater penalties for export offenses involving small arms and more guidance on export offenses involving ammunition. Finally, the amendment revises the references in Appendix A (Statutory Index) for certain offenses, including providing a reference for a new offense created by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111–195.*

### Firearms Leaving the United States

*Subsection (b)(6) provides a 4-level enhancement, and a minimum offense level of 18, if the defendant used or possessed any firearm or ammunition in connection with another felony offense, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense. The amendment establishes a new prong (A) in subsection (b)(6) that applies "if the defendant possessed any firearm or ammunition while leaving or attempting to leave the United States; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transferred out of the United States", and redesignates the existing provision as prong (B). Under the amendment, a defendant receives the 4-level enhancement and minimum offense level 18 if either prong applies. The Commission determined that possessing a firearm while leaving or attempting to leave the United States is conduct sufficiently similar in seriousness to possessing a firearm in connection with another felony offense to warrant similar punishment. Likewise, possessing or transferring a firearm with knowledge, intent, or reason to believe that it would be transported out of the United States is conduct sufficiently similar in seriousness to possessing or transferring a firearm with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense to warrant similar punishment.*

*Prior to the amendment, some courts have applied subsection (b)(6) to cases in which the defendant has transported or attempted to transport firearms across the border. These courts have concluded that because transporting a firearm outside the United States is generally a felony under federal law, such conduct may qualify as "another felony offense" for purposes of subsection (b)(6). See, e.g., United States v. Juarez, 626 F.3d 246 (5th Cir. 2010) (holding that, under the guideline as amended by the Commission in 2008, the district court did not plainly err in applying §2K2.1(b)(6) to a defendant who transferred firearms with reason to believe they would be taken across the border in a manner that would violate 22 U.S.C. § 2778(b) and (c), which prohibits, among other things, the unlicensed export of defense articles and punishes such*



violations by up to 20 years' imprisonment). However, for clarity and to promote consistency of application, the Commission created a separate, distinct prong (A) in subsection (b)(6) to cover this conduct.

#### Straw Purchasers

Second, the amendment amends §2K2.1 to address the concerns about straw purchasers. The amendment increases penalties for certain defendants convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) for making a false statement in connection with a firearms transaction. Specifically, the amendment increases penalties for a defendant who is convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. The base offense level for a defendant convicted under either of these statutes has been level 12, or level 18 if the offense involved a firearm described in 26 U.S.C. § 5845(a). *See* §2K2.1(a)(5), (7). The amendment amends subsections (a)(4)(B) and (a)(6) to increase the base offense level for these defendants to level 14, or 20 if the offense involved either a semiautomatic firearm that is capable of accepting a large capacity magazine or a firearm described in 26 U.S.C. § 5845(a).

The amendment ensures that defendants convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) receive the same punishment as defendants convicted under a third statute used to prosecute straw purchasers, 18 U.S.C. § 922(d), when the conduct is similar. Section 922(d) differs from 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A) in that it requires as an element of the offense that the defendant sell or otherwise dispose of a firearm or ammunition to a prohibited person knowing or having reasonable cause to believe that such person is a prohibited person. Section 2K2.1 has accounted for the increased offense seriousness and offender culpability in violations of 18 U.S.C. § 922(d) by providing base offense levels for convictions under section 922(d) that are generally 2 levels higher than for convictions under 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A). *See* §2K2.1(a)(4)(B), (a)(6)(B). The Commission determined that defendants who are convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) for making a false statement in connection with a firearms transaction and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person have engaged in conduct similar to the elements of 18 U.S.C. § 922(d), are similarly culpable, and therefore warrant a similar sentence under §2K2.1.

In addition, the amendment provides a new Application Note 15 stating that, in a case in which the defendant is convicted under any of the three statutes, a downward departure may be warranted if (A) none of the enhancements in subsection (b) of §2K2.1 apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense. The Commission determined that a defendant meeting these criteria may be less culpable than the typical straw purchaser.

#### Export Offenses Involving Small Arms or Ammunition

Third, the amendment amends §2M5.2 to narrow the application of the alternative base offense level of 14 at subsection (a)(2). The alternative base offense level of 14 has applied "if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns) and the number of weapons did not exceed ten." *See* §2M5.2(a)(2). The amendment reduces the threshold number of small arms in subsection (a)(2) from ten to two. The Commission determined that export offenses involving more than two firearms are more serious and more likely to involve trafficking. Narrowing the application of subsection (a)(2) also brings §2M5.2 into greater conformity with §2K2.1 in how it accounts for the number of firearms involved in the

offense. *See* §2K2.1(b)(1) (providing a tiered enhancement of 2 to 10 levels if the offense involved three or more firearms); §2K2.1, comment. (n.13) (specifying that the trafficking enhancement in §2K2.1(b)(5) applies if the offense involved two or more firearms and other requirements are also met).

The amendment also amends §2M5.2 to address cases in which the defendant possessed ammunition, either in a case involving ammunition only or in a case involving ammunition and small arms. There appears to be differences in how §2M5.2 is being applied by the courts in such cases. Under the amendment, a defendant with ammunition will receive the alternative base offense level of 14 if the ammunition consisted of not more than 500 rounds of ammunition for small arms. Such ammunition typically is sold in quantities of not more than 500 rounds, depending on the manufacturer and the type of ammunition. The Commission determined that, as with export offenses involving more than two firearms, export offenses involving more than 500 rounds of ammunition are more serious and more likely to involve trafficking.

#### References in Appendix A (Statutory Index)

Fourth, the amendment amends Appendix A (Statutory Index) to expand the number of guidelines to which offenses under 50 U.S.C. § 1705 are referenced. Section 1705 makes it unlawful to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under the International Emergency Economic Powers Act (50 U.S.C. § 1701 *et seq.*). Any person who willfully commits, willfully attempts or conspires to commit, or aids or abets in the commission of such an unlawful act may be imprisoned for not more than 20 years. *See* 50 U.S.C. § 1705(c). Appendix A (Statutory Index) previously contained two separate entries: the criminal offense, 50 U.S.C. § 1705, was referenced to §2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose), while another statute that contains no criminal offense, 50 U.S.C. § 1701, was referenced to §2M5.3 as well as to §§2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism) and 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). The amendment revises the entry for 50 U.S.C. § 1705 to include all three guidelines, §§2M5.1, 2M5.2, and 2M5.3, and deletes as unnecessary the entry for 50 U.S.C. § 1701.

Finally, the amendment addresses a new offense created by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111–195. Section 103 of that Act (22 U.S.C. § 8512) makes it unlawful to import into the United States certain goods or services of Iranian origin, or export to Iran certain goods, services, or technology, and provides that the penalties under 50 U.S.C. § 1705 apply to a violation. The amendment amends Appendix A (Statutory Index) to reference the new offense at 22 U.S.C. § 8512 to §§2M5.1, 2M5.2, and 2M5.3.

#### **Amendment:**

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

- (a) Base Offense Level (Apply the Greatest):
- (1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in

26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20**, if --

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; ~~or~~ (II) is convicted under 18 U.S.C. § 922(d); ~~or~~ (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);

(6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; ~~or~~ (B) is convicted under 18 U.S.C. § 922(d); ~~or~~ (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(7) **12**, except as provided below; or

(8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1).

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

	<u>Number of Firearms</u>	<u>Increase in Level</u>
(A)	3-7	add <b>2</b>
(B)	8-24	add <b>4</b>
(C)	25-99	add <b>6</b>
(D)	100-199	add <b>8</b>
(E)	200 or more	add <b>10</b> .

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.

(3) If the offense involved—

(A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or

(B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.

(4) If any firearm (A) was stolen, increase by **2** levels; or (B) had an altered or obliterated serial number, increase by **4** levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

(5) If the defendant engaged in the trafficking of firearms, increase by **4** levels.

(6) If the defendant—

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense, apply --

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r)-(w), (x)(1), 924(a), (b), (e)-(i), (k)-(o), 2332g; 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. Definitions.— For purposes of this guideline:

"Ammunition" has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

"Controlled substance offense" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"Crime of violence" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

"Destructive device" has the meaning given that term in 26 U.S.C. § 5845(f).

"Felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult

conviction if the defendant was expressly proceeded against as an adult).

"Firearm" has the meaning given that term in 18 U.S.C. § 921(a)(3).

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.
3. Definition of "Prohibited Person".—For purposes of subsections (a)(4)(B) and (a)(6), "prohibited person" means any person described in 18 U.S.C. § 922(g) or § 922(n).
4. Application of Subsection (a)(7).— Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.
5. Application of Subsection (b)(1).—For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.

\* \* \*

9. Application of Subsection (b)(7).— Under subsection (b)(7), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (e.g., if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).
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).

*Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

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

circumstances: (A) the number of firearms substantially exceeded 200; (B) 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)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 7).

12. Armed Career Criminal.—A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. See §4B1.4.

13. Application of Subsection (b)(5).—

(A) In General.—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—

(i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and

(ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—

(I) whose possession or receipt of the firearm would be unlawful; or

(II) who intended to use or dispose of the firearm unlawfully.

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

"Individual whose possession or receipt of the firearm would be unlawful" means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. "Crime of violence" and "controlled substance offense" have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). "Misdemeanor crime of domestic violence" has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term "defendant", consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(C) Upward Departure Provision.—If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.

(D) Interaction with Other Subsections.—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense

other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.

14. "In Connection With".—

(A) In General.—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.

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

(C) Definitions.—

"Another felony offense", for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

"Another offense", for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

(D) Upward Departure Provision.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

15. Certain Convictions Under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A).—In a case in which the defendant is convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense.

\* \* \*



**§2M5.1. Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism**

- (a) Base Offense Level (Apply the greater):
- (1) **26**, if (A) national security controls or controls relating to the proliferation of nuclear, biological, or chemical weapons or materials were evaded; or (B) the offense involved a financial transaction with a country supporting international terrorism; or
  - (2) **14**, otherwise.

Commentary

*Statutory Provisions:* 18 U.S.C. § 2332d; 22 U.S.C. § 8512; 50 U.S.C. § 1705; 50 U.S.C. App. §§ 2401-2420.

Application Notes:

1. *In the case of a violation during time of war or armed conflict, an upward departure may be warranted.*
2. *In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. See Chapter Five, Part K (Departures).*
3. *In addition to the provisions for imprisonment, 50 U.S.C. App. § 2410 contains provisions for criminal fines and forfeiture as well as civil penalties. The maximum fine for individual defendants is \$250,000. In the case of corporations, the maximum fine is five times the value of the exports involved or \$1 million, whichever is greater. When national security controls are violated, in addition to any other sanction, the defendant is subject to forfeiture of any interest in, security of, or claim against: any goods or tangible items that were the subject of the violation; property used to export or attempt to export that was the subject of the violation; and any proceeds obtained directly or indirectly as a result of the violation.*
4. *For purposes of subsection (a)(1)(B), "a country supporting international terrorism" means a country designated under section 6(j) of the Export Administration Act (50 U.S.C. App. 2405).*

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

- (a) Base Offense Level:
- (1) **26**, except as provided in subdivision (2) below;

- (2) **14**, if the offense involved only (A) non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ~~ten~~**two**, (B) ammunition for non-fully automatic small arms, and the number of rounds did not exceed 500, or (C) both.

Commentary

Statutory Provisions: 18 U.S.C. § 554; 22 U.S.C. §§ 2778, 2780, 8512; 50 U.S.C. § 1705.

Application Notes:

1. *Under 22 U.S.C. § 2778, the President is authorized, through a licensing system administered by the Department of State, to control exports of defense articles and defense services that he deems critical to a security or foreign policy interest of the United States. The items subject to control constitute the United States Munitions List, which is set out in 22 C.F.R. Part 121.1. Included in this list are such things as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, vessels of war, explosives, military and space electronics, and certain firearms.*

*The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted. In the case of a violation during time of war or armed conflict, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

2. *In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted.*

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

(a) Base Offense Level: **26**

(b) Specific Offense Characteristic

- (1) If the offense involved the provision of (A) dangerous weapons; (B) firearms; (C) explosives; (D) funds with the intent, knowledge, or reason to believe such funds would be used to purchase any of the items described in subdivisions (A) through (C); or (E) funds or other material support or resources with the intent, knowledge, or reason to believe they are to be used to commit or assist in the commission of a violent act, increase by **2** levels.

(c) Cross References

- (1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) otherwise, if the resulting offense level is greater than that determined above.
- (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.
- (3) If the offense involved the provision of (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2283, 2284, 2339B, 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(B)); 22 U.S.C. § 8512; 50 U.S.C. §§ ~~1701~~, 1705.

Application Notes:

1. Definitions.—For purposes of this guideline:

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

"Dangerous weapon", "firearm", and "destructive device" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"Explosives" has the meaning given that term in Application Note 1 of the Commentary to §2K1.4 (Arson; Property Damage by Use of Explosives).

"Foreign terrorist organization" has the meaning given the term "terrorist organization" in 18 U.S.C. § 2339B(g)(6).

"Material support or resources" has the meaning given that term in 18 U.S.C. § 2339B(g)(4).

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

2. Departure Provisions.—

- (A) *In General.*—*In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of the funds or other material support or resources involved, the extent of planning or sophistication, and whether there were multiple occurrences. In a case in which such factors are present in an extreme form, a departure from the guidelines may be warranted. See Chapter Five, Part K (Departures).*
- (B) *War or Armed Conflict.*—*In the case of a violation during time of war or armed conflict, an upward departure may be warranted.*

\* \* \*

**APPENDIX A - STATUTORY INDEX**

\* \* \*

22 U.S.C. § 4221      2B1.1

22 U.S.C. § 8512      2M5.1, 2M5.2, 2M5.3

\* \* \*

~~50 U.S.C. § 1701~~      ~~2M5.1, 2M5.2, 2M5.3~~

50 U.S.C. § 1705      2M5.1, 2M5.2, 2M5.3

## 6. ILLEGAL REENTRY

**Reason for Amendment:** *This amendment amends §2L1.2 (Unlawfully Entering or Remaining in the United States) to limit the extent of the enhancement at subsection (b)(1) provided for certain offenders. Subsection (b)(1) provides an enhancement if the defendant previously was deported, or unlawfully remained in the United States, after a predicate conviction. The amount of the enhancement ranges from 16 levels to 4 levels, depending on the nature of the prior conviction. Specifically, prior to the amendment, subsection (b)(1)(A) has provided a 16-level increase for a prior 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; and subsection (b)(1)(B) has provided a 12-level increase for a felony drug trafficking offense for which the sentence imposed was 13 months or less. Both of these enhancements have applied regardless of whether the prior conviction received criminal history points under Chapter Four (Criminal History and Criminal Livelihood).*

*The amendment reduces the enhancements at subsections (b)(1)(A) and (B) to 12 or 8 levels, respectively, if the prior conviction does not receive criminal history points under Chapter Four. Subsections (b)(1)(A) and (B) as amended continue to provide a 16- or 12-level enhancement, as applicable, if the prior conviction receives criminal history points under Chapter Four. Thus, for reasons of proportionality, the amendment maintains the 4-level distinction between defendants who receive an enhancement under subsection (b)(1)(A) and those who receive an enhancement under subsection (b)(1)(B), regardless of whether the prior conviction receives criminal history points.*

*The amendment responds to case law and public comment regarding the magnitude of the enhancement when a defendant's predicate conviction does not receive criminal history points. Compare United States v. Amezcua-Vasquez, 567 F.3d 1050, 1055 (9th Cir. 2009) (defendant had two convictions that were 25 years old; court stated that the 16-level enhancement in §2L1.2(b)(1)(A) "addresses the seriousness of the offense" but "does not . . . justify increasing a defendant's sentence by the same magnitude irrespective of the age of the prior conviction at the time of reentry" [emphasis in original]); with United States v. Chavez-Suarez, 597 F.3d 1137, 1139 (10th Cir. 2010) (defendant had a conviction that was 11 years old; court discussed Amezcua-Vasquez but was "not convinced that this conviction was so stale" as to require the sentencing court to vary downward from the 16-level enhancement).*

*Under the amendment, defendants with predicate offenses that qualify for an enhancement under subsections (b)(1)(A) and (B) continue to receive an enhancement, regardless of whether the prior convictions receive criminal history points under Chapter Four. Other provisions in the guidelines exclude consideration of a predicate conviction because of the age of the predicate conviction. See, e.g., §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), comment. (n.9); §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), comment. (n.10); §4B1.2 (Definitions of Terms Used in Section 4B1.1), comment. (n.3). The amendment conforms §2L1.2(b)(1)(A) and (B) more closely to those provisions, but because of the seriousness of the predicate offenses covered by subsection (b)(1)(A) and (B) reduces, rather than eliminates, the 16- and 12-level enhancements. See, e.g., Amezcua-Vasquez, 567 F.3d at 1055 (acknowledging that it is "reasonable to take some account of an aggravated felony, no matter how stale, in assessing the seriousness of an unlawful reentry into the country"). See also id. at 1055 (in certain cases in which the prior conviction is "stale", an enhancement may be appropriate to address the "seriousness" of the prior conviction but need not be of the "same*

magnitude"); *Chavez-Suarez*, 597 F.3d at 1139 (same). For similar reasons, the amendment also adds an upward departure provision at Application Note 7 for cases in which the lower 12- or 8-level enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction. Conforming changes to the Commentary are also made.

**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 if the conviction receives criminal history points under Chapter Four or by **12** levels if the conviction does not receive criminal history points;
- (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels if the conviction receives criminal history points under Chapter Four or by **8** levels if the conviction does not receive criminal history points;
- (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:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

- (i) *A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.*
- (ii) *A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.*
- (iii) *A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.*
- (iv) *Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*

(B) Definitions.—For purposes of subsection (b)(1):

- (i) *"Alien smuggling offense" has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).*
- (ii) *"Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*
- (iii) *"Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.*
- (iv) *"Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.*

- (v) *"Firearms offense" means any of the following:*
- (I) *An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).*
  - (II) *An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).*
  - (III) *A violation of 18 U.S.C. § 844(h).*
  - (IV) *A violation of 18 U.S.C. § 924(c).*
  - (V) *A violation of 18 U.S.C. § 929(a).*
  - (VI) *An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*
- (vi) *"Human trafficking offense" means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*
- (vii) *"Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.*
- (viii) *"Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).*

**(C)** *Prior Convictions.—In determining the amount of an enhancement under subsection (b)(1), note that the levels in subsections (b)(1)(A) and (B) depend on whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives criminal history points.*

2. *Definition of "Felony".—For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*
3. *Application of Subsection (b)(1)(C).—*



- (A) Definitions.—For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.
- (B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).
4. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):
- (A) "Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.
- (B) "Three or more convictions" means at least three convictions for offenses that are not counted as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).
5. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.
6. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).
7. Departure 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 the 12-level enhancement under subsection (b)(1)(A) or the 8-level enhancement in subsection (b)(1)(B) applies but that enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction, an upward departure may be warranted. (C) 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.

\* \* \*

## 7. ROLE

**Reason for Amendment:** *This amendment deletes two sentences from the commentary to §3B1.2 (Mitigating Role). Specifically, in Application Note 3(C), the amendment deletes the statement that "[a]s with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted," while retaining the "totality of the circumstances" approach. In Application Note 4, the amendment deletes the sentence, "It is intended that the downward adjustment for a minimal participant will be used infrequently". The Commission determined that these two sentences are unnecessary and may have the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances.*

### **Amendment:**

#### **§3B1.2. Mitigating Role**

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

In cases falling between (a) and (b), decrease by **3** levels.

#### Commentary

#### Application Notes:

1. Definition.—*For purposes of this guideline, "participant" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).*
2. Requirement of Multiple Participants.—*This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.*
3. Applicability of Adjustment.—
  - (A) Substantially Less Culpable than Average Participant.—*This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.*

*A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in*

*concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.*

- (B) Conviction of Significantly Less Serious Offense.—*If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 14 under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.*
- (C) Fact-Based Determination.—*The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.*
4. Minimal Participant.—*Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant. It is intended that the downward adjustment for a minimal participant will be used infrequently.*
5. Minor Participant.—*Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants, but whose role could not be described as minimal.*
6. Application of Role Adjustment in Certain Drug Cases.—*In a case in which the court applied §2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(5), the court also shall apply the appropriate adjustment under this guideline.*

## 8. SUPERVISED RELEASE

**Reason for Amendment:** *This amendment makes revisions to the supervised release guidelines, §5D1.1 (Imposition of a Term of Supervised Release) and §5D1.2 (Term of Supervised Release), in response to both the findings in the Commission's July 2010 report, Federal Offenders Sentenced to Supervised Release, and changes in federal immigration law and the federal offender population in recent years.*

*First, the amendment creates an exception to the general rule in §5D1.1(a) that a term of supervised release be imposed when a sentence of imprisonment of more than one year is imposed or when required by statute. The exception, which appears in a new subsection (c) in §5D1.1, states that supervised release ordinarily should not be imposed in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment. A corresponding application note explains that imposing supervised release in such a case is generally unnecessary, although there may be particular cases in which it is appropriate. Non-citizens now are approximately half of the overall population of federal offenders, see 2010 Sourcebook of Federal Sentencing Statistics, Table 9 (showing that 47.5% of federal offenders in fiscal year 2010 were non-citizens), and supervised release is imposed in more than 91 percent of cases in which the defendant is a non-citizen, see Federal Offenders Sentenced to Supervised Release at 60. The Commission determined that such a high rate of imposition of supervised release for non-citizen offenders is unnecessary because "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders." Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010); see also id. at 1478 ("[D]eportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes."). Furthermore, such offenders likely would face prosecution for a new offense under the federal immigration laws if they were to return illegally to the United States.*

*Second, the amendment lowers the minimum term of supervised release required by the guidelines for certain defendants (regardless of their citizenship status) when a statute does not require a higher minimum term. Section 5D1.2 requires the court to impose a term of supervised release of at least three years when the defendant is convicted of a Class A or B felony and at least two years when the defendant is convicted of a Class C or D felony. The amendment lowers these minimum terms to two years for a defendant convicted of a Class A and B felony and one year for a defendant convicted of a Class C or D felony. Thus, for reasons of proportionality, the amendment maintains a 1-year distinction in the minimum term of supervised release between a defendant convicted of a Class A or B felony and a defendant convicted of a Class C or D felony. The Commission determined that these lesser minimum terms should be sufficient in most cases because research indicates that the majority of defendants who violate a condition of supervised release do so during the first year of the term of supervised release. See Federal Offenders Sentenced to Supervised Release at 63 & n. 265. Furthermore, if an offender shows non-compliance during such a minimum term, the court may extend the term of supervision up to the statutory maximum. See 18 U.S.C. § 3583(e)(2). The amendment also adds commentary at new Application Note 5 encouraging courts to exercise their authority to terminate supervised release at any time after the expiration of one year of supervised release in appropriate cases. See 18 U.S.C. § 3583(e)(1).*

*Finally, the amendment adds commentary in §§5D1.1 and 5D1.2 that provides guidance on the factors a court should consider in deciding whether to order a term of supervised release (when not required by statute) and, if so, how long such a term should be. Such factors include the extent of an offender's criminal record, which research shows to be predictive of an offender's likelihood of complying with the conditions of supervision. See Federal Offenders Sentenced to Supervised Release at 66-67 (Figure 4) (noting that the*

rates of revocation for offenders increased steadily across the six Criminal History Categories (CHC), from 18.7% for offenders in CHC I to 59.8% in CHC VI).

**Amendment:**

**§5D1.1. Imposition of a Term of Supervised Release**

- (a) The court shall order a term of supervised release to follow imprisonment—
  - (1) when required by statute (see 18 U.S.C. § 3583(a)); or
  - (2) except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed; ~~or when required by statute.~~
- (b) The court may order a term of supervised release to follow imprisonment in any other case. See 18 U.S.C. § 3583(a).
- (c) The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.

Commentary

Application Notes:

1. Application of Subsection (a).—Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment if ~~when supervised release is required by statute or, except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed or if a term of supervised release is required by a specific statute.~~ The court may depart from this guideline and not impose a term of supervised release if it determines that supervised release is neither required by statute nor required for any of the following reasons: (1) to protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute. ~~supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary.~~
2. Application of Subsection (b).—Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment ~~of one year or less for any of the reasons set forth in Application Note 1.~~ in any other case, after considering the factors set forth in Note 3.
3. Factors to Be Considered.—
  - (A) Statutory Factors.—In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors:
    - (i) the nature and circumstances of the offense and the history and characteristics of

*the defendant;*

- (ii) *the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;*
- (iii) *the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and*
- (iv) *the need to provide restitution to any victims of the offense.*

*See 18 U.S.C. § 3583(c).*

(B) *Criminal History.—The court should give particular consideration to the defendant's criminal history (which is one aspect of the "history and characteristics of the defendant" in subparagraph (A)(i), above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.*

(C) *Substance Abuse.—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is highly recommended that a term of supervised release also be imposed. See §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).*

4. *Community Confinement or Home Detention Following Imprisonment.—A term of supervised release must be imposed if the court wishes to impose a "split sentence" under which the defendant serves a term of imprisonment followed by a period of community confinement or home detention pursuant to subsection (c)(2) or (d)(2) of §5C1.1 (Imposition of a Term of Imprisonment). In such a case, the period of community confinement or home detention is imposed as a condition of supervised release.*

5. *Application of Subsection (c).—In a case in which the defendant is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.*

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

- (a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:
- (1) At least ~~three~~**two** years but not more than five years for a defendant convicted of a Class A or B felony. **See 18 U.S.C. § 3583(b)(1).**
  - (2) At least ~~two years~~ **one year** but not more than three years for a defendant convicted of a Class C or D felony. **See 18 U.S.C. § 3583(b)(2).**
  - (3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor. **See 18 U.S.C. § 3583(b)(3).**
- (b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—
- (1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or
  - (2) a sex offense.
- (Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.
- (c) The term of supervised release imposed shall be not less than any statutorily required term of supervised release.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

2. *Safety Valve Cases.*—*A defendant who qualifies under §5C1.2 (Limitation on Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. See 18 U.S.C. § 3553(f). In such a case, the term of supervised release shall be determined under subsection (a).*
3. *Substantial Assistance Cases.*—*Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. See 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).*
4. *Factors Considered.*—*The factors to be considered in determining the length of a term of supervised release are the same as the factors considered in determining whether to impose such a term. See 18 U.S.C. § 3583(c); Application Note 3 to §5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is long enough to address the purposes of imposing supervised release on the defendant.*
5. *Early Termination and Extension.*—*The court has authority to terminate or extend a term of supervised release. See 18 U.S.C. § 3583(e)(1), (2). The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.*

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



## 9. MISCELLANEOUS

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

### Plea Agreements

*First, the amendment updates the policy statement at §6B1.2 (Standards for Acceptance of Plea Agreements) in light of United States v. Booker, 543 U.S. 220 (2005). Specifically, it amends §6B1.2 to provide standards for acceptance of plea agreements when the sentence is outside the applicable guideline range, including when the sentence is a "variance" (*i.e.*, a sentence that is outside the guidelines framework). These changes to §6B1.2 are consistent with the changes to §1B1.1 (Application Instructions) that the Commission promulgated last year, *see* USSG App. C, Amendment 741 (effective November 1, 2010), and reflect Booker and subsequent case law.*

*The amendment also responds to the Federal Judiciary Administrative Improvements Act of 2010, Pub. L. 111–174 (enacted May 27, 2010), which amended 18 U.S.C. § 3553(c)(2) to require that the reasons for a sentence be set forth in the statement of reasons form (rather than in the judgment and commitment order). The amendment makes appropriate clerical changes to §6B1.2 and subsection (e) of §5K2.0 (Grounds for Departure) to reflect this statutory change.*

### Coast Guard Authorization Act of 2010

*Second, the amendment responds to the Coast Guard Authorization Act of 2010, Pub. L. 111–281 (enacted October 15, 2010), which provided statutory sentencing enhancements for certain offenses under 18 U.S.C. § 2237 (Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information) and created a new criminal offense at 33 U.S.C. § 3851.*

*The amendment addresses the section 2237 offenses by expanding the range of guidelines to which certain section 2237 offenses are referenced. Section 2237 makes it unlawful for—*

*the operator of a vessel to knowingly fail to obey a law enforcement order to heave to, see 18 U.S.C. § 2237(a)(1);*

*a person on board a vessel to forcibly interfere with a law enforcement boarding or other law enforcement action, or to resist arrest, see 18 U.S.C. § 2237(a)(2)(A); or*

*a person on board a vessel to provide materially false information to a law enforcement officer during a boarding regarding the vessel's destination, origin, ownership, registration, nationality, cargo, or crew, see 18 U.S.C. § 2237(a)(2)(B).*

*All three of these offenses are punishable by not more than 5 years of imprisonment. The first two are referenced in Appendix A (Statutory Index) to §2A2.4 (Obstructing or Impeding Officers); the third is referenced to §2B1.1 (Theft, Property Destruction, and Fraud). However, the Coast Guard Authorization Act of 2010 provided statutory sentencing enhancements that apply to persons convicted under either of the first two offenses under section 2237 (*i.e.*, the failure-to-heave-to and forcible-interference offenses referenced to §2A2.4; the statutory sentencing enhancements do not apply to the false-information offense*

referenced to §2B1.1). The amendment addresses these new statutory sentencing enhancements by referencing them in Appendix A (Statutory Index) to Chapter Two offense guidelines most analogous to the conduct forming the basis for the statutory sentencing enhancements, as follows.

If the section 2237 offense results in death, the statutory maximum term of imprisonment is raised to any term of years or life. See 18 U.S.C. § 2237(b)(2)(B)(i). The Commission referenced this statutory sentencing enhancement to §§2A1.3 (Voluntary Manslaughter) and 2A1.4 (Involuntary Manslaughter) because the statutory sentencing enhancement involves death without proof of malice aforethought.

If the section 2237 offense involves an attempt to kill, kidnapping or an attempt to kidnap, or an offense under 18 U.S.C. § 2241 (aggravated sexual abuse), the statutory maximum term of imprisonment likewise is raised to any term of years or life. See 18 U.S.C. § 2237(b)(2)(B)(ii). The Commission referenced this statutory sentencing enhancement to §§2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) and 2A2.2 (Aggravated Assault) to account for when the section 2237 offense involves an attempt to kill, because those guidelines apply to attempted murder and attempted manslaughter, respectively; to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) to account for when the section 2237 offense involves an offense under 18 U.S.C. § 2241, because offenses under section 2241 are referenced to that guideline; and to §2A4.1 (Kidnapping, Abduction, Unlawful Restraint) to account for when the section 2237 offense involves kidnapping or attempted kidnapping, because that guideline applies to kidnapping.

If the section 2237 offense results in serious bodily injury, the statutory maximum term of imprisonment is raised to 15 years. See 18 U.S.C. § 2237(b)(3). The Commission referenced this statutory sentencing enhancement to §2A2.2 because a section 2237 offense involving this statutory sentencing enhancement is similar to an assault that results in bodily injury, and that guideline applies to such an assault. See USSG §2A2.2, comment. (n.1) (defining aggravated assault to include any assault that involved serious bodily injury).

If the section 2237 offense involves knowing transportation under inhumane conditions, and is committed in the course of a violation of 8 U.S.C. § 1324; chapter 77 of title 18, United States Code; or section 113 or 117 of such title, the statutory maximum term of imprisonment is raised to 15 years. See 18 U.S.C. § 2237(b)(4). The Commission referenced this statutory sentencing enhancement to the following guidelines:

to §§2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) and 2A2.2 to account for when the section 2237 offense involves a violation of section 113, because section 113 offenses are referenced to those guidelines;

to §§2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) to account for when the section 2237 offense involve a violation of 18 U.S.C. § 1591 (which is within chapter 77), because offenses under section 1591 are referenced to those guidelines;

to §2H4.1 (Peonage, Involuntary Servitude, Slave Trade, and Child Soldiers) to account for when the section 2237 offense involves a violation of any provision of chapter 77 other than 18 U.S.C. § 1591, because such violations generally are referenced to that guideline; and

to §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) to account for when the section 2237 offense involves a violation of 8 U.S.C. § 1324, because section 1324 offenses are referenced to that guideline.

Finally, the amendment addresses the new criminal offense at 33 U.S.C. § 3851, which makes it a felony, punishable by imprisonment for not more than six years, to sell or distribute an organotin or to sell, distribute, make, use, or apply an anti-fouling system (e.g., paint) containing an organotin. The Commission referenced this offense to §2Q1.2 ( Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) because the offense involves pesticides known to be toxic.

**Amendment:**

**(A) Plea Agreements and Statement of Reasons**

**§6B1.2. Standards for Acceptance of Plea Agreements (Policy Statement)**

- (a) In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges (Rule 11(c)(1)(A)), the court may accept the agreement if the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.

However, a plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being considered under the provisions of §1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted.

- (b) In the case of a plea agreement that includes a nonbinding recommendation (Rule 11(c)(1)(B)), the court may accept the recommendation if the court is satisfied either that:
- (1) the recommended sentence is within the applicable guideline range; or
  - (2) (A) the recommended sentence ~~departs from~~ **is outside** the applicable guideline range for justifiable reasons; and (B) those reasons are ~~specifically set forth in writing~~ **set forth with specificity** in the statement of reasons ~~form~~ **or judgment and commitment order**.
- (c) In the case of a plea agreement that includes a specific sentence (Rule 11(c)(1)(C)), the court may accept the agreement if the court is satisfied either that:

- (1) the agreed sentence is within the applicable guideline range; or
- (2) (A) the agreed sentence ~~departs from~~ **is outside** the applicable guideline range for justifiable reasons; and (B) those reasons are ~~specifically set forth in writing~~ **set forth with specificity** in the statement of reasons ~~form~~ **or judgment and commitment order**.

#### Commentary

*The court may accept an agreement calling for dismissal of charges or an agreement not to pursue potential charges if the remaining charges reflect the seriousness of the actual offense behavior. This requirement does not authorize judges to intrude upon the charging discretion of the prosecutor. If the government's motion to dismiss charges or statement that potential charges will not be pursued is not contingent on the disposition of the remaining charges, the judge should defer to the government's position except under extraordinary circumstances. Rule 48(a), Fed. R. Crim. P. However, when the dismissal of charges or agreement not to pursue potential charges is contingent on acceptance of a plea agreement, the court's authority to adjudicate guilt and impose sentence is implicated, and the court is to determine whether or not dismissal of charges will undermine the sentencing guidelines.*

*Similarly, the court should accept a recommended sentence or a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence ~~departs from~~ **is outside** the applicable guideline range for justifiable reasons (~~i.e., that such departure is authorized by 18 U.S.C. § 3553(b)~~) and those reasons are ~~specifically set forth in writing~~ **set forth with specificity** in the statement of reasons ~~or the judgment and commitment order~~ **form**. See 18 U.S.C. § 3553(c). As set forth in subsection (d) of §5K2.0 (Grounds for Departure), however, the court may not depart below the applicable guideline range merely because of the defendant's decision to plead guilty to the offense or to enter a plea agreement with respect to the offense.*

*A defendant who enters a plea of guilty in a timely manner will enhance the likelihood of his receiving a reduction in offense level under §3E1.1 (Acceptance of Responsibility). Further reduction in offense level (or sentence) due to a plea agreement will tend to undermine the sentencing guidelines.*

*The second paragraph of subsection (a) provides that a plea agreement that includes the dismissal of a charge, or a plea agreement not to pursue a potential charge, shall not prevent the conduct underlying that charge from being considered under the provisions of §1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted. This paragraph prevents a plea agreement from restricting consideration of conduct that is within the scope of §1B1.3 (Relevant Conduct) in respect to the count(s) of which the defendant is convicted; it does not in any way expand or modify the scope of §1B1.3 (Relevant Conduct). Section 5K2.21 (Dismissed and Uncharged Conduct) addresses the use, as a basis for upward departure, of conduct underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement.*

*The Commission encourages the prosecuting attorney prior to the entry of a plea of guilty or nolo contendere under Rule 11 of the Federal Rules of Criminal Procedure to disclose to the defendant the facts and circumstances of the offense and offender characteristics, then known to the*

*prosecuting attorney, that are relevant to the application of the sentencing guidelines. This recommendation, however, shall not be construed to confer upon the defendant any right not otherwise recognized in law.*

\* \* \*

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

\* \* \*

- (e) **REQUIREMENT OF SPECIFIC WRITTEN REASONS FOR DEPARTURE.**—If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the ~~written judgment and commitment order~~statement of reasons form.

Commentary

Application Notes:

\* \* \*

3.

\* \* \*

- (C) *Departures Based on Circumstances Identified as Not Ordinarily Relevant.—Because certain circumstances are specified in the guidelines as not ordinarily relevant to sentencing (see, e.g., Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.*

*In addition, as required by subsection (e), each circumstance forming the basis for a departure described in this subdivision shall be stated with specificity in the ~~written judgment and commitment order~~statement of reasons form.*

\* \* \*

5. *Departures Based on Plea Agreements.—Subsection (d)(4) prohibits a downward departure based only on the defendant’s decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense. Even though a departure may not be based merely on the fact*

that the defendant agreed to plead guilty or enter a plea agreement, a departure may be based on justifiable, non-prohibited reasons for departure as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea Agreements). In cases in which the court departs based on such reasons as set forth in the plea agreement, the court must state the reasons for departure with specificity in the ~~written judgment and commitment order~~ statement of reasons form, as required by subsection (e).

\* \* \*

**(B) Coast Guard Authorization Act**

**APPENDIX A - STATUTORY INDEX**

\* \* \*

18 U.S.C. § 2237(a)(1),(a)(2)(A)	2A2.4
18 U.S.C. § 2237(a)(2)(B)	2B1.1
18 U.S.C. § 2237(a)(2)(B)	2B1.1
18 U.S.C. § 2237(b)(2)(B)(i)	2A1.3, 2A1.4
18 U.S.C. § 2237(b)(2)(B)(ii)(I)	2A2.1, 2A2.2
18 U.S.C. § 2237(b)(2)(B)(ii)(II)	2A4.1
18 U.S.C. § 2237(b)(2)(B)(ii)(III)	2A3.1
18 U.S.C. § 2237(b)(3)	2A2.2
18 U.S.C. § 2237(b)(4)	2A2.1, 2A2.2, 2G1.1, 2G1.3, 2G2.1, 2H4.1, 2L1.1

\* \* \*

33 U.S.C. § 1908	2Q1.3
33 U.S.C. § 3851	2Q1.2

## 10. TECHNICAL

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

*First, the amendment makes certain technical and conforming changes in connection with the amendments that the Commission submitted to Congress on April 29, 2010. See 75 Fed. Reg. 27388 (May 14, 2010); USSG App. C, Amendments 738–746. Those changes are as follows:*

- (1) Amendment 744 made changes to the organizational guidelines in Chapter Eight, including a change that consolidated subsections (b) and (c) of §8D1.4 (Recommended Conditions of Probation — Organizations) into a single subsection (b). To reflect this consolidation, subsection (a) of §8B2.1 (Effective Compliance and Ethics Program) is changed so that it refers to the correct subsection of §8D1.4.*
- (2) Amendment 745 expanded the scope of §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) to cover not only cultural heritage resources but also paleontological resources. To reflect this expanded scope, a conforming change is made to subsection (c)(1) of §2Q2.1 (Offenses Involving Fish, Wildlife, and Plants).*

*Second, the amendment makes technical changes to §3C1.1 (Obstructing or Impeding the Administration of Justice), subsection (k)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History), and subsection (b) of §4B1.1 (Career Offender) to promote stylistic consistency in how subdivisions are designated throughout the Guidelines Manual.*

*Finally, the amendment makes a series of changes throughout the Guidelines Manual to provide full and accurate references to the titles of Chapter Three, Part C (Obstruction and Related Adjustments) and §3C1.1.*

**Amendment:**

### CHAPTER TWO - OFFENSE CONDUCT

#### Introductory Commentary

*Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward. Certain factors relevant to the offense that are not covered in specific guidelines in Chapter Two are set forth in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), and C (Obstruction and Related Adjustments); Chapter Four, Part B (Career Offenders and Criminal Livelihood); and Chapter Five, Part K (Departures).*

\* \* \*

**§2J1.2. Obstruction of Justice**

\* \* \*

Commentary

\* \* \*

Application Notes:

2. Chapter Three Adjustments.—

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

\* \* \*

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

\* \* \*

**§2J1.3. Perjury or Subornation of Perjury; Bribery of Witness**

\* \* \*

Commentary

Application Notes:

\* \* \*

2. For offenses covered under this section, Chapter Three, Part C (Obstruction and Related Adjustments) does not apply, unless the defendant obstructed the investigation or trial of the perjury count.

3. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which he committed perjury, subornation of perjury, or witness bribery), see the Commentary to Chapter Three, Part C (Obstruction and Related Adjustments), and to §3D1.2(c) (Groups of Closely Related Counts).

\* \* \*

**§2J1.6. Failure to Appear by Defendant**



\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

2. For offenses covered under this section, Chapter Three, Part C (Obstruction and Related Adjustments) does not apply, unless the defendant obstructed the investigation or trial of the failure to appear count.

\* \* \*

4. If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (e.g., perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under §3C1.1 (Obstruction of Justice Obstructing or Impeding the Administration of Justice) is made because of the operation of the rules set out in Application Note 3.

\* \* \*

**§2J1.9. Payment to Witness**

\* \* \*

Commentary

\* \* \*

Application Notes:

1. For offenses covered under this section, Chapter Three, Part C (Obstruction and Related Adjustments) does not apply unless the defendant obstructed the investigation or trial of the payment to witness count.
2. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which the payment was made), see the Commentary to Chapter Three, Part C (Obstruction and Related Adjustments), and to §3D1.2(c) (Groups of Closely Related Counts).

\* \* \*

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

\* \* \*

(c) **Cross Reference**

- (1) If the offense involved a cultural heritage resource **or 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.

\* \* \*

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

If **(A1)** the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and **(B2)** the obstructive conduct related to **(iA)** the defendant's offense of conviction and any relevant conduct; or **(iiB)** a closely related offense, increase the offense level by **2** levels.

\* \* \*

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

\* \* \*

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

\* \* \*

- (2) 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: **(iA)** 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)); **(iiB)** 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 **(iiiC)** in any other case, the date of the original sentence (see §4A1.2(d)(2)(B) and (e)(2)).

\* \* \*

**§4B1.1. Career Offender**

\* \* \*

- (b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

<u>Offense Statutory Maximum</u>	<u>Offense Level*</u>
(A1) Life	37
(B2) 25 years or more	34
(C3) 20 years or more, but less than 25 years	32
(D4) 15 years or more, but less than 20 years	29
(E5) 10 years or more, but less than 15 years	24
(F6) 5 years or more, but less than 10 years	17
(G7) More than 1 year, but less than 5 years	12.

\* \* \*

**§5E1.2. Fines for Individual Defendants**

\* \* \*

Commentary

Application Notes:

\* \* \*

- 6. *The existence of income or assets that the defendant failed to disclose may justify a larger fine than that which otherwise would be warranted under this section. The court may base its conclusion as to this factor on information revealing significant unexplained expenditures by the defendant or unexplained possession of assets that do not comport with the defendant's reported income. If the court concludes that the defendant willfully misrepresented all or part of his income or assets, it may increase the offense level and resulting sentence in accordance with Chapter Three, Part C (Obstruction and Related Adjustments).*

\* \* \*

**§8A1.2.            Application Instructions - Organizations**

\* \* \*

Commentary

Application Notes:

\* \* \*

2.     *The definitions in the Commentary to §1B1.1 (Application Instructions) and the guidelines and commentary in §§1B1.2 through 1B1.8 apply to determinations under this chapter unless otherwise specified. The adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), C (Obstruction and Related Adjustments), and E (Acceptance of Responsibility) do not apply. The provisions of Chapter Six (Sentencing Procedures, Plea Agreements, and Crime Victims' Rights) apply to proceedings in which the defendant is an organization. Guidelines and policy statements not referenced in this chapter, directly or indirectly, do not apply when the defendant is an organization; e.g., the policy statements in Chapter Seven (Violations of Probation and Supervised Release) do not apply to organizations.*

\* \* \*

**§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 (e)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—

\* \* \*

**§8C2.3.            Offense Level**

Commentary

Application Notes:

\* \* \*

2.     *In determining the offense level under this section, apply the provisions of §§1B1.2 through 1B1.8. Do not apply the adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), C (Obstruction and Related Adjustments), and E (Acceptance of Responsibility).*

\* \* \*