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# UNITED STATES SENTENCING COMMISSION

## SUPPLEMENT TO THE 2002 GUIDELINES MANUAL

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APRIL 30, 2003

This supplement incorporates the following: (1) emergency guideline amendments to §§2B1.1, 2E5.3, 2J1.2, 2T4.1, 3D1.2, 5E1.2, and Appendix A (Statutory Index), effective January 25, 2003; (2) the emergency promulgation of §2C1.8, effective January 25, 2003; (3) guideline amendments to §§2G2.2, 2G2.4, 3E1.1, 4B1.5, 5H1.6, 5K2.0, 5K2.13, and 5K2.20, and the promulgation of §5K2.22, made directly by Public Law 108–21 and effective April 30, 2003; and (4) guideline amendments to §2A4.1 made directly by Public Law 108–21 and effective May 30, 2003. This document supercedes the January 25, 2003 Supplement, and, when used in conjunction with the 2002 Guidelines Manual (dark teal cover), constitutes the operative Guidelines Manual effective April 30, 2003.

April 30, 2003

For immediate attention:

- Amendment to §2A4.1, effective May 30, 2003.
- Congressional amendments to §2G2.2, §2G2.4, §3E1.1, §4B1.5, §5H1.6, §5K2.0, §5K2.13, and §5K2.20, effective April 30, 2003.
- Congressional enactment of new policy statement, §5K2.22, effective April 30, 2003.
- Reprinting of emergency amendments to §2B1.1, §2E5.3, §2J1.2, §2T4.1, §3D1.2, and §5E1.2, and Appendix A, effective January 25, 2003.
- Reprinting of promulgation of new guideline, §2C1.8, effective January 25, 2003.
- Issuance of supplement that supercedes the Supplement to the 2002 Guidelines Manual that became effective January 25, 2003.
- Reprinting of notice of typographical error in the statutory references in §2D1.11(b)(2).

To Recipients of the Guidelines Manual:

In passing the PROTECT Act, Pub. L. 108–21, (the “Act”) on April 10, 2003, Congress directly amended several sentencing guidelines and policy statements in the 2002 Guidelines Manual. These amendments made by Congress became effective on April 30, 2003, when the President signed the Act into law, and the Sentencing Commission is required under the

legislation to distribute the amendments forthwith to federal courts and probation offices. The Commission recognizes that you need to work from a current and accurate Guidelines Manual and has worked expeditiously to execute and distribute these amendments.

This Supplement to the 2002 Guidelines Manual includes the amendments made by Congress in the PROTECT Act to §2G2.2 (Trafficking in Materials Involving Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic), §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), §3E1.1 (Acceptance of Responsibility), §4B1.5 (Repeat and Dangerous Sex Offender Against Minors), §5H1.6 (Family Ties and Responsibilities, and Community Ties), §5K2.0 (Grounds for Departure), §5K2.13 (Diminished Capacity), and §5K2.20 (Aberrant Behavior) as well as a new policy statement enacted by the Act, §5K2.22 (Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses).

This Supplement also includes an amendment to the kidnapping guideline, §2A4.1, which Congress specifically directed the Commission to promulgate and which is to become effective on May 30, 2003.

For ease of use we have reprinted in this Supplement the amendments promulgated by the Commission acting under emergency amendment authority provided in the Sarbanes-Oxley Act of 2002, Pub. L. 107–204, and the Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155. Those emergency amendments had an effective date of January 25, 2003.

This document, together with the 2002 Guidelines Manual (dark teal color), will supersede the Supplement to the 2002 Guidelines Manual effective January 25, 2003, and becomes the operative Guidelines Manual effective April 30, 2003.

The PROTECT Act contains further directives which the Commission must respond to during the coming year, and we hope you will participate in this process. Within 180 days after the enactment of the Act, or October 27, 2003, the Commission is directed to review the grounds of downward departure now authorized by the guidelines and policy statements and to develop amendments to ensure that the frequency of downward departures is “substantially reduced.” The Commission is also directed to promulgate a policy statement authorizing a downward departure on motion by the government pursuant to an early disposition program authorized by the Attorney General.

During our 2003-2004 amendment cycle, the Commission expects to address several other provisions in the Act, including directives relating to certain sex offenses, pornography offenses, and GHB offenses.

The Commission will follow its established procedures as it proceeds to implement the congressional directives in the PROTECT Act which are not self executing. This process includes publishing notice of intent to amend the guidelines, either by requesting comment on

possible amendments or generally soliciting public comment on a pending issue, and posting it on our web site and in the Federal Register. All public comment submitted will be considered as the Commission works on and within the congressional mandate.

Sincerely,

Diana E. Muphy  
Chair

Note: Please be advised that currently there is a typographical error in the statutory references in §2D1.11(b)(2). The Commission will correct this error during the next amendment cycle. Until then, please note that §2D1.11(b)(2) should read:

“If the defendant is convicted of violating 21 U.S.C. § 841(c)(2), (f)(1), or § 960(d)(2), decrease by 3 levels, unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully.”.

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**AMENDED GUIDELINES\***

\*For guidelines other than those shown in this supplement, see the main volume of the 2002 Guidelines Manual.

**§2A4.1. Kidnapping, Abduction, Unlawful Restraint**

- (a) Base Offense Level:
  - (1) **24** (effective before, but not on or after, May 30, 2003).
  - (1) **32** (effective on and after May 30, 2003).
- (b) Specific Offense Characteristics
  - (1) If a ransom demand or a demand upon government was made, increase by **6** levels.
  - (2) (A) If the victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) if the victim sustained serious bodily injury, increase by **2** levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.
  - (3) If a dangerous weapon was used, increase by **2** levels.
  - (4) (A) If the victim was not released before thirty days had elapsed, increase by **2** levels.  
(B) If the victim was not released before seven days had elapsed, increase by **1** level.  
(C) If the victim was released before twenty-four hours had elapsed, decrease by **1** level (effective before, but not on or after, May 30, 2003).
  - (5) If the victim was sexually exploited:
    - (A) increase by **3** levels (effective before, but not on or after, May 30, 2003).
    - (A) increase by **6** levels (effective on and after May 30, 2003).
  - (6) If the victim is a minor and, in exchange for money or other consideration, was placed in the care or custody of another person who had no legal right to such care or custody of the victim, increase by **3** levels.
  - (7) If the victim was kidnapped, abducted, or unlawfully restrained during the commission of, or in connection with, another offense or escape therefrom; or if another offense was committed during the kidnapping, abduction, or unlawful restraint, increase to --

- (A) the offense level from the Chapter Two offense guideline applicable to that other offense if such offense guideline includes an adjustment for kidnapping, abduction, or unlawful restraint, or otherwise takes such conduct into account; or
- (B) **4** plus the offense level from the offense guideline applicable to that other offense, but in no event greater than level **43**, in any other case,

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

(c) Cross Reference

- (1) If the 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).

Commentary

*Statutory Provisions:* 18 U.S.C. §§ 115(b)(2), 351(b), (d), 1201, 1203, 1751(b), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—

*Definitions of "serious bodily injury" and "permanent or life-threatening bodily injury" are found in the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which is taken into account in the specific offense characteristic under subsection (b)(5).*

2. *"A dangerous weapon was used" means that a firearm was discharged, or a "firearm" or "dangerous weapon" was "otherwise used" (as defined in the Commentary to §1B1.1 (Application Instructions)).*
3. *For the purpose of subsection (b)(4)(C), "released" includes allowing the victim to escape or turning him over to law enforcement authorities without resistance (effective before, but not on or after, May 30, 2003).*
4. *"Sexually exploited" includes offenses set forth in 18 U.S.C. §§ 2241-2244, 2251, and 2421-2423.*
5. *In the case of a conspiracy, attempt, or solicitation to kidnap, §2X1.1 (Attempt, Solicitation, or Conspiracy) requires that the court apply any adjustment that can be determined with reasonable certainty. Therefore, for example, if an offense involved conspiracy to kidnap for the purpose of committing murder, subsection (b)(7) would reference first degree murder (resulting in an offense level of 43, subject to a possible 3-level reduction under §2X1.1(b)).*

*Similarly, for example, if an offense involved a kidnapping during which a participant attempted to murder the victim under circumstances that would have constituted first degree murder had death*



*occurred, the offense referenced under subsection (b)(7) would be the offense of first degree murder.*

Background: *Federal kidnapping cases generally encompass three categories of conduct: limited duration kidnapping where the victim is released unharmed; kidnapping that occurs as part of or to facilitate the commission of another offense (often, sexual assault); and kidnapping for ransom or political demand.*

*The guideline contains an adjustment for the length of time that the victim was detained. The adjustment recognizes the increased suffering involved in lengthy kidnappings and provides an incentive to release the victim.*

*An enhancement is provided when the offense is committed for ransom (subsection (b)(1)) or involves another federal, state, or local offense that results in a greater offense level (subsections (b)(7) and (c)(1)).*

*Section 401 of Public Law 101-647 amended 18 U.S.C. § 1201 to require that courts take into account certain specific offense characteristics in cases involving a victim under eighteen years of age and directed the Commission to include those specific offense characteristics within the guidelines. Where the guidelines did not already take into account the conduct identified by the Act, additional specific offense characteristics have been provided.*

*Subsections (a) and (b)(5), and the deletion of subsection (b)(4)(C), effective May 30, 2003, implement the directive to the Commission in section 104 of Public Law 108-21.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 96); November 1, 1991 (see Appendix C, amendment 363); November 1, 1992 (see Appendix C, amendment 445); November 1, 1993 (see Appendix C, amendment 478); November 1, 1997 (see Appendix C, amendment 545); November 1, 2002 (see Appendix C, amendment 637); May 30, 2003 (see Appendix C, amendment 650).

**§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: **6**
- (b) Specific Offense Characteristics
  - (1) If the loss exceeded \$5,000, increase the offense level as follows:

<u>Loss</u> (Apply the Greatest)	<u>Increase in Level</u>
(A) \$5,000 or less	no increase
(B) More than \$5,000	add <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, or destruction of, property from a national cemetery, increase by **2** levels.
- (7) 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**.
- (8) 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**.

- (9) If the offense involved (A) the possession or use of any device-making equipment; (B) the production or trafficking of any unauthorized access device or counterfeit access device; 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**.
- (10) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the offense level is less than level **14**, increase to level **14**.
- (11) 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**.
- (12) (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.

If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

- (13) If the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or a director of a publicly traded company, increase by **4** levels.

(c) Cross References

- (1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt,

Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

- (2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.
- (3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.
- (4) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), if the resulting offense level is greater than that determined above.

Commentary

*Statutory Provisions:* 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1341-1344, 1348, 1350, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992, 1993(a)(1), (a)(4), 2113(b), 2312-2317, 2332b(a)(1); 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

"Financial institution" includes any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital

*insurance association, "primarily include large pension funds that serve many persons (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.*

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

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

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

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

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

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

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

2. 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) Protected Computer Cases.—*In the case of an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer" as defined in 18 U.S.C. § 1030(e)(2), actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: reasonable costs to the victim of conducting a damage assessment, and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.*

(B) Gain.—*The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.*

(C) Estimation of Loss.—*The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).*

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

(i) *The fair market value of the property unlawfully taken or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.*

(ii) *The cost of repairs to damaged property.*

(iii) *The approximate number of victims multiplied by the average loss to each victim.*

- (iv) *The reduction that resulted from the offense in the value of equity securities or other corporate assets.*
  - (v) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*
- (D) Exclusions from Loss.—*Loss shall not include the following:*
- (i) *Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.*
  - (ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.*
- (E) Credits Against Loss.—*Loss shall be reduced by the following:*
- (i) *The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.*
  - (ii) *In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.*
- (F) Special Rules.—*Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:*
- (i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—*In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 7(A).*
  - (ii) Government Benefits.—*In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient*

*of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, loss is \$50.*

- (iii) *Davis-Bacon Act Violations.*—*In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.*
- (iv) *Ponzi and Other Fraudulent Investment Schemes.*—*In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).*
- (v) *Certain Other Unlawful Misrepresentation Schemes.*—*In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.*
- (vi) *Value of Controlled Substances.*—*In a case involving controlled substances, loss is the estimated street value of the controlled substances.*
- (vii) *Value of Cultural Heritage Resources.*—*In a case involving a cultural heritage resource, loss attributable to that cultural heritage resource shall be determined in accordance with the rules for determining the "value of the cultural heritage resource" set forth in Application Note 2 of the Commentary to §2B1.5.*

3. *Application of Subsection (b)(2).*—

- (A) *Definition.*—*For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.*
- (B) *Undelivered United States Mail.*—
  - (i) *In General.*—*In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, "victim" means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.*



- (ii) Special Rule.—A case described in subdivision (B)(i) of this note that involved a Postal Service (I) relay box; (II) collection box; (III) delivery vehicle; or (IV) satchel or cart, shall be considered to have involved at least 50 or more victims.
  - (iii) Definition.—"Undelivered United States mail" means mail that has not actually been received by the addressee or his agent (e.g., mail taken from the addressee's mail box).
- (C) Vulnerable Victims.—If subsection (b)(2)(B) or (C) applies, an enhancement under §3A1.1(b)(2) shall not apply.
4. Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4).—For purposes of subsection (b)(4), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:
- (A) The regularity and sophistication of the defendant's activities.
  - (B) The value and size of the inventory of stolen property maintained by the defendant.
  - (C) The extent to which the defendant's activities encouraged or facilitated other crimes.
  - (D) The defendant's past activities involving stolen property.
5. Application of Subsection (b)(7).—
- (A) In General.—The adjustments in subsection (b)(7) 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)(7)(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)(7)(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)(7)(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 §2J1.7 (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)(7)(D):

"Financial assistance" means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.

"Institution of higher education" has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).

(E) Non-Applicability of Enhancements.—

(i) Subsection (b)(7)(A).—If the conduct that forms the basis for an enhancement under subsection (b)(7)(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)(7)(B) and (C).—If the conduct that forms the basis for an enhancement under subsection (b)(7)(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.

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

(A) Definition of United States.—For purposes of subsection (b)(8)(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)(8)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

- (C) Non-Applicability of Enhancement.—*If the conduct that forms the basis for an enhancement under subsection (b)(8) is the only conduct that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.*

7. Application of Subsection (b)(9).—

- (A) Definitions.—*For purposes of subsection (b)(9):*

*"Counterfeit access device" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service. "Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).*

*"Device-making equipment" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (ii) includes (I) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (II) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). "Scanning receiver" has the meaning given that term in 18 U.S.C. § 1029(e)(8).*

*"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(4), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).*

*"Produce" includes manufacture, design, alter, authenticate, duplicate, or assemble. "Production" includes manufacture, design, alteration, authentication, duplication, or assembly.*

*"Unauthorized access device" has the meaning given that term in 18 U.S.C. § 1029(e)(3).*

- (B) Identification Documents.—*Offenses involving identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.*

- (C) Application of Subsection (b)(9)(C)(i).—

(i) In General.—*Subsection (b)(9)(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)(9)(C)(i) applies are as follows:*

- (I) *A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox)*

and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.

(II) A defendant obtains an individual's name and address from a source (e.g., from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.

(iii) Nonapplicability of Subsection (b)(9)(C)(i):—Examples of conduct to which subsection (b)(9)(C)(i) does not apply are as follows:

(I) A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.

(II) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.

(D) Application of Subsection (b)(9)(C)(ii).—Subsection (b)(9)(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.

8. Chop Shop Enhancement under Subsection (b)(10).—Subsection (b)(10) provides a minimum offense level in the case of an ongoing, sophisticated operation (such as an auto theft ring or "chop shop") to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts. "Vehicles" refers to all forms of vehicles, including aircraft and watercraft.

9. Gross Receipts Enhancement under Subsection (b)(12)(A).—

(A) In General.—For purposes of subsection (b)(12)(A), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.

(B) Definition.—"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

10. Application of Subsection (b)(12)(B).—

(A) Application of Subsection (b)(12)(B)(i).—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:

(i) The financial institution became insolvent.

- (ii) *The financial institution substantially reduced benefits to pensioners or insureds.*
- (iii) *The financial institution was unable on demand to refund fully any deposit, payment, or investment.*
- (iv) *The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.*

(B) Application of Subsection (b)(12)(B)(ii).—

- (i) Definition.—*For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).*
- (ii) In General.—*The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:*
  - (I) *The organization became insolvent or suffered a substantial reduction in the value of its assets.*
  - (II) *The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).*
  - (III) *The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.*
  - (IV) *The organization substantially reduced its workforce.*
  - (V) *The organization substantially reduced its employee pension benefits.*
  - (VI) *The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.*

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

- (A) Definition.—*For purposes of this subsection, "securities law" (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.*
- (B) In General.—*A conviction under a securities law is not required in order for subsection (b)(13) 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. 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)(13) applies, do not apply §3B1.3.
12. Cross Reference in Subsection (c)(3).—Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses.
13. Continuing Financial Crimes Enterprise.—If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise".
14. Partially Completed Offenses.—In the case of a partially completed offense (e.g., an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 of the Commentary to §2X1.1.
15. Multiple-Count Indictments.—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).
16. Departure Considerations.—
- (A) Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:
- (i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.
  - (ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records).

- (iii) *The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).*
- (iv) *The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).*
- (v) *In a case involving stolen information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.*
- (vi) *In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:*
  - (I) *The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.*
  - (II) *An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.*
  - (III) *The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.*
- (B) *Downward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.*

*Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States). It also covers offenses involving altering or removing motor vehicle identification numbers, trafficking in automobiles or automobile parts with altered or obliterated identification numbers, odometer laws and regulations, obstructing correspondence, the falsification of documents or records relating to a benefit plan covered by the Employment Retirement Income Security Act, and the failure to maintain, or falsification of, documents required by the Labor Management Reporting and Disclosure Act.*

*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.*

*Subsection (b)(7)(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)(8) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.*

*Subsections (b)(9)(A) and (B) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.*

*Subsection (b)(9)(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)(11)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.*

*Subsection (b)(12)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101-647.*

*Subsection (b)(12)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.*

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 7); November 1, 1989 (see Appendix C, amendments 99-101 and 303); November 1, 1990 (see Appendix C, amendments 312, 317, and 361); November 1, 1991 (see Appendix C, amendments 364 and 393); November 1, 1993 (see Appendix C, amendments 481 and 482); November 1, 1995 (see Appendix C, amendment 512); November 1, 1997 (see Appendix C, amendment 551); November 1, 1998 (see Appendix C, amendment 576); November 1, 2000 (see Appendix C, amendment 596); November 1, 2001 (see Appendix C, amendment 617); November 1, 2002 (see Appendix C, amendments 637, 638, and 646); January 25, 2003 (see Appendix C, amendment 647).

## **PART C - OFFENSES INVOLVING PUBLIC OFFICIALS AND VIOLATIONS OF FEDERAL ELECTION CAMPAIGN LAWS**

Historical Note: Effective November 1, 1987. Amended effective January 25, 2003 (see Appendix C, amendment 648). Introductory Commentary to Part C, effective November 1, 1987, was deleted effective January 25, 2003 (see Appendix C, amendment 648).

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
  - (1) If the value of the illegal transactions exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
  - (2) (Apply the greater) If the offense involved, directly or indirectly, an illegal transaction made by or received from—
    - (A) a foreign national, increase by **2** levels; or
    - (B) a government of a foreign country, increase by **4** levels.

- (3) If (A) the offense involved the contribution, donation, solicitation, expenditure, disbursement, or receipt of governmental funds; or (B) the defendant committed the offense for the purpose of obtaining a specific, identifiable non-monetary Federal benefit, increase by **2** levels.
  - (4) If the defendant engaged in 30 or more illegal transactions, increase by **2** levels.
  - (5) If the offense involved a contribution, donation, solicitation, or expenditure made or obtained through intimidation, threat of pecuniary or other harm, or coercion, increase by **4** levels.
- (c) Cross Reference
- (1) If the offense involved a bribe or gratuity, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than the offense level determined above.

Commentary

Statutory Provisions: 2 U.S.C. §§ 437g(d)(1), 439a, 441a, 441a-1, 441b, 441c, 441d, 441e, 441f, 441g, 441h(a), 441i, 441k; 18 U.S.C. § 607. For additional provision(s), see *Statutory Index* (Appendix A).

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Foreign national" has the meaning given that term in section 319(b) of the Federal Election Campaign Act of 1971, 2 U.S.C. § 441e(b).*

*"Government of a foreign country" has the meaning given that term in section 1(e) of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611(e)).*

*"Governmental funds" means money, assets, or property, of the United States government, of a State government, or of a local government, including any branch, subdivision, department, agency, or other component of any such government. "State" means any of the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, or American Samoa. "Local government" means the government of a political subdivision of a State.*

*"Illegal transaction" means (A) any contribution, donation, solicitation, or expenditure of money or anything of value, or any other conduct, prohibited by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 et seq; (B) any contribution, donation, solicitation, or expenditure of money or anything of value made in excess of the amount of such contribution, donation, solicitation, or expenditure that may be made under such Act; and (C) in the case of a violation of 18 U.S.C. § 607, any solicitation or receipt of money or anything of value under that section. The terms*

"contribution" and "expenditure" have the meaning given those terms in section 301(8) and (9) of the Federal Election Campaign Act of 1971 (2 U.S.C. § 431(8) and (9)), respectively.

2. Application of Subsection (b)(3)(B).—Subsection (b)(3)(B) provides an enhancement for a defendant who commits the offense for the purpose of achieving a specific, identifiable non-monetary Federal benefit that does not rise to the level of a bribe or a gratuity. Subsection (b)(3)(B) is not intended to apply to offenses under this guideline in which the defendant's only motivation for commission of the offense is generally to achieve increased visibility with, or heightened access to, public officials. Rather, subsection (b)(3)(B) is intended to apply to defendants who commit the offense to obtain a specific, identifiable non-monetary Federal benefit, such as a Presidential pardon or information proprietary to the government.
3. Application of Subsection (b)(4).—Subsection (b)(4) shall apply if the defendant engaged in any combination of 30 or more illegal transactions during the course of the offense, whether or not the illegal transactions resulted in a conviction for such conduct.
4. Departure Provision.—In a case in which the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted.

Historical Note: Effective January 25, 2003 (see Appendix C, amendment 648).

**§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**

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

- (1) **6**; or
- (2) If the offense was committed to facilitate or conceal (A) an offense involving a theft, a fraud, or an embezzlement; (B) an offense involving a bribe or a gratuity; or (C) an obstruction of justice offense, apply §2B1.1 (Theft, Property Destruction, and Fraud), §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations), or §2J1.2 (Obstruction of Justice), as applicable.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1027, 1520; 29 U.S.C. §§ 439, 461, 1131. For additional statutory provision(s), see Appendix A (Statutory Index).

Background: This section covers the falsification of documents or records relating to a benefit plan covered by ERISA. It also covers failure to maintain proper documents required by the LMRDA or falsification of

*such documents. Such violations sometimes occur in connection with the criminal conversion of plan funds or schemes involving bribery or graft. Where a violation under this section occurs in connection with another offense, the offense level is determined by reference to the offense facilitated by the false statements or documents.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 151); November 1, 1993 (see Appendix C, amendment 481); January 25, 2003 (see Appendix C, amendment 647).

**§2G2.2.      Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic**

- (a)      Base Offense Level: **17**
- (b)      Specific Offense Characteristics
  - (1)      If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.
  - (2)      (Apply the Greatest) If the offense involved:
    - (A)      Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.
    - (B)      Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.
    - (C)      Distribution to a minor, increase by **5** levels.
    - (D)      Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.
    - (E)      Distribution other than distribution described in subdivisions (A) through (D), increase by **2** levels.
  - (3)      If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.
  - (4)      If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.
  - (5)      If a computer was used for the transmission of the material or a notice or advertisement of the material, increase by **2** levels.

- (6) If the offense involved—
  - (A) at least 10 images, but fewer than 150, increase by **2** levels;
  - (B) at least 150 images, but fewer than 300, increase by **3** levels;
  - (C) at least 300 images, but fewer than 600, increase by **4** levels; and
  - (D) 600 or more images, increase by **5** levels.

(c) Cross Reference

- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2251(c)(1)(A), 2252(a)(1)-(3), 2260.

Application Notes:

1. For purposes of this guideline—

*"Distribution" means any act, including production, transportation, and possession with intent to distribute, related to the transfer of material involving the sexual exploitation of a minor.*

*"Distribution for pecuniary gain" means distribution for profit.*

*"Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. "Thing of value" means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.*

*"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense, knowing or believing the individual is a minor at that time.*

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

*"Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the*

*defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.*

*"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).*

*"Sexual abuse or exploitation" means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor, abusive sexual contact of a minor, any similar offense under state law, or an attempt or conspiracy to commit any of the above offenses. "Sexual abuse or exploitation" does not include trafficking in material relating to the sexual abuse or exploitation of a minor.*

*"Sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256.*

2. *If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(4) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.*

*Prior convictions taken into account under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

3. *The cross reference in subsection (c)(1) is to be construed broadly to include all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.*

*Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (6), effective April 30, 2003.*

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 31); November 1, 1990 (see Appendix C, amendment 325); November 1, 1991 (see Appendix C, amendment 372); November 27, 1991 (see Appendix C, amendment 435); November 1, 1996 (see Appendix C, amendment 537); November 1, 1997 (see Appendix C, amendment 575); November 1, 2000 (see Appendix C, amendment 592); November 1, 2001 (see Appendix C, amendment 617); April 30, 2003 (see Appendix C, amendment 649).

#### **§2G2.4. Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct**

- (a) **Base Offense Level: 15**
- (b) **Specific Offense Characteristics**
  - (1) **If the material involved a prepubescent minor or a minor under the age of twelve years, increase by 2 levels.**
  - (2) **If the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor, increase by 2 levels.**

- (3) If the defendant's possession of the material resulted from the defendant's use of a computer, increase by **2** levels.
  - (4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.
  - (5) If the offense involved—
    - (A) at least 10 images, but fewer than 150, increase by **2** levels;
    - (B) at least 150 images, but fewer than 300, increase by **3** levels;
    - (C) at least 300 images, but fewer than 600, increase by **4** levels; and
    - (D) 600 or more images, increase by **5** levels.
- (c) Cross References
- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).
  - (2) If the offense involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, shipping, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic), apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic).

Commentary

Statutory Provision: 18 U.S.C. § 2252(a)(4).

Application Notes:

1. For purposes of this guideline—

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

*"Visual depiction" means any visual depiction described in 18 U.S.C. § 2256(5) and (8).*

2. *For purposes of subsection (b)(2), a file that (A) contains a visual depiction; and (B) is stored on a magnetic, optical, digital, other electronic, or other storage medium or device, shall be considered to be one item.*

*If the offense involved a large number of visual depictions, an upward departure may be warranted, regardless of whether subsection (b)(2) applies.*

***Background:*** Section 401(i)(1)(B) of Public Law 108–21 directly amended subsection (b) to add subdivisions (4) and (5), effective April 30, 2003.

***Historical Note:*** Effective November 1, 1991 (see Appendix C, amendment 372). Amended effective November 27, 1991 (see Appendix C, amendment 436); November 1, 1996 (see Appendix C, amendment 537); November 1, 2000 (see Appendix C, amendment 592); April 30, 2003 (see Appendix C, amendment 649).

**§2J1.2.            Obstruction of Justice**

- (a)    Base Offense Level: **14**
- (b)    Specific Offense Characteristics
- (1)    If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by **8** levels.
- (2)    If the offense resulted in substantial interference with the administration of justice, increase by **3** levels.
- (3)    If the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation, increase by **2** levels.
- (c)    Cross Reference
- (1)    If the offense involved obstructing the investigation or prosecution of a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

**Commentary**

***Statutory Provisions:*** 18 U.S.C. §§ 1503, 1505-1513, 1516, 1519. For additional statutory provision(s), see Appendix A (Statutory Index).

**Application Notes:**

1.        *"Substantial interference with the administration of justice" includes a premature or improper*



*termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.*

2. *For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation or trial of the obstruction of justice count.*
3. *In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense that is the object of the obstruction), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).*
4. *If a weapon was used, or bodily injury or significant property damage resulted, a departure may be warranted. See Chapter Five, Part K (Departures).*
5. *The inclusion of "property damage" under subsection (b)(1) is designed to address cases in which property damage is caused or threatened as a means of intimidation or retaliation (e.g., to intimidate a witness from, or retaliate against a witness for, testifying). Subsection (b)(1) is not intended to apply, for example, where the offense consisted of destroying a ledger containing an incriminating entry.*

*Background: This section addresses offenses involving the obstruction of justice generally prosecuted under the above-referenced statutory provisions. Numerous offenses of varying seriousness may constitute obstruction of justice: using threats or force to intimidate or influence a juror or federal officer; obstructing a civil or administrative proceeding; stealing or altering court records; unlawfully intercepting grand jury deliberations; obstructing a criminal investigation; obstructing a state or local investigation of illegal gambling; using intimidation or force to influence testimony, alter evidence, evade legal process, or obstruct the communication of a judge or law enforcement officer; or causing a witness bodily injury or property damage in retaliation for providing testimony, information or evidence in a federal proceeding. The conduct that gives rise to the violation may, therefore, range from a mere threat to an act of extreme violence.*

*The specific offense characteristics reflect the more serious forms of obstruction. Because the conduct covered by this guideline is frequently part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense, a cross reference to §2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 172-174); November 1, 1991 (see Appendix C, amendment 401); January 25, 2003 (see Appendix C, amendment 647).

**§2T4.1. Tax Table**

	<u>Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
(A)	\$2,000 or less	<b>6</b>
(B)	More than \$2,000	<b>8</b>
(C)	More than \$5,000	<b>10</b>
(D)	More than \$12,500	<b>12</b>
(E)	More than \$30,000	<b>14</b>

(F)	More than \$80,000	<b>16</b>
(G)	More than \$200,000	<b>18</b>
(H)	More than \$400,000	<b>20</b>
(I)	More than \$1,000,000	<b>22</b>
(J)	More than \$2,500,000	<b>24</b>
(K)	More than \$7,000,000	<b>26</b>
(L)	More than \$20,000,000	<b>28</b>
(M)	More than \$50,000,000	<b>30</b>
(N)	More than \$100,000,000	<b>32</b>
(O)	More than \$200,000,000	<b>34</b>
(P)	More than \$400,000,000	<b>36.</b>

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 237); November 1, 1993 (see Appendix C, amendment 491); November 1, 2001 (see Appendix C, amendment 617); January 25, 2003 (see Appendix C, amendment 647).

**§3D1.2.            Groups of Closely Related Counts**

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

- (a)    When counts involve the same victim and the same act or transaction.
- (b)    When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
- (c)    When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
- (d)    When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

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

- §§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
- §§2C1.1, 2C1.2, 2C1.7, 2C1.8;
- §§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
- §§2E4.1, 2E5.1;
- §§2G2.2, 2G2.4;
- §2K2.1;
- §§2L1.1, 2L2.1;
- §2N3.1;
- §2Q2.1;
- §2R1.1;

§§2S1.1, 2S1.3;  
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:

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

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

#### Commentary

##### Application Notes:

1. *Subsections (a)-(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment are excepted from application of the multiple count rules. See §3D1.1(b); id., comment. (n.1).*
2. *The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims (e.g., drug or immigration offenses, where society at large is the victim), the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related. Where one count, for example, involves unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interests harmed (the interests protected by laws governing immigration) are closely related. In contrast, where one count involves the sale of controlled substances and the other involves an immigration law violation, the counts are not grouped together because different societal interests are harmed. Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph, i.e., to identify and group "counts involving substantially the same harm."*

3. *Under subsection (a), counts are to be grouped together when they represent essentially a single injury or are part of a single criminal episode or transaction involving the same victim.*

*When one count charges an attempt to commit an offense and the other charges the commission of that offense, or when one count charges an offense based on a general prohibition and the other charges violation of a specific prohibition encompassed in the general prohibition, the counts will be grouped together under subsection (a).*

*Examples: (1) The defendant is convicted of forging and uttering the same check. The counts are to be grouped together. (2) The defendant is convicted of kidnapping and assaulting the victim during the course of the kidnapping. The counts are to be grouped together. (3) The defendant is convicted of bid rigging (an antitrust offense) and of mail fraud for signing and mailing a false statement that the bid was competitive. The counts are to be grouped together. (4) The defendant is convicted of two counts of assault on a federal officer for shooting at the same officer twice while attempting to prevent apprehension as part of a single criminal episode. The counts are to be grouped together. (5) The defendant is convicted of three counts of unlawfully bringing aliens into the United States, all counts arising out of a single incident. The three counts are to be grouped together. But: (6) The defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days. The counts are not to be grouped together.*

4. *Subsection (b) provides that counts that are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim are to be grouped together, even if they constitute legally distinct offenses occurring at different times. This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).*

*When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b).*

*Examples: (1) The defendant is convicted of one count of conspiracy to commit extortion and one count of extortion for the offense he conspired to commit. The counts are to be grouped together. (2) The defendant is convicted of two counts of mail fraud and one count of wire fraud, each in furtherance of a single fraudulent scheme. The counts are to be grouped together, even if the mailings and telephone call occurred on different days. (3) The defendant is convicted of one count of auto theft and one count of altering the vehicle identification number of the car he stole. The counts are to be grouped together. (4) The defendant is convicted of two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each count under §1B1.3(a)(2). The two counts will then be grouped together under either this subsection or subsection (d) to avoid double counting. But: (5) The defendant is convicted of two counts of rape for raping the same person on different days. The counts are not to be grouped together.*

5. *Subsection (c) provides that when conduct that represents a separate count, e.g., bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision prevents "double counting" of offense behavior. Of course,*

*this rule applies only if the offenses are closely related. It is not, for example, the intent of this rule that (assuming they could be joined together) a bank robbery on one occasion and an assault resulting in bodily injury on another occasion be grouped together. The bodily injury (the harm from the assault) would not be a specific offense characteristic to the robbery and would represent a different harm. On the other hand, use of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to warrant grouping of counts under this subsection. Frequently, this provision will overlap subsection (a), at least with respect to specific offense characteristics. However, a count such as obstruction of justice, which represents a Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c) even though it is not covered by subsection (a).*

*Sometimes there may be several counts, each of which could be treated as an aggravating factor to another more serious count, but the guideline for the more serious count provides an adjustment for only one occurrence of that factor. In such cases, only the count representing the most serious of those factors is to be grouped with the other count. For example, if in a robbery of a credit union on a military base the defendant is also convicted of assaulting two employees, one of whom is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault conviction would be treated separately.*

*A cross reference to another offense guideline does not constitute "a specific offense characteristic ... or other adjustment" within the meaning of subsection (c). For example, the guideline for bribery of a public official contains a cross reference to the guideline for a conspiracy to commit the offense that the bribe was to facilitate. Nonetheless, if the defendant were convicted of one count of securities fraud and one count of bribing a public official to facilitate the fraud, the two counts would not be grouped together by virtue of the cross reference. If, however, the bribe was given for the purpose of hampering a criminal investigation into the offense, it would constitute obstruction and under §3C1.1 would result in a 2-level enhancement to the offense level for the fraud. Under the latter circumstances, the counts would be grouped together.*

6. *Subsection (d) likely will be used with the greatest frequency. It provides that most property crimes (except robbery, burglary, extortion and the like), drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together. The list of instances in which this subsection should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection (d).*

*A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d).*

*Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. In such cases, the offense guideline that results in the highest offense level is used; see §3D1.3(b). The "same general type" of offense is to be construed broadly.*

*Examples: (1) The defendant is convicted of five counts of embezzling money from a bank. The five counts are to be grouped together. (2) The defendant is convicted of two counts of theft of social security checks and three counts of theft from the mail, each from a different victim. All five counts are to be grouped together. (3) The defendant is convicted of five counts of mail fraud and ten counts of wire fraud. Although the counts arise from various schemes, each involves a monetary objective. All fifteen counts are to be grouped together. (4) The defendant is convicted of three counts of unlicensed dealing in firearms. All three counts are to be grouped together. (5) The*

*defendant is convicted of one count of selling heroin, one count of selling PCP, and one count of selling cocaine. The counts are to be grouped together. The Commentary to §2D1.1 provides rules for combining (adding) quantities of different drugs to determine a single combined offense level. (6) The defendant is convicted of three counts of tax evasion. The counts are to be grouped together. (7) The defendant is convicted of three counts of discharging toxic substances from a single facility. The counts are to be grouped together. (8) The defendant is convicted on two counts of check forgery and one count of uttering the first of the forged checks. All three counts are to be grouped together. Note, however, that the uttering count is first grouped with the first forgery count under subsection (a) of this guideline, so that the monetary amount of that check counts only once when the rule in §3D1.3(b) is applied. But: (9) The defendant is convicted of three counts of bank robbery. The counts are not to be grouped together, nor are the amounts of money involved to be added.*

7. *A single case may result in application of several of the rules in this section. Thus, for example, example (8) in the discussion of subsection (d) involves an application of §3D1.2(a) followed by an application of §3D1.2(d). Note also that a Group may consist of a single count; conversely, all counts may form a single Group.*
  
8. *A defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or more of the substantive offenses. In such cases, treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. See §1B1.2(d) and accompanying commentary. Then apply the ordinary grouping rules to determine the combined offense level based upon the substantive counts of which the defendant is convicted and the various acts cited by the conspiracy count that would constitute behavior of a substantive nature. Example: The defendant is convicted of two counts: conspiring to commit offenses A, B, and C, and committing offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) conspiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense C. Count (1) and count (2) are grouped together under §3D1.2(b). Group the remaining counts, including the various acts cited by the conspiracy count that would constitute behavior of a substantive nature, according to the rules in this section.*

*Background: Ordinarily, the first step in determining the combined offense level in a case involving multiple counts is to identify those counts that are sufficiently related to be placed in the same Group of Closely Related Counts ("Group"). This section specifies four situations in which counts are to be grouped together. Although it appears last for conceptual reasons, subsection (d) probably will be used most frequently.*

*A primary consideration in this section is whether the offenses involve different victims. For example, a defendant may stab three prison guards in a single escape attempt. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together even when there are distinct victims. Although such a proposal was considered, it was rejected because it probably would require departure in many cases in order to capture adequately the criminal behavior. Cases involving injury to distinct victims are sufficiently comparable, whether or not the injuries are inflicted in distinct transactions, so that each such count should be treated separately rather than grouped together. Counts involving different victims (or societal harms in the case of "victimless" crimes) are grouped together only as provided in subsection (c) or (d).*

*Even if counts involve a single victim, the decision as to whether to group them together may not always be clear cut. For example, how contemporaneous must two assaults on the same victim be in order to warrant grouping together as constituting a single transaction or occurrence? Existing case law may provide some guidance as to what constitutes distinct offenses, but such decisions often turn on the technical*

*language of the statute and cannot be controlling. In interpreting this Part and resolving ambiguities, the court should look to the underlying policy of this Part as stated in the Introductory Commentary.*

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 45); November 1, 1989 (see Appendix C, amendments 121, 253-256, and 303); November 1, 1990 (see Appendix C, amendments 309, 348, and 349); November 1, 1991 (see Appendix C, amendment 417); November 1, 1992 (see Appendix C, amendment 458); November 1, 1993 (see Appendix C, amendment 496); November 1, 1995 (see Appendix C, amendment 534); November 1, 1996 (see Appendix C, amendment 538); November 1, 1998 (see Appendix C, amendment 579); November 1, 2001 (see Appendix C, amendments 615, 617, and 634); November 1, 2002 (see Appendix C, amendment 638); January 25, 2003 (see Appendix C, amendment 648).

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

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

Commentary

Application Notes:

- 1. *In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:*
  - (a) *truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;*
  - (b) *voluntary termination or withdrawal from criminal conduct or associations;*
  - (c) *voluntary payment of restitution prior to adjudication of guilt;*
  - (d) *voluntary surrender to authorities promptly after commission of the offense;*
  - (e) *voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;*

- (f) *voluntary resignation from the office or position held during the commission of the offense;*
  - (g) *post-offense rehabilitative efforts (e.g., counseling or drug treatment); and*
  - (h) *the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.*
2. *This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.*
  3. *Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(a)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.*
  4. *Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.*
  5. *The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.*
  6. *Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.*

*Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of Public Law 108-21.*



*Background:* The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

Section 401(g) of Public Law 108-21 directly amended subsection (b), Application Note 6 (including adding the last paragraph of that application note), and the Background Commentary, effective April 30, 2003.

*Historical Note:* Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 46); November 1, 1989 (see Appendix C, amendment 258); November 1, 1990 (see Appendix C, amendment 351); November 1, 1992 (see Appendix C, amendment 459); April 30, 2003 (see Appendix C, amendment 649).

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

- (a) In any case in which the defendant’s instant offense of conviction is a covered sex crime, §4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction:
  - (1) The offense level shall be the greater of:
    - (A) the offense level determined under Chapters Two and Three; or
    - (B) the offense level from the table below decreased by the number of levels corresponding to any applicable adjustment from §3E1.1 (Acceptance of Responsibility):

<u>Offense Statutory Maximum</u>	<u>Offense Level</u>
(i) Life	<b>37</b>
(ii) 25 years or more	<b>34</b>
(iii) 20 years or more, but less than 25 years	<b>32</b>
(iv) 15 years or more, but less than 20 years	<b>29</b>
(v) 10 years or more, but less than 15 years	<b>24</b>
(vi) 5 years or more, but less than 10 years	<b>17</b>
(vii) More than 1 year, but less than 5 years	<b>12.</b>

- (2) The criminal history category shall be the greater of: (A) the criminal history category determined under Chapter Four, Part A (Criminal History); or (B) criminal history Category V.
- (b) In any case in which the defendant's instant offense of conviction is a covered sex crime, neither §4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct:
  - (1) The offense level shall be **5** plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than level **22**, the offense level shall be level **22**, decreased by the number of levels corresponding to any applicable adjustment from §3E1.1.
  - (2) The criminal history category shall be the criminal history category determined under Chapter Four, Part A.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

3. Application of Subsection (a).—

(A) Definitions.—For purposes of subsection (a):

(i) *"Offense statutory maximum" means the maximum term of imprisonment authorized for the instant offense of conviction that is a covered sex crime, including any increase in that maximum term under a sentencing enhancement provision (such as a sentencing enhancement provision contained in 18 U.S.C. § 2247(a) or § 2426(a)) that applies to that covered sex crime because of the defendant's prior criminal record.*

(ii) *"Sex offense conviction" (I) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor; and (II) does*

*not include trafficking in, receipt of, or possession of, child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).*

- (B) Determination of Offense Statutory Maximum in the Case of Multiple Counts of Conviction.—*In a case in which more than one count of the instant offense of conviction is a felony that is a covered sex crime, the court shall use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (a).*

4. Application of Subsection (b).—

- (A) Definition.—*For purposes of subsection (b), "prohibited sexual conduct" (i) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) includes the production of child pornography; (iii) includes trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography; and (iv) does not include receipt or possession of child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).*

- (B) Determination of Pattern of Activity.—

- (i) In General.—*For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.*
- (ii) Occasion of Prohibited Sexual Conduct.—*An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion.*

5. Treatment and Monitoring.—

- (A) Recommended Maximum Term of Supervised Release.—*The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.*
- (B) Recommended Conditions of Probation and Supervised Release.—*Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.*

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

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

Historical Note: Effective November 1, 2001 (see Appendix C, amendment 615). Amended effective April 30, 2003 (see Appendix C, amendment 649).

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

- (a) The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.
- (b) The applicable fine guideline range is that specified in subsection (c) below. If, however, the guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedence over subsection (c) of this section.
- (c)
  - (1) The minimum of the fine guideline range is the amount shown in column A of the table below.
  - (2) Except as specified in (4) below, the maximum of the fine guideline range is the amount shown in column B of the table below.

(3) Fine Table

<u>Offense Level</u>	<u>A Minimum</u>	<u>B Maximum</u>
3 and below	\$100	\$5,000
4-5	\$250	\$5,000
6-7	\$500	\$5,000
8-9	\$1,000	\$10,000
10-11	\$2,000	\$20,000
12-13	\$3,000	\$30,000
14-15	\$4,000	\$40,000
16-17	\$5,000	\$50,000
18-19	\$6,000	\$60,000
20-22	\$7,500	\$75,000
23-25	\$10,000	\$100,000
26-28	\$12,500	\$125,000
29-31	\$15,000	\$150,000
32-34	\$17,500	\$175,000
35-37	\$20,000	\$200,000
38 and above	\$25,000	\$250,000.

- (4) Subsection (c)(2), limiting the maximum fine, does not apply if the defendant is convicted under a statute authorizing (A) a maximum fine greater than \$250,000, or (B) a fine for each day of violation. In such cases, the court may impose a fine up to the maximum authorized by the statute.

- (d) In determining the amount of the fine, the court shall consider:
- (1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;
  - (2) any evidence presented as to the defendant's ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;
  - (3) the burden that the fine places on the defendant and his dependents relative to alternative punishments;
  - (4) any restitution or reparation that the defendant has made or is obligated to make;
  - (5) any collateral consequences of conviction, including civil obligations arising from the defendant's conduct;
  - (6) whether the defendant previously has been fined for a similar offense;
  - (7) the expected costs to the government of any term of probation, or term of imprisonment and term of supervised release imposed; and
  - (8) any other pertinent equitable considerations.

The amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive.

- (e) If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine. In these circumstances, the court shall consider alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive. Although any additional sanction not proscribed by the guidelines is permissible, community service is the generally preferable alternative in such instances.
- (f) If the defendant establishes that payment of the fine in a lump sum would have an unduly severe impact on him or his dependents, the court should establish an installment schedule for payment of the fine. The length of the installment schedule generally should not exceed twelve months, and shall not exceed the maximum term of probation authorized for the offense. The defendant should be required to pay a substantial installment at the time of sentencing. If the court authorizes a defendant sentenced to probation or supervised release to pay a fine on an installment schedule, the court shall require as a condition of probation or supervised release that the defendant pay the fine according to the schedule. The court also may impose a condition prohibiting the defendant from incurring new

credit charges or opening additional lines of credit unless he is in compliance with the payment schedule.

- (g) If the defendant knowingly fails to pay a delinquent fine, the court shall resentence him in accordance with 18 U.S.C. § 3614.

Commentary

Application Notes:

1. *A fine may be the sole sanction if the guidelines do not require a term of imprisonment. If, however, the fine is not paid in full at the time of sentencing, it is recommended that the court sentence the defendant to a term of probation, with payment of the fine as a condition of probation. If a fine is imposed in addition to a term of imprisonment, it is recommended that the court impose a term of supervised release following imprisonment as a means of enforcing payment of the fine.*
2. *In general, the maximum fine permitted by law as to each count of conviction is \$250,000 for a felony or for any misdemeanor resulting in death; \$100,000 for a Class A misdemeanor; and \$5,000 for any other offense. 18 U.S.C. § 3571(b)(3)-(7). However, higher or lower limits may apply when specified by statute. 18 U.S.C. § 3571(b)(1), (e). As an alternative maximum, the court may fine the defendant up to the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571(b)(2), (d).*
3. *The determination of the fine guideline range may be dispensed with entirely upon a court determination of present and future inability to pay any fine. The inability of a defendant to post bail bond (having otherwise been determined eligible for release) and the fact that a defendant is represented by (or was determined eligible for) assigned counsel are significant indicators of present inability to pay any fine. In conjunction with other factors, they may also indicate that the defendant is not likely to become able to pay any fine.*
4. *The Commission envisions that for most defendants, the maximum of the guideline fine range from subsection (c) will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline may be warranted.*

*Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would not be disgorged (e.g., by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted.*

5. *Subsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases. These statutes include, among others: 21 U.S.C. §§ 841(b) and 960(b), which authorize fines up to \$8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S.C. § 848(a), which authorizes fines up to \$4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S.C. § 1956(a), which authorizes a fine equal to the greater of \$500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; 18 U.S.C. § 1957(b)(2),*

*which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction; 33 U.S.C. § 1319(c), which authorizes a fine of up to \$50,000 per day for violations of the Water Pollution Control Act; 42 U.S.C. § 6928(d), which authorizes a fine of up to \$50,000 per day for violations of the Resource Conservation Act; and 2 U.S.C. § 437g(d)(1)(D), which authorizes, for violations of the Federal Election Campaign Act under 2 U.S.C. § 441f, a fine up to the greater of \$50,000 or 1,000 percent of the amount of the violation, and which requires, in the case of such a violation, a minimum fine of not less than 300 percent of the amount of the violation.*

*There may be cases in which the defendant has entered into a conciliation agreement with the Federal Election Commission under section 309 of the Federal Election Campaign Act of 1971 in order to correct or prevent a violation of such Act by the defendant. The existence of a conciliation agreement between the defendant and Federal Election Commission, and the extent of compliance with that conciliation agreement, may be appropriate factors in determining at what point within the applicable fine guideline range to sentence the defendant, unless the defendant began negotiations toward a conciliation agreement after becoming aware of a criminal investigation.*

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).*
7. *In considering subsection (d)(7), the court may be guided by reports published by the Bureau of Prisons and the Administrative Office of the United States Courts concerning average costs.*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 54); November 1, 1989 (see Appendix C, amendments 280, 281, and 302); November 1, 1990 (see Appendix C, amendment 356); November 1, 1991 (see Appendix C, amendment 384); November 1, 1997 (see Appendix C, amendment 572); November 1, 2002 (see Appendix C, amendment 646); January 25, 2003 (see Appendix C, amendment 648).

#### **§5H1.6. Family Ties and Responsibilities, and Community Ties (Policy Statement)**

In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

Commentary

*Background:* Section 401(b)(4) of Public Law 108–21 directly amended this policy statement to add the second paragraph, effective April 30, 2003.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386); April 30, 2003 (see Appendix C, amendment 649).

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

- (a)        **DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.**—Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is inadequate or excessive.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that



there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under other guidelines. Therefore, if a weapon is a relevant factor to sentencing under one of these other guidelines, the court may depart for this reason.

Finally, an offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines.

- (b) **DOWNWARD DEPARTURES IN CHILD CRIMES AND SEXUAL OFFENSES.**—Under 18 U.S.C. § 3553(b)(2), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—
- (1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;
  - (2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and
  - (3) should result in a sentence different from that described.

The grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.

Commentary\*

*[\*Section 401(m)(2)(C) of Public Law 108–21 directs the Commission to revise §5K2.0, within 180 days after the date of the enactment of that Public Law, or October 27, 2003, to conform §5K2.0 to changes made by that Public Law, including changes to the appellate standard of review for decisions to depart from the guidelines. That directive has not been implemented yet in the following commentary.]*

*The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. Koon v. United States, 518 U.S. 81 (1996). Furthermore, "[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this*

*question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District Courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." Id. at 98.*

*The last paragraph of subsection (a) sets forth the conditions under which an offender characteristic or other circumstance that is not ordinarily relevant to a departure from the applicable guideline range may be relevant to this determination. The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.*

*In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. See 18 U.S.C. § 3553(b). For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range.*

*Section 401(b)(1) of Public Law 108–21 directly amended this policy statement to add subsection (b), effective April 30, 2003.*

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 57); November 1, 1990 (see Appendix C, amendment 358); November 1, 1994 (see Appendix C, amendment 508); November 1, 1997 (see Appendix C, amendment 561); November 1, 1998 (see Appendix C, amendment 585); April 30, 2003 (see Appendix C, amendment 649).

**§5K2.13. Diminished Capacity (Policy Statement)**

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant’s offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant’s criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Commentary

Application Note:

1. For purposes of this policy statement—

*"Significantly reduced mental capacity" means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.*

Background: Section 401(b)(5) of Public Law 108–21 directly amended this policy statement to add subdivision (4), effective April 30, 2003.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1998 (see Appendix C, amendment 583); April 30, 2003 (see Appendix C, amendment 649).

**§5K2.20. Aberrant Behavior (Policy Statement)**

Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, a sentence below the applicable guideline range may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior. However, the court may not depart below the guideline range on this basis if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood); or (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter Four.

Commentary

Application Notes:

1. *For purposes of this policy statement—*

*"Aberrant behavior" means a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life.*

*"Dangerous weapon," "firearm," "otherwise used," and "serious bodily injury" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).*

*"Serious drug trafficking offense" means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that, because the defendant does not meet the criteria under §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases), results in the imposition of a mandatory minimum term of imprisonment upon the defendant.*

2. *In determining whether the court should depart on the basis of aberrant behavior, the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense.*

Background: Section 401(b)(3) of Public Law 108–21 directly amended this policy statement, effective

*April 30, 2003.*

Historical Note: Effective November 1, 2000 (see Appendix C, amendment 603). Amended effective April 30, 2003 (see Appendix C, amendment 649).

**§5K2.22. Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)**

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code:

- (1) Age may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by §5H1.1.
- (2) An extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by §5H1.4.
- (3) Drug, alcohol, or gambling dependence or abuse is not a reason for imposing a sentence below the guidelines.

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*Commentary*

*Background: Section 401(b)(2) of Public Law 108–21 directly amended Chapter Five, Part K, to add this policy statement, effective April 30, 2003.*

Historical Note: Effective April 30, 2003 (see Appendix C, amendment 649).

## APPENDIX A - STATUTORY INDEX

### INTRODUCTION

This index specifies the offense guideline section(s) in Chapter Two (Offense Conduct) applicable to the statute of conviction. If more than one guideline section is referenced for the particular statute, use the guideline most appropriate for the offense conduct charged in the count of which the defendant was convicted. For the rules governing the determination of the offense guideline section(s) from Chapter Two, and for any exceptions to those rules, see §1B1.2 (Applicable Guidelines).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 296 and 297); November 1, 1993 (see Appendix C, amendment 496); November 1, 2000 (see Appendix C, amendment 591).

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7 U.S.C. § 163	2N2.1	8 U.S.C. § 1325(c)	2L2.1, 2L2.2
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18 U.S.C. § 654	2B1.1	18 U.S.C. § 793(a)-(c)	2M3.2
18 U.S.C. § 655	2B1.1	18 U.S.C. § 793(d),(e)	2M3.2, 2M3.3
18 U.S.C. § 656	2B1.1	18 U.S.C. § 793(f)	2M3.4
18 U.S.C. § 657	2B1.1	18 U.S.C. § 793(g)	2M3.2, 2M3.3
18 U.S.C. § 658	2B1.1	18 U.S.C. § 794	2M3.1

18 U.S.C. § 798	2M3.3	18 U.S.C. § 875(d)	2B3.2, 2B3.3
18 U.S.C. § 831	2M6.1	18 U.S.C. § 876	2A4.2, 2A6.1, 2B3.2, 2B3.3
18 U.S.C. § 842(a)-(e)	2K1.3	18 U.S.C. § 877	2A4.2, 2A6.1, 2B3.2, 2B3.3
18 U.S.C. § 842(f)	2K1.6	18 U.S.C. § 878(a)	2A6.1
18 U.S.C. § 842(g)	2K1.6	18 U.S.C. § 878(b)	2B3.2
18 U.S.C. § 842(h),(i)	2K1.3	18 U.S.C. § 879	2A6.1
18 U.S.C. § 842(j)	2K1.1	18 U.S.C. § 880	2B1.1
18 U.S.C. § 842(k)	2K1.1	18 U.S.C. § 892	2E2.1
18 U.S.C. § 842(l)-(o)	2K1.3	18 U.S.C. § 893	2E2.1
18 U.S.C. § 842(p)(2)	2K1.3, 2M6.1	18 U.S.C. § 894	2E2.1
18 U.S.C. § 844(b)	2K1.1	18 U.S.C. § 911	2B1.1, 2L2.2
18 U.S.C. § 844(d)	2K1.3	18 U.S.C. § 912	2J1.4
18 U.S.C. § 844(e)	2A6.1	18 U.S.C. § 913	2J1.4
18 U.S.C. § 844(f)	2K1.4, 2X1.1	18 U.S.C. § 914	2B1.1
18 U.S.C. § 844(g)	2K1.3	18 U.S.C. § 915	2B1.1
18 U.S.C. § 844(h)	2K2.4 (2K1.4 for offenses committed prior to November 18, 1988)	18 U.S.C. § 917	2B1.1
18 U.S.C. § 844(i)	2K1.4	18 U.S.C. § 922(a)-(p)	2K2.1
18 U.S.C. § 844(m)	2K1.3	18 U.S.C. § 922(q)	2K2.5
18 U.S.C. § 844(n)	2X1.1	18 U.S.C. § 922(r)-(w)	2K2.1
18 U.S.C. § 844(o)	2K2.4	18 U.S.C. § 922(x)(1)	2K2.1
18 U.S.C. § 871	2A6.1	18 U.S.C. § 923	2K2.1
18 U.S.C. § 872	2C1.1	18 U.S.C. § 924(a)	2K2.1
18 U.S.C. § 873	2B3.3	18 U.S.C. § 924(b)	2K2.1
18 U.S.C. § 874	2B3.2, 2B3.3	18 U.S.C. § 924(c)	2K2.4
18 U.S.C. § 875(a)	2A4.2, 2B3.2	18 U.S.C. § 924(e)	2K2.1 (see also 4B1.4)
18 U.S.C. § 875(b)	2B3.2	18 U.S.C. § 924(f)	2K2.1
18 U.S.C. § 875(c)	2A6.1	18 U.S.C. § 924(g)	2K2.1
		18 U.S.C. § 924(h)	2K2.1

18 U.S.C. § 924(i)	2K2.1	18 U.S.C. § 1023	2B1.1
18 U.S.C. § 924(j)(1)	2A1.1, 2A1.2	18 U.S.C. § 1024	2B1.1
18 U.S.C. § 924(j)(2)	2A1.3, 2A1.4	18 U.S.C. § 1025	2B1.1
18 U.S.C. § 924(k)-(o)	2K2.1	18 U.S.C. § 1026	2B1.1
18 U.S.C. § 929(a)	2K2.4	18 U.S.C. § 1027	2E5.3
18 U.S.C. § 930	2K2.5	18 U.S.C. § 1028	2B1.1, 2L2.1, 2L2.2
18 U.S.C. § 956	2A1.5, 2X1.1	18 U.S.C. § 1029	2B1.1
18 U.S.C. § 970(a)	2B1.1, 2K1.4	18 U.S.C. § 1030(a)(1)	2M3.2
18 U.S.C. § 1001	2B1.1	18 U.S.C. § 1030(a)(2)	2B1.1
18 U.S.C. § 1002	2B1.1	18 U.S.C. § 1030(a)(3)	2B2.3
18 U.S.C. § 1003	2B1.1, 2B5.1	18 U.S.C. § 1030(a)(4)	2B1.1
18 U.S.C. § 1004	2B1.1	18 U.S.C. § 1030(a)(5)	2B1.1
18 U.S.C. § 1005	2B1.1	18 U.S.C. § 1030(a)(6)	2B1.1
18 U.S.C. § 1006	2B1.1, 2S1.3	18 U.S.C. § 1030(a)(7)	2B3.2
18 U.S.C. § 1007	2B1.1, 2S1.3	18 U.S.C. § 1030(b)	2X1.1
18 U.S.C. § 1010	2B1.1	18 U.S.C. § 1031	2B1.1
18 U.S.C. § 1011	2B1.1	18 U.S.C. § 1032	2B1.1, 2B4.1
18 U.S.C. § 1012	2B1.1, 2C1.3	18 U.S.C. § 1033	2B1.1, 2J1.2
18 U.S.C. § 1013	2B1.1	18 U.S.C. § 1035	2B1.1
18 U.S.C. § 1014	2B1.1	18 U.S.C. § 1071	2X3.1
18 U.S.C. § 1015	2B1.1, 2J1.3, 2L2.1, 2L2.2	18 U.S.C. § 1072	2X3.1
18 U.S.C. § 1016	2B1.1	18 U.S.C. § 1073	2J1.5, 2J1.6
18 U.S.C. § 1017	2B1.1	18 U.S.C. § 1082	2E3.1
18 U.S.C. § 1018	2B1.1	18 U.S.C. § 1084	2E3.1
18 U.S.C. § 1019	2B1.1	18 U.S.C. § 1091	2H1.3
18 U.S.C. § 1020	2B1.1	18 U.S.C. § 1111(a)	2A1.1, 2A1.2
18 U.S.C. § 1021	2B1.1	18 U.S.C. § 1112	2A1.3, 2A1.4
18 U.S.C. § 1022	2B1.1	18 U.S.C. § 1113	2A2.1, 2A2.2
		18 U.S.C. § 1114	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1

18 U.S.C. § 1115	2A1.4	18 U.S.C. § 1343	2B1.1, 2C1.7
18 U.S.C. § 1116	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1	18 U.S.C. § 1344	2B1.1
18 U.S.C. § 1117	2A1.5	18 U.S.C. § 1347	2B1.1
18 U.S.C. § 1118	2A1.1, 2A1.2	18 U.S.C. § 1348	2B1.1
18 U.S.C. § 1119	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1	18 U.S.C. § 1349	2X1.1
18 U.S.C. § 1120	2A1.1, 2A1.2, 2A1.3, 2A1.4	18 U.S.C. § 1350	2B1.1
18 U.S.C. § 1121	2A1.1, 2A1.2	18 U.S.C. § 1361	2B1.1, 2B1.5
18 U.S.C. § 1152	2B1.5	18 U.S.C. § 1362	2B1.1, 2K1.4
18 U.S.C. § 1153	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, 2B1.1, 2B1.5, 2B2.1, 2B3.1, 2K1.4	18 U.S.C. § 1363	2B1.1, 2K1.4
18 U.S.C. § 1163	2B1.1, 2B1.5	18 U.S.C. § 1364	2K1.4
18 U.S.C. § 1167	2B1.1	18 U.S.C. § 1365(a)	2N1.1
18 U.S.C. § 1168	2B1.1	18 U.S.C. § 1365(b)	2N1.3
18 U.S.C. § 1170	2B1.5	18 U.S.C. § 1365(c)	2N1.2
18 U.S.C. § 1201(a)	2A4.1	18 U.S.C. § 1365(d)	2N1.2
18 U.S.C. § 1201(c),(d)	2X1.1	18 U.S.C. § 1365(e)	2N1.1
18 U.S.C. § 1202	2A4.2	18 U.S.C. § 1366	2B1.1
18 U.S.C. § 1203	2A4.1, 2X1.1	18 U.S.C. § 1422	2B1.1, 2C1.2
18 U.S.C. § 1204	2J1.2	18 U.S.C. § 1423	2L2.2
18 U.S.C. § 1301	2E3.1	18 U.S.C. § 1424	2L2.2
18 U.S.C. § 1302	2E3.1	18 U.S.C. § 1425	2L2.1, 2L2.2
18 U.S.C. § 1303	2E3.1	18 U.S.C. § 1426	2L2.1, 2L2.2
18 U.S.C. § 1304	2E3.1	18 U.S.C. § 1427	2L2.1
18 U.S.C. § 1306	2E3.1	18 U.S.C. § 1428	2L2.5
18 U.S.C. § 1341	2B1.1, 2C1.7	18 U.S.C. § 1429	2J1.1
18 U.S.C. § 1342	2B1.1, 2C1.7	18 U.S.C. § 1460	2G3.1
		18 U.S.C. § 1461	2G3.1
		18 U.S.C. § 1462	2G3.1
		18 U.S.C. § 1463	2G3.1
		18 U.S.C. § 1464	2G3.2

18 U.S.C. § 1465	2G3.1	18 U.S.C. § 1546	2L2.1, 2L2.2
18 U.S.C. § 1466	2G3.1	18 U.S.C. § 1581	2H4.1
18 U.S.C. § 1468	2G3.2	18 U.S.C. § 1582	2H4.1
18 U.S.C. § 1470	2G3.1	18 U.S.C. § 1583	2H4.1
18 U.S.C. § 1501	2A2.2, 2A2.4	18 U.S.C. § 1584	2H4.1
18 U.S.C. § 1502	2A2.4	18 U.S.C. § 1585	2H4.1
18 U.S.C. § 1503	2J1.2	18 U.S.C. § 1586	2H4.1
18 U.S.C. § 1505	2J1.2	18 U.S.C. § 1587	2H4.1
18 U.S.C. § 1506	2J1.2	18 U.S.C. § 1588	2H4.1
18 U.S.C. § 1507	2J1.2	18 U.S.C. § 1589	2H4.1
18 U.S.C. § 1508	2J1.2	18 U.S.C. § 1590	2H4.1
18 U.S.C. § 1509	2J1.2	18 U.S.C. § 1591	2G1.1, 2G2.1
18 U.S.C. § 1510	2J1.2	18 U.S.C. § 1592	2H4.1
18 U.S.C. § 1511	2E3.1, 2J1.2	18 U.S.C. § 1621	2J1.3
18 U.S.C. § 1512(a)	2A1.1, 2A1.2, 2A1.3, 2A2.1	18 U.S.C. § 1622	2J1.3
18 U.S.C. § 1512(b)	2A1.2, 2A2.2, 2J1.2	18 U.S.C. § 1623	2J1.3
18 U.S.C. § 1512(c)	2J1.2	18 U.S.C. § 1700	2H3.3
18 U.S.C. § 1512(d)	2J1.2	18 U.S.C. § 1702	2B1.1, 2H3.3
18 U.S.C. § 1513	2J1.2	18 U.S.C. § 1703	2B1.1, 2H3.3
18 U.S.C. § 1516	2J1.2	18 U.S.C. § 1704	2B1.1
18 U.S.C. § 1517	2J1.2	18 U.S.C. § 1705	2B1.1
18 U.S.C. § 1518	2J1.2	18 U.S.C. § 1706	2B1.1
18 U.S.C. § 1519	2J1.2	18 U.S.C. § 1707	2B1.1
18 U.S.C. § 1520	2E5.3	18 U.S.C. § 1708	2B1.1
18 U.S.C. § 1541	2L2.1	18 U.S.C. § 1709	2B1.1
18 U.S.C. § 1542	2L2.1, 2L2.2	18 U.S.C. § 1710	2B1.1
18 U.S.C. § 1543	2L2.1, 2L2.2	18 U.S.C. § 1711	2B1.1
18 U.S.C. § 1544	2L2.1, 2L2.2	18 U.S.C. § 1712	2B1.1
		18 U.S.C. § 1716 (felony provisions only)	2K1.3, 2K3.2

18 U.S.C. § 1716C	2B1.1	18 U.S.C. § 1905	2H3.1
18 U.S.C. § 1716D	2Q2.1	18 U.S.C. § 1909	2C1.3, 2C1.4
18 U.S.C. § 1720	2B1.1	18 U.S.C. § 1915	2T3.1
18 U.S.C. § 1721	2B1.1	18 U.S.C. § 1919	2B1.1
18 U.S.C. § 1728	2B1.1	18 U.S.C. § 1920	2B1.1
18 U.S.C. § 1735	2G3.1	18 U.S.C. § 1923	2B1.1
18 U.S.C. § 1737	2G3.1	18 U.S.C. § 1951	2B3.1, 2B3.2, 2B3.3, 2C1.1
18 U.S.C. § 1751(a)	2A1.1, 2A1.2, 2A1.3, 2A1.4	18 U.S.C. § 1952	2E1.2
18 U.S.C. § 1751(b)	2A4.1	18 U.S.C. § 1952A	2E1.4
18 U.S.C. § 1751(c)	2A2.1, 2A4.1, 2X1.1	18 U.S.C. § 1952B	2E1.3
18 U.S.C. § 1751(d)	2A1.5, 2A4.1, 2X1.1	18 U.S.C. § 1953	2E3.1
18 U.S.C. § 1751(e)	2A2.2, 2A2.3	18 U.S.C. § 1954	2E5.1
18 U.S.C. § 1791	2P1.2	18 U.S.C. § 1955	2E3.1
18 U.S.C. § 1792	2P1.3	18 U.S.C. § 1956	2S1.1
18 U.S.C. § 1831	2B1.1	18 U.S.C. § 1957	2S1.1
18 U.S.C. § 1832	2B1.1	18 U.S.C. § 1958	2E1.4
18 U.S.C. § 1851	2B1.1	18 U.S.C. § 1959	2E1.3
18 U.S.C. § 1852	2B1.1	18 U.S.C. § 1960	2S1.3
18 U.S.C. § 1853	2B1.1	18 U.S.C. § 1962	2E1.1
18 U.S.C. § 1854	2B1.1	18 U.S.C. § 1963	2E1.1
18 U.S.C. § 1855	2K1.4	18 U.S.C. § 1991	2A2.1, 2X1.1
18 U.S.C. § 1857	2B1.1, 2B2.3	18 U.S.C. § 1992	2A1.1, 2B1.1, 2K1.4, 2X1.1
18 U.S.C. § 1860	2R1.1		
18 U.S.C. § 1861	2B1.1	18 U.S.C. § 1993(a)(1)	2B1.1, 2K1.4
18 U.S.C. § 1864	2Q1.6	18 U.S.C. § 1993(a)(2)	2K1.4, 2M6.1
18 U.S.C. § 1901	2C1.3	18 U.S.C. § 1993(a)(3)	2K1.4, 2M6.1
18 U.S.C. § 1902	2B1.4	18 U.S.C. § 1993(a)(4)	2A5.2, 2B1.1
18 U.S.C. § 1903	2C1.3	18 U.S.C. § 1993(a)(5)	2A5.2
		18 U.S.C. § 1993(a)(6)	2A2.1, 2A2.2, 2A5.2



18 U.S.C. § 1993(a)(7)	2A6.1	18 U.S.C. § 2197	2B1.1
18 U.S.C. § 1993(a)(8)	2A6.1	18 U.S.C. § 2199	2B1.1, 2B2.3
18 U.S.C. § 1993(b)	2A5.2, 2K1.4, 2M6.1	18 U.S.C. § 2231	2A2.2, 2A2.3
18 U.S.C. § 2071	2B1.1	18 U.S.C. § 2232	2B1.5, 2J1.2
18 U.S.C. § 2072	2B1.1	18 U.S.C. § 2233	2B1.1, 2B3.1
18 U.S.C. § 2073	2B1.1	18 U.S.C. § 2241	2A3.1
18 U.S.C. § 2111	2B3.1	18 U.S.C. § 2242	2A3.1
18 U.S.C. § 2112	2B3.1	18 U.S.C. § 2243(a)	2A3.2
18 U.S.C. § 2113(a)	2B1.1, 2B2.1, 2B3.1, 2B3.2	18 U.S.C. § 2243(b)	2A3.3
18 U.S.C. § 2113(b)	2B1.1	18 U.S.C. § 2244	2A3.4
18 U.S.C. § 2113(c)	2B1.1	18 U.S.C. § 2245	2A1.1
18 U.S.C. § 2113(d)	2B3.1	18 U.S.C. § 2251(a),(b)	2G2.1
18 U.S.C. § 2113(e)	2A1.1, 2B3.1	18 U.S.C. § 2251(c)(1)(A)	2G2.2
18 U.S.C. § 2114(a)	2B3.1	18 U.S.C. § 2251(c)(1)(B)	2G2.1
18 U.S.C. § 2114(b)	2B1.1	18 U.S.C. § 2251A	2G2.3
18 U.S.C. § 2115	2B2.1	18 U.S.C. § 2252	2G2.2, 2G2.4
18 U.S.C. § 2116	2A2.2, 2A2.3, 2B2.1, 2B3.1	18 U.S.C. § 2252A	2G2.2, 2G2.4
18 U.S.C. § 2117	2B2.1	18 U.S.C. § 2257	2G2.5
18 U.S.C. § 2118(a)	2B3.1	18 U.S.C. § 2260	2G2.1, 2G2.2
18 U.S.C. § 2118(b)	2B2.1	18 U.S.C. § 2261	2A6.2
18 U.S.C. § 2118(c)(1)	2A2.1, 2A2.2, 2B3.1	18 U.S.C. § 2261A	2A6.2
18 U.S.C. § 2118(c)(2)	2A1.1	18 U.S.C. § 2262	2A6.2
18 U.S.C. § 2118(d)	2X1.1	18 U.S.C. § 2271	2X1.1
18 U.S.C. § 2119	2B3.1	18 U.S.C. § 2272	2B1.1
18 U.S.C. § 2153	2M2.1	18 U.S.C. § 2275	2B1.1, 2K1.4
18 U.S.C. § 2154	2M2.1	18 U.S.C. § 2276	2B1.1, 2B2.1
18 U.S.C. § 2155	2M2.3	18 U.S.C. § 2280	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.1, 2B3.1, 2B3.2, 2K1.4,
18 U.S.C. § 2156	2M2.3	18 U.S.C. § 2281	<del>2X1.1</del> 2A1.1, 2A1.2, 2A1.3,

	2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1	18 U.S.C. § 2340A	2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A4.1
		18 U.S.C. § 2342(a)	2E4.1
18 U.S.C. § 2312	2B1.1	18 U.S.C. § 2344(a)	2E4.1
18 U.S.C. § 2313	2B1.1	18 U.S.C. § 2381	2M1.1
18 U.S.C. § 2314	2B1.1, 2B1.5	18 U.S.C. § 2421	2G1.1
18 U.S.C. § 2315	2B1.1, 2B1.5	18 U.S.C. § 2422	2G1.1
18 U.S.C. § 2316	2B1.1	18 U.S.C. § 2423(a)	2G1.1
18 U.S.C. § 2317	2B1.1	18 U.S.C. § 2423(b)	2A3.1, 2A3.2, 2A3.3
18 U.S.C. § 2318	2B5.3	18 U.S.C. § 2425	2G1.1
18 U.S.C. § 2319	2B5.3	18 U.S.C. § 2511	2B5.3, 2H3.1
18 U.S.C. § 2319A	2B5.3	18 U.S.C. § 2512	2H3.2
18 U.S.C. § 2320	2B5.3	18 U.S.C. § 3056(d)	2A2.4
18 U.S.C. § 2321	2B6.1	18 U.S.C. § 3146(b)(1)(A)	2J1.6
18 U.S.C. § 2322	2B6.1	18 U.S.C. § 3146(b)(1)(B)	2J1.5
18 U.S.C. § 2332(a)	2A1.1, 2A1.2, 2A1.3, 2A1.4	18 U.S.C. § 3147	2J1.7
		19 U.S.C. § 283	2T3.1
18 U.S.C. § 2332(b)(1)	2A2.1	19 U.S.C. § 1304	2T3.1
18 U.S.C. § 2332(b)(2)	2A1.5	19 U.S.C. § 1433	2T3.1
18 U.S.C. § 2332(c)	2A2.2	19 U.S.C. § 1434	2B1.1, 2T3.1
18 U.S.C. § 2332a	2K1.4, 2M6.1	19 U.S.C. § 1435	2B1.1, 2T3.1
18 U.S.C. § 2332b(a)(1)	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A4.1, 2B1.1	19 U.S.C. § 1436	2B1.1, 2T3.1
		19 U.S.C. § 1464	2T3.1
18 U.S.C. § 2332b(a)(2)	2A6.1	19 U.S.C. § 1465	2T3.1
18 U.S.C. § 2332d	2M5.1	19 U.S.C. § 1586(e)	2T3.1
18 U.S.C. § 2339	2X2.1, 2X3.1	19 U.S.C. § 1707	2T3.1
18 U.S.C. § 2339A	2X2.1, 2X3.1	19 U.S.C. § 1708(b)	2T3.1
18 U.S.C. § 2339B	2M5.3	19 U.S.C. § 1919	2B1.1
		19 U.S.C. § 2316	2B1.1

20 U.S.C. § 1097(a)	2B1.1	21 U.S.C. § 158	2N2.1
20 U.S.C. § 1097(b)	2B1.1	21 U.S.C. § 331	2N2.1
20 U.S.C. § 1097(c)	2B4.1	21 U.S.C. § 333(a)(1)	2N2.1
20 U.S.C. § 1097(d)	2B1.1	21 U.S.C. § 333(a)(2)	2B1.1, 2N2.1
21 U.S.C. § 101	2N2.1	21 U.S.C. § 333(b)	2N2.1
21 U.S.C. § 102	2N2.1	21 U.S.C. § 458	2N2.1
21 U.S.C. § 103	2N2.1	21 U.S.C. § 459	2N2.1
21 U.S.C. § 104	2N2.1	21 U.S.C. § 460	2N2.1
21 U.S.C. § 105	2N2.1	21 U.S.C. § 461	2N2.1
21 U.S.C. § 111	2N2.1	21 U.S.C. § 463	2N2.1
21 U.S.C. § 115	2N2.1	21 U.S.C. § 466	2N2.1
21 U.S.C. § 117	2N2.1	21 U.S.C. § 610	2N2.1
21 U.S.C. § 120	2N2.1	21 U.S.C. § 611	2N2.1
21 U.S.C. § 121	2N2.1	21 U.S.C. § 614	2N2.1
21 U.S.C. § 122	2N2.1	21 U.S.C. § 617	2N2.1
21 U.S.C. § 124	2N2.1	21 U.S.C. § 619	2N2.1
21 U.S.C. § 126	2N2.1	21 U.S.C. § 620	2N2.1
21 U.S.C. § 134a-e	2N2.1	21 U.S.C. § 622	2C1.1
21 U.S.C. § 135a	2N2.1	21 U.S.C. § 642	2N2.1
21 U.S.C. § 141	2N2.1	21 U.S.C. § 643	2N2.1
21 U.S.C. § 143	2N2.1	21 U.S.C. § 644	2N2.1
21 U.S.C. § 144	2N2.1	21 U.S.C. § 675	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3
21 U.S.C. § 145	2N2.1		
21 U.S.C. § 151	2N2.1	21 U.S.C. § 676	2N2.1
21 U.S.C. § 152	2N2.1	21 U.S.C. § 841(a)	2D1.1
21 U.S.C. § 153	2N2.1	21 U.S.C. § 841(b)(1)-(3)	2D1.1
21 U.S.C. § 154	2N2.1	21 U.S.C. § 841(b)(4)	2D2.1
21 U.S.C. § 155	2N2.1	21 U.S.C. § 841(b)(7)	2D1.1
21 U.S.C. § 156	2N2.1	21 U.S.C. § 841(c)(1),(2)	2D1.11
21 U.S.C. § 157	2N2.1	21 U.S.C. § 841(c)(3)	2D1.13

21 U.S.C. § 841(d)	2D1.9	21 U.S.C. § 858	2D1.10
21 U.S.C. § 841(f)(1)	2D1.11, 2D1.13	21 U.S.C. § 859	2D1.2
21 U.S.C. § 842(a)(1)	2D3.1	21 U.S.C. § 860	2D1.2
21 U.S.C. § 842(a)(2),(9), (10)	2D3.2	21 U.S.C. § 861	2D1.2
21 U.S.C. § 842(b)	2D3.2	21 U.S.C. § 863	2D1.7
21 U.S.C. § 843(a)(1),(2)	2D3.1	21 U.S.C. § 864	2D1.12
21 U.S.C. § 843(a)(3)	2D2.2	21 U.S.C. § 952	2D1.1
21 U.S.C. § 843(a)(4)(A)	2D1.13	21 U.S.C. § 953	2D1.1
21 U.S.C. § 843(a)(4)(B)	2D1.13	21 U.S.C. § 954	2D3.2
21 U.S.C. § 843(a)(6),(7)	2D1.12	21 U.S.C. § 955	2D1.1
21 U.S.C. § 843(a)(8)	2D1.13	21 U.S.C. § 955a(a)-(d)	2D1.1
21 U.S.C. § 843(a)(9)	2D3.1	21 U.S.C. § 957	2D1.1
21 U.S.C. § 843(b)	2D1.6	21 U.S.C. § 959	2D1.1, 2D1.11
21 U.S.C. § 843(c)	2D3.1	21 U.S.C. § 960(a),(b)	2D1.1
21 U.S.C. § 844(a)	2D2.1	21 U.S.C. § 960(d)(1),(2)	2D1.11
21 U.S.C. § 845	2D1.2	21 U.S.C. § 960(d)(3),(4)	2D1.11
21 U.S.C. § 845a	2D1.2	21 U.S.C. § 960(d)(5)	2D1.13
21 U.S.C. § 845b	2D1.2	21 U.S.C. § 960(d)(6)	2D3.1
21 U.S.C. § 846	2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2	21 U.S.C. § 960(d)(7)	2D1.11
21 U.S.C. § 848(a)	2D1.5	21 U.S.C. § 961	2D3.2
21 U.S.C. § 848(b)	2D1.5	21 U.S.C. § 963	2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2
21 U.S.C. § 848(e)	2A1.1	22 U.S.C. § 1980(g)	2B1.1
21 U.S.C. § 849	2D1.2	22 U.S.C. § 2197(n)	2B1.1
21 U.S.C. § 854	2S1.1	22 U.S.C. § 2778	2M5.2
21 U.S.C. § 856	2D1.8	22 U.S.C. § 2780	2M5.2
21 U.S.C. § 857	2D1.7	22 U.S.C. § 4217	2B1.1
		22 U.S.C. § 4221	2B1.1

25 U.S.C. § 450d	2B1.1	26 U.S.C. § 7205	2T1.8
26 U.S.C. § 5148(1)	2T2.1	26 U.S.C. § 7206(1),(3), (4),(5)	2S1.3, 2T1.1
26 U.S.C. § 5214(a)(1)	2T2.1	26 U.S.C. § 7206(2)	2S1.3, 2T1.4
26 U.S.C. § 5273(b)(2)	2T2.1	26 U.S.C. § 7207	2T1.1
26 U.S.C. § 5273(c)	2T2.1	26 U.S.C. § 7208	2B1.1
26 U.S.C. § 5291(a)	2T2.1, 2T2.2	26 U.S.C. § 7210	2J1.1
26 U.S.C. § 5601(a)	2T2.1, 2T2.2	26 U.S.C. § 7211	2T1.1
26 U.S.C. § 5602	2T2.1	26 U.S.C. § 7212(a)	2A2.4
26 U.S.C. § 5603	2T2.1, 2T2.2	26 U.S.C. § 7212(a) (omnibus clause)	2J1.2, 2T1.1
26 U.S.C. § 5604(a)	2T2.1, 2T2.2	26 U.S.C. § 7212(b)	2B1.1, 2B2.1, 2B3.1
26 U.S.C. § 5605	2T2.1, 2T2.2	26 U.S.C. § 7213(a)(1)	2H3.1
26 U.S.C. § 5607	2T2.1	26 U.S.C. § 7213(a)(2)	2H3.1
26 U.S.C. § 5608	2T2.1	26 U.S.C. § 7213(a)(3)	2H3.1
26 U.S.C. § 5661	2T2.1, 2T2.2	26 U.S.C. § 7213(a)(5)	2H3.1
26 U.S.C. § 5662	2T2.2	26 U.S.C. § 7213(d)	2H3.1
26 U.S.C. § 5671	2T2.1, 2T2.2	26 U.S.C. § 7213A	2H3.1
26 U.S.C. § 5684	2T2.1	26 U.S.C. § 7214	2B1.1, 2C1.1, 2C1.2
26 U.S.C. § 5685	2K1.3, 2K2.1	26 U.S.C. § 7215	2T1.7
26 U.S.C. § 5691(a)	2T2.1	26 U.S.C. § 7216	2H3.1
26 U.S.C. § 5751(a)(1),(2)	2T2.1	26 U.S.C. § 7232	2B1.1
26 U.S.C. § 5752	2T2.2	26 U.S.C. § 7512(b)	2T1.7
26 U.S.C. § 5762(a)(1), (2),(4),(5),(6)	2T2.2	26 U.S.C. § 9012(e)	2B4.1
26 U.S.C. § 5762(a)(3)	2T2.1	26 U.S.C. § 9042(d)	2B4.1
26 U.S.C. § 5861(a)-(l)	2K2.1	28 U.S.C. § 1826(c)	2P1.1
26 U.S.C. § 5871	2K2.1	28 U.S.C. § 2902(e)	2P1.1
26 U.S.C. § 7201	2T1.1	29 U.S.C. § 186	2E5.1
26 U.S.C. § 7202	2T1.6	29 U.S.C. § 431	2E5.3
26 U.S.C. § 7203	2S1.3, 2T1.1	29 U.S.C. § 432	2E5.3
26 U.S.C. § 7204	2T1.8		

29 U.S.C. § 433	2E5.3	33 U.S.C. § 1319(c)(1), (2),(4)	2Q1.2, 2Q1.3
29 U.S.C. § 439	2E5.3		
29 U.S.C. § 461	2E5.3	33 U.S.C. § 1319(c)(3)	2Q1.1
29 U.S.C. § 501(c)	2B1.1	33 U.S.C. § 1321	2Q1.2, 2Q1.3
29 U.S.C. § 530	2B3.2	33 U.S.C. § 1342	2Q1.2, 2Q1.3
29 U.S.C. § 1131	2E5.3	33 U.S.C. § 1415(b)	2Q1.2, 2Q1.3
29 U.S.C. § 1141	2B1.1, 2B3.2	33 U.S.C. § 1517	2Q1.2, 2Q1.3
29 U.S.C. § 1851	2H4.2	33 U.S.C. § 1907	2Q1.3
30 U.S.C. § 1461(a)(3), (4),(5),(7)	2A2.4	33 U.S.C. § 1908	2Q1.3
30 U.S.C. § 1463	2A2.4	38 U.S.C. § 787	2B1.1
31 U.S.C. § 5311 note (section 329 of the USA PATRIOT Act of 2001)	2C1.1	38 U.S.C. § 3501(a)	2B1.1
31 U.S.C. § 5313	2S1.3	38 U.S.C. § 3502	2B1.1
31 U.S.C. § 5314	2S1.3	41 U.S.C. § 53	2B4.1
31 U.S.C. § 5316	2S1.3	41 U.S.C. § 54	2B4.1
31 U.S.C. § 5318	2S1.3	41 U.S.C. § 423(e)	2B1.1, 2C1.1, 2C1.7
31 U.S.C. § 5318A(b)	2S1.3	42 U.S.C. § 261(a)	2D1.1
31 U.S.C. § 5322	2S1.3	42 U.S.C. § 262	2N2.1
31 U.S.C. § 5324	2S1.3	42 U.S.C. § 300h-2	2Q1.2
31 U.S.C. § 5326	2S1.3, 2T2.2	42 U.S.C. § 300i-1	2Q1.4, 2Q1.5
31 U.S.C. § 5331	2S1.3	42 U.S.C. § 408	2B1.1
31 U.S.C. § 5332	2S1.3	42 U.S.C. § 1011	2B1.1
33 U.S.C. § 403	2Q1.3	42 U.S.C. § 1307(a)	2B1.1
33 U.S.C. § 406	2Q1.3	42 U.S.C. § 1307(b)	2B1.1
33 U.S.C. § 407	2Q1.3	42 U.S.C. § 1320a-7b	2B1.1, 2B4.1
33 U.S.C. § 411	2Q1.3	42 U.S.C. § 1383(d)(2)	2B1.1
33 U.S.C. § 506	2J1.1	42 U.S.C. § 1383a(a)	2B1.1
33 U.S.C. § 1227(b)	2J1.1	42 U.S.C. § 1383a(b)	2B1.1
33 U.S.C. § 1232(b)(2)	2A2.4	42 U.S.C. § 1395nn(a)	2B1.1
		42 U.S.C. § 1395nn(b)(1)	2B4.1
		42 U.S.C. § 1395nn(b)(2)	2B4.1

42 U.S.C. § 1395nn(c)	2B1.1	42 U.S.C. § 2276	2M3.5
42 U.S.C. § 1396h(a)	2B1.1	42 U.S.C. § 2278a(c)	2B2.3
42 U.S.C. § 1396h(b)(1)	2B4.1	42 U.S.C. § 2283(a)	2A1.1, 2A1.2, 2A1.3, 2A1.4
42 U.S.C. § 1396h(b)(2)	2B4.1	42 U.S.C. § 2283(b)	2A2.2, 2A2.3
42 U.S.C. § 1713	2B1.1	42 U.S.C. § 2284(a)	2M2.1, 2M2.3
42 U.S.C. § 1760(g)	2B1.1	42 U.S.C. § 3220(a)	2B1.1
42 U.S.C. § 1761(o)(1)	2B1.1	42 U.S.C. § 3220(b)	2B1.1
42 U.S.C. § 1761(o)(2)	2B1.1	42 U.S.C. § 3426	2B1.1
42 U.S.C. § 1973i(c)	2H2.1	42 U.S.C. § 3611(f)	2J1.1
42 U.S.C. § 1973i(d)	2H2.1	42 U.S.C. § 3631	2H1.1
42 U.S.C. § 1973i(e)	2H2.1	42 U.S.C. § 3791	2B1.1
42 U.S.C. § 1973j(a)	2H2.1	42 U.S.C. § 3792	2B1.1
42 U.S.C. § 1973j(b)	2H2.1	42 U.S.C. § 3795	2B1.1
42 U.S.C. § 1973j(c)	2X1.1	42 U.S.C. § 5157(a)	2B1.1
42 U.S.C. § 1973aa	2H2.1	42 U.S.C. § 5409	2N2.1
42 U.S.C. § 1973aa-1	2H2.1	42 U.S.C. § 6928(d)	2Q1.2
42 U.S.C. § 1973aa-1a	2H2.1	42 U.S.C. § 6928(e)	2Q1.1
42 U.S.C. § 1973aa-3	2H2.1	42 U.S.C. § 7270b	2B2.3
42 U.S.C. § 1973bb	2H2.1	42 U.S.C. § 7413(c)(1)-(4)	2Q1.2, 2Q1.3
42 U.S.C. § 1973gg-10	2H2.1	42 U.S.C. § 7413(c)(5)	2Q1.1
42 U.S.C. § 2000e-13	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3	42 U.S.C. § 9151(2),(3), (4),(5)	2A2.4
42 U.S.C. § 2077	2M6.1	42 U.S.C. § 9152(d)	2A2.4
42 U.S.C. § 2122	2M6.1	42 U.S.C. § 9603(b)	2Q1.2
42 U.S.C. § 2131	2M6.1	42 U.S.C. § 9603(c)	2Q1.2
42 U.S.C. § 2272	2M6.1	42 U.S.C. § 9603(d)	2Q1.2
42 U.S.C. § 2273	2M6.2	42 U.S.C. § 14905	2B1.1
42 U.S.C. § 2274(a),(b)	2M3.1	43 U.S.C. § 1350	2Q1.2
42 U.S.C. § 2275	2M3.1		

43 U.S.C. § 1733(a) (43 C.F.R. 4140.1 (b)(1)(i))	2B2.3	49 U.S.C. § 11907(a)	2B4.1(for offenses committed prior to January 1, 1996)
43 U.S.C. § 1816(a)	2Q1.2	49 U.S.C. § 11907(b)	2B4.1(for offenses committed prior to January 1, 1996)
43 U.S.C. § 1822(b)	2Q1.2		
45 U.S.C. § 359(a)	2B1.1	49 U.S.C. § 14103(b)	2B1.1
46 U.S.C. § 1276	2B1.1	49 U.S.C. § 14905(b)	2B1.1
46 U.S.C. § 3718(b)	2Q1.2	49 U.S.C. § 14909	2J1.1
46 U.S.C. App. § 1707a (f)(2)	2B1.1	49 U.S.C. § 14912	2B1.1
46 U.S.C. App. § 1903(a)	2D1.1	49 U.S.C. § 16102	2B1.1
46 U.S.C. App. § 1903(g)	2D1.1	49 U.S.C. § 16104	2J1.1
46 U.S.C. App. § 1903(j)	2D1.1	49 U.S.C. § 30170	2B1.1
47 U.S.C. § 223(a)(1)(C)	2A6.1	49 U.S.C. § 32703	2N3.1
47 U.S.C. § 223(a)(1)(D)	2A6.1	49 U.S.C. § 32704	2N3.1
47 U.S.C. § 223(a)(1)(E)	2A6.1	49 U.S.C. § 32705	2N3.1
47 U.S.C. § 223(b)(1)(A)	2G3.2	49 U.S.C. § 32709(b)	2N3.1
47 U.S.C. § 553(b)(2)	2B5.3	49 U.S.C. § 46308	2A5.2
47 U.S.C. § 605	2B5.3, 2H3.1	49 U.S.C. § 46312	2Q1.2
49 U.S.C. § 121	2B1.1(for offenses committed prior to July 5, 1994)	49 U.S.C. § 46317(a)	2B1.1
49 U.S.C. § 1809(b)	2Q1.2(for offenses committed prior to July 5, 1994)	49 U.S.C. § 46317(b)	2D1.1
49 U.S.C. § 5124	2Q1.2	49 U.S.C. § 46502(a),(b)	2A5.1, 2X1.1
49 U.S.C. § 11902	2B4.1	49 U.S.C. § 46503	2A5.2
49 U.S.C. § 11903	2B1.1	49 U.S.C. § 46504	2A5.2
49 U.S.C. § 11904	2B1.1 (2B4.1 for offenses committed prior to January 1, 1996)	49 U.S.C. § 46505	2K1.5
		49 U.S.C. § 46506	2A5.3
		49 U.S.C. § 46507	2A6.1
		49 U.S.C. § 60123(b)	2B1.1, 2K1.4, 2M2.1, 2M2.3
		49 U.S.C. § 60123(d)	2B1.1
		49 U.S.C. § 80116	2B1.1



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49 U.S.C. § 80501	2B1.1	50 U.S.C. § 783(c)	2M3.3
49 U.S.C. App. § 1687(g)	2B1.1(for offenses committed prior to July 5, 1994)	50 U.S.C. App. § 462	2M4.1
		50 U.S.C. App. § 1701	2M5.1, 2M5.2
50 U.S.C. § 421	2M3.9	50 U.S.C. App. § 2410	2M5.1
50 U.S.C. § 783(b)	2M3.3		

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendments 60 and 61); June 15, 1988 (see Appendix C, amendments 62 and 63); October 15, 1988 (see Appendix C, amendments 64 and 65); November 1, 1989 (see Appendix C, amendments 297-301); November 1, 1990 (see Appendix C, amendment 359); November 1, 1991 (see Appendix C, amendment 421); November 1, 1992 (see Appendix C, amendment 468); November 1, 1993 (see Appendix C, amendment 496); November 1, 1995 (see Appendix C, amendment 534); November 1, 1996 (see Appendix C, amendment 540); November 1, 1997 (see Appendix C, amendment 575); November 1, 1998 (see Appendix C, amendment 589); November 1, 2000 (see Appendix C, amendment 592); May 1, 2001 (see Appendix C, amendment 612); November 1, 2001 (see Appendix C, amendments 617, 622, 626, 627, 628, 633, and 634); November 1, 2002 (see Appendix C, amendments 637, 638, 639, and 646); January 25, 2003 (see Appendix C, amendments 647 and 648).

**SUPPLEMENT TO THE 2002 SUPPLEMENT TO APPENDIX C**

This supplement to the 2002 supplement to Appendix C presents (1) the emergency amendments to §§2B1.1 (Theft, Property Destruction, and Fraud), 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), 2J1.2 (Obstruction of Justice), 2T4.1 (Tax Table), 3D1.2 (Groups of Closely Related Counts), and 5E1.2 (Fines for Individual Defendants), and Appendix A (Statutory Index), effective January 25, 2003; and (2) the emergency promulgation of a new guideline, §2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property), effective January 25, 2003.

This supplement also presents (1) the amendments to §§2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic), 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), 3E1.1 (Acceptance of Responsibility), 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), 5H1.6 (Family Ties and Responsibilities, and Community Ties), 5K2.0 (Grounds for Departure), 5K2.13 (Diminished Capacity), and 5K2.20 (Aberrant Behavior) made by the PROTECT Act, Pub. L. 108–21, effective April 30, 2003; (2) the promulgation of a new policy statement, §5K2.22 (Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses) made by the PROTECT Act, Pub. L. 108–21, effective April 30, 2003; and (3) the amendments to §2A4.1 (Kidnapping, Abduction, Unlawful Restraint) made pursuant to the PROTECT Act, Pub. L. 108–21, effective May 30, 2003.

The format under which the amendments are presented in Appendix C, including this supplement and the 2002 supplement to Appendix C, is designed to facilitate a comparison between previously existing and amended provisions, in the event it becomes necessary to reference the former guideline, policy statement, or commentary language. For amendments to the guidelines, policy statements, and official commentary effective November 1, 1997, and earlier, see the main volume of Appendix C. For amendments to the guidelines, policy statements, and official commentary effective after November 1, 1997, but before January 25, 2003, see the 2002 supplement to Appendix C.

**AMENDMENTS**

**647. Amendment:** Section 2B1.1(b)(1) is amended by striking the period; and by adding at the end the following:

"(O)	More than \$200,000,000	add 28
"(P)	More than \$400,000,000	add 30."

Section 2B1.1 is amended by striking subsection (b)(2) as follows:

"(2)	(Apply the greater) If the offense—
(A)	(i) involved more than 10, but less than 50, victims; or (ii) was committed through mass-marketing, increase by 2 levels; or

(B) involved 50 or more victims, increase by 4 levels.",

and inserting the following:

"(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.".

Section 2B1.1 is amended by striking subsection (b)(12)(B) as follows:

"(B) the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels.",

and inserting the following:

"(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.".

Section 2B1.1(b) is amended by adding at the end the following:

"(13) If the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or a director of a publicly traded company, increase by 4 levels.".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "1348, 1350," after "1341-1344,".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by adding after "Resources)." the following new paragraph:

"'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)).";

by inserting after "Secretary of the Interior." the following new paragraph:

"'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. § 781); 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).";

and by adding at the end the following:

"'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."

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 2(C) by redesignating subdivision (iv) as (v); and by adding after subdivision (iii) the following new subdivision:

"(iv) The reduction that resulted from the offense in the value of equity securities or other corporate assets."

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3 by striking "Victim and Mass-Marketing Enhancement under" in the heading and inserting "Application of"; by striking subdivision (A) as follows:

"(A) Definitions.— For purposes of subsection (b)(2):

- (i) 'Mass-marketing' means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (I) purchase goods or services; (II) participate in a contest or sweepstakes; or (III) invest for financial profit. 'Mass-marketing' includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.
- (ii) 'Victim' means (I) any person who sustained any part of the actual loss determined under subsection (b)(1); or (II) 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.",

and inserting the following:

"(A) Definition.— For purposes of subsection (b)(2), 'mass-marketing' means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. 'Mass-marketing' includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.";

in subdivision (B)(i)(I) by striking "described in subdivision (A)(ii) of this note;" and inserting "any victim as defined in Application Note 1;"

in subdivision (B)(ii)(IV) by inserting "at least" after "to have involved"; and in subdivision (C) by inserting "or (C)" after "(B)".

The Commentary to §2B1.1 captioned "Application Notes" is amended by redesignating Notes 11

through 15 as Notes 12 through 16, respectively.

The Commentary to §2B1.1 captioned "Application Notes" is amended by striking Note 10 as follows:

- "10. Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(12)(B).—For purposes of subsection (b)(12)(B), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of any of subdivisions (A) through (D) of this note.",

and inserting the following:

- "10. Application of Subsection (b)(12)(B).—
- (A) Application of Subsection (b)(12)(B)(i).—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:
- (i) The financial institution became insolvent.
  - (ii) The financial institution substantially reduced benefits to pensioners or insureds.
  - (iii) The financial institution was unable on demand to refund fully any deposit, payment, or investment.
  - (iv) The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.
- (B) Application of Subsection (b)(12)(B)(ii).—
- (i) Definition.—For purposes of this subsection, ‘organization’ has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).
  - (ii) In General.—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1000 employees was substantially endangered:
    - (I) The organization became insolvent or suffered a substantial reduction in the value of its assets.

- (II) The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).
- (III) The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.
- (IV) The organization substantially reduced its workforce.
- (V) The organization substantially reduced its employee pension benefits.
- (VI) The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.

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

- (A) Definition.—For purposes of this subsection, ‘securities law’ (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.
- (B) In General.—A conviction under a securities law is not required in order for subsection (b)(13) 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. 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)(13) applies, do not apply §3B1.3."

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 16, as redesignated by this amendment, by striking subdivision (v) as follows:

"(v) The offense endangered the solvency or financial security of one or more victims.";

and by redesignating subdivisions (vi) and (vii) as subdivisions (v) and (vi), respectively.

The Commentary to §2B1.1 captioned "Background" is amended in the last paragraph by inserting

"(i)" after "(B)".

Section 2E5.3 is amended in the heading by adding at the end "; Destruction and Failure to Maintain Corporate Audit Records".

Section 2E5.3 is amended by striking subsection (a)(2) as follows:

"(2) If the offense was committed to facilitate or conceal a theft or embezzlement, or an offense involving a bribe or a gratuity, apply §2B1.1 or §2E5.1, as applicable.",

and inserting the following:

"(2) If the offense was committed to facilitate or conceal (A) an offense involving a theft, a fraud, or an embezzlement; (B) an offense involving a bribe or a gratuity; or (C) an obstruction of justice offense, apply §2B1.1 (Theft, Property Destruction, and Fraud), §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations), or §2J1.2 (Obstruction of Justice), as applicable."

The Commentary to §2E5.3 captioned "Statutory Provisions" is amended by inserting "§" before "1027"; and by inserting ", 1520" after "1027".

Section 2J1.2(a) is amended by striking "12" and inserting "14".

Section 2J1.2(b) is amended by adding at the end the following:

"(3) If the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation, increase by 2 levels."

The Commentary to §2J1.2 captioned "Statutory Provisions" is amended by inserting ", 1519" after "1516".

Section 2T4.1 is amended in the table by striking the period and adding at the end the following:

"(O) More than \$200,000,000	34
(P) More than \$400,000,000	36."

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1347 the following new lines:

"18 U.S.C. § 1348	2B1.1
18 U.S.C. § 1349	2X1.1
18 U.S.C. § 1350	2B1.1".

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 1512(c) by striking

"(c)" and inserting "(d)".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1512(b) the following new line:

"18 U.S.C. § 1512(c) 2J1.2".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1518 the following new lines:

"18 U.S.C. § 1519 2J1.2  
18 U.S.C. § 1520 2E5.3".

**Reason for Amendment:** This amendment implements directives to the Commission contained in sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204 (the "Act"), by making several modifications to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) and §2J1.2 (Obstruction of Justice). The directives pertain to serious fraud and related offenses and obstruction of justice offenses. The directives require the Commission under emergency amendment authority to promulgate amendments addressing, among other things, officers and directors of publicly traded companies who commit fraud and related offenses, fraud offenses that endanger the solvency or financial security of a substantial number of victims, fraud offenses that involve significantly greater than 50 victims, and obstruction of justice offenses that involve the destruction of evidence.

First, the amendment addresses the directive contained in section 1104(b)(5) of the Act to "ensure that the guideline offense levels and enhancements under United States Sentencing Guideline §2B1.1 (as in effect on the date of enactment of this Act) are sufficient for a fraud offense when the number of victims adversely involved is significantly greater than 50." The amendment implements this directive by expanding the existing enhancement at §2B1.1(b)(2) based on the number of victims involved in the offense. Prior to the amendment, subsection (b)(2) provided a two level enhancement if the offense involved more than 10, but less than 50, victims (or was committed through mass-marketing), and a four level enhancement if the offense involved 50 or more victims. The amendment provides an additional two level increase, for a total of six levels, if the offense involved 250 or more victims. The Commission determined that an enhancement of this magnitude appropriately responds to the pertinent directive and reflects the extensive nature of, and the large scale victimization caused by, such offenses.

Second, the amendment addresses directives contained in sections 805 and 1104 of the Act pertaining to securities and accounting fraud offenses and fraud offenses that endanger the solvency or financial security of a substantial number of victims. Specifically, section 805(a)(4) directs the Commission to ensure that "a specific offense characteristic enhancing sentencing is provided under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) for a fraud offense that endangers the solvency or financial security of a substantial number of victims." In addition, section 1104(b)(1) directs the Commission to "ensure that the sentencing guidelines and policy statements reflect the serious nature of securities, pension, and accounting fraud and the need for aggressive and appropriate law enforcement action to prevent such offenses." The amendment implements these directives by expanding the scope of the existing enhancement at §2B1.1(b)(12)(B).



Prior to the amendment, §2B1.1(b)(12)(B) provided a four level enhancement and a minimum offense level of 24 if the offense substantially jeopardized the safety and soundness of a financial institution. The amendment expands the scope of this enhancement by providing two additional prongs. The first prong applies to offenses that substantially endanger the solvency or financial security of an organization that, at any time during the offense, was a publicly traded company or had 1,000 or more employees. The addition of this prong reflects the Commission's determination that such an offense undermines the public's confidence in the securities and investment market much in the same manner as an offense that jeopardizes the safety and soundness of a financial institution undermines the public's confidence in the banking system. This prong also reflects the likelihood that an offense that endangers the solvency or financial security of an employer of this size will similarly affect a substantial number of individual victims, without requiring the court to determine whether the solvency or financial security of each individual victim was substantially endangered.

A corresponding application note for §2B1.1(b)(12)(B) sets forth a non-exhaustive list of factors that the court shall consider in determining whether the offense endangered the solvency or financial security of a publicly traded company or an organization with 1,000 or more employees. The list of factors includes references to insolvency, filing for bankruptcy, substantially reducing the value of the company's stock, and substantially reducing the company's workforce among the list of factors that the court shall consider when applying the new enhancement, and other factors not enumerated in the application note could be considered by the court as appropriate.

The amendment also modifies the application note of the previously existing prong of §2B1.1(b)(12)(B), the financial institutions enhancement, to be consistent structurally with the new prongs of the enhancement. Prior to the amendment, the presence of any one of the factors enumerated in the application note would trigger the financial institutions enhancement under §2B1.1(b)(12)(B). Under the amendment, the application note to the financial institutions enhancement sets forth a non-exhaustive list of factors that the court shall consider in determining whether the offense substantially jeopardized the safety and soundness of a financial institution. The list of factors that the court shall consider when applying this enhancement includes references to insolvency, substantially reducing benefits to pensioners and insureds, and an inability to refund fully any deposit, payment, or investment on demand.

The second prong added to §2B1.1(b)(12)(B) by the amendment applies to offenses that substantially endangered the solvency or financial security of 100 or more victims, regardless of whether a publicly traded company or other organization was affected by the offense. The Commission concluded that the specificity of the directive in section 805(a)(4) required an enhancement focused specifically on conduct that endangers the financial security of individual victims. Thus, use of this prong of the enhancement will be appropriate in cases in which there is sufficient evidence for the court to determine that the amount of loss suffered by individual victims of the offense substantially endangered the solvency or financial security of those victims. The Commission also determined that the enhancement provided in §2B1.1(b)(12)(B) shall apply cumulatively with the enhancement at §2B1.1(b)(2), which is based solely on the number of victims involved in the offense, to reflect the particularly acute harm suffered by victims of offenses for which the new prongs of subsection (b)(12)(B) apply.

Third, the amendment addresses the directive contained at section 1104(a)(2) of the Act to "consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses." The amendment implements this directive by providing a new, four level

enhancement at §2B1.1(b)(13) that applies if the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company. The Commission concluded that a four level enhancement appropriately reflects that an officer or director of a publicly traded company who commits such an offense violates certain heightened fiduciary duties imposed by securities law upon such individuals. Accordingly, the court is not required to determine specifically whether the defendant abused a position of trust in order for the enhancement to apply, and a corresponding application note provides that, in cases in which the new, four level enhancement applies, the existing two level enhancement for abuse of position of trust at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) shall not apply.

The corresponding application note also expressly provides that the enhancement would apply regardless of whether the defendant was convicted under a specific securities fraud statute (e.g., 18 U.S.C. § 1348, a new offense created by the Act specifically prohibiting securities fraud) or under a general fraud statute (e.g., 18 U.S.C. § 1341, prohibiting mail fraud), provided that the offense involved a violation of "securities law" as defined in the application note.

Fourth, the amendment expands the loss table at §2B1.1(b)(1) to punish adequately offenses that cause catastrophic losses of magnitudes previously unforeseen, such as the serious corporate scandals that gave rise to several portions of the Act. Prior to the amendment, the loss table at §2B1.1(b)(1) provided sentencing enhancements in two level increments up to a maximum of 26 levels for offenses in which the loss exceeded \$100,000,000. The amendment adds two additional loss amount categories to the table; an increase of 28 levels for offenses in which the loss exceeded \$200,000,000, and an increase of 30 levels for offenses in which the loss exceeded \$400,000,000. These additions to the loss table address congressional concern regarding particularly extensive and serious fraud offenses, and more fully effectuate increases in statutory maximum penalties provided by the Act (e.g., the increase in the statutory maximum penalties for wire fraud and mail fraud offenses from five to 20 years set forth in section 903 of the Act). The amendment also modifies the tax table in §2T4.1 in a similar manner to maintain the longstanding proportional relationship between the loss table in §2B1.1 and the tax table.

The amendment also adds a new factor to the general, enumerated factors that the court may consider in determining the amount of loss under §2B1.1(b)(1). Specifically, the amendment adds the reduction in the value of equity securities or other corporate assets that resulted from the offense to the list of general factors set forth in Application Note 2(C) of §2B1.1. This factor was added to provide courts additional guidance in determining loss in certain cases, particularly in complex white collar cases.

Fifth, the amendment modifies §2J1.2 to address the directives pertaining to obstruction of justice offenses contained in sections 805 and 1104 of the Act. Specifically, section 805(a) of the Act directs the Commission to ensure that the base offense level and existing enhancements in §2J1.2 are sufficient to deter and punish obstruction of justice offenses generally, and specifically are adequate in cases involving the destruction, alteration, or fabrication of a large amount of evidence, a large number of participants, the selection of evidence that is particularly probative or essential to the investigation, more than minimal planning, or abuse of a special skill or a position of trust. Section 1104(b) of the Act further directs the Commission to ensure that the "guideline offense levels and enhancements for an obstruction of justice offense are adequate in cases where documents or other physical evidence are actually destroyed or fabricated."

The amendment implements these directives by making two modifications to §2J1.2. First, the amendment increases the base offense level in §2J1.2 from level 12 to level 14. Second, the

amendment adds a new two level enhancement to §2J1.2. This enhancement applies if the offense (i) involved the destruction, alteration, or fabrication of a substantial number of records, documents or tangible objects; (ii) involved the selection of any essential or especially probative record, document, or tangible object to destroy or alter; or (iii) was otherwise extensive in scope, planning, or preparation. The Commission determined that existing adjustments in Chapter Three for aggravating role, §3B1.1, and abuse of position of trust or use of special skill, §3B1.3, adequately account for those particular factors described in section 805(a) of the Act.

Sixth, the amendment addresses new offenses created by the Act. Section 1520 of title 18, United States Code, relating to destruction of corporate audit records, 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). Section 1520 provides a statutory maximum penalty of ten years' imprisonment for knowing and willful violations of document maintenance requirements as set forth in that section or in rules or regulations to be promulgated by the Securities and Exchange Commission pursuant to that section. The amendment also expands the existing cross reference in §2E5.3(a)(2) specifically to cover fraud and obstruction of justice offenses. Accordingly, if a defendant who is convicted under 18 U.S.C. § 1520 committed the offense in order to obstruct justice, the amendment to the cross reference provision requires the court to apply §2J1.2 instead of §2E5.3. Other new offenses are listed in Appendix A (Statutory Index), as well as in the statutory provisions of the relevant guidelines.

**Effective Date: The effective date of this amendment is January 25, 2003.**

- 648. Amendment:** Chapter Two, Part C is amended in the heading by adding at the end "AND VIOLATIONS OF FEDERAL ELECTION CAMPAIGN LAWS".

Chapter Two, Part C is amended by striking the introductory commentary as follows:

" Introductory Commentary

The Commission believes that pre-guidelines sentencing practice did not adequately reflect the seriousness of public corruption offenses. Therefore, these guidelines provide for sentences that are considerably higher than average pre-guidelines practice."

Chapter Two, Part C is amended by adding at the end the following new guideline and accompanying commentary:

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

- (a) Base Offense Level: 8
- (b) Specific Offense Characteristics

- (1) If the value of the illegal transactions exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
  - (2) (Apply the greater) If the offense involved, directly or indirectly, an illegal transaction made by or received from—
    - (A) a foreign national, increase by 2 levels; or
    - (B) a government of a foreign country, increase by 4 levels.
  - (3) If (A) the offense involved the contribution, donation, solicitation, expenditure, disbursement, or receipt of governmental funds; or (B) the defendant committed the offense for the purpose of obtaining a specific, identifiable non-monetary Federal benefit, increase by 2 levels.
  - (4) If the defendant engaged in 30 or more illegal transactions, increase by 2 levels.
  - (5) If the offense involved a contribution, donation, solicitation, or expenditure made or obtained through intimidation, threat of pecuniary or other harm, or coercion, increase by 4 levels.
- (c) Cross Reference
- (1) If the offense involved a bribe or gratuity, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than the offense level determined above.

Commentary

Statutory Provisions: 2 U.S.C. §§ 437g(d)(1), 439a, 441a, 441a-1, 441b, 441c, 441d, 441e, 441f, 441g, 441h(a), 441i, 441k; 18 U.S.C. § 607. For additional provision(s), see Statutory Index (Appendix A).

Application Notes:

1. Definitions.—For purposes of this guideline:

‘Foreign national’ has the meaning given that term in section 319(b) of the Federal Election Campaign Act of 1971, 2 U.S.C. § 441e(b).

‘Government of a foreign country’ has the meaning given that term in section 1(e) of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611(e)).

‘Governmental funds’ means money, assets, or property, of the United States government, of a State government, or of a local government, including any branch, subdivision, department, agency, or other component of any such government. ‘State’ means any of the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, or American Samoa. ‘Local government’ means the government of a political subdivision of a State.

‘Illegal transaction’ means (A) any contribution, donation, solicitation, or expenditure of money or anything of value, or any other conduct, prohibited by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 et seq; (B) any contribution, donation, solicitation, or expenditure of money or anything of value made in excess of the amount of such contribution, donation, solicitation, or expenditure that may be made under such Act; and (C) in the case of a violation of 18 U.S.C. § 607, any solicitation or receipt of money or anything of value under that section. The terms ‘contribution’ and ‘expenditure’ have the meaning given those terms in section 301(8) and (9) of the Federal Election Campaign Act of 1971 (2 U.S.C. § 431(8) and (9)), respectively.

2. Application of Subsection (b)(3)(B).—Subsection (b)(3)(B) provides an enhancement for a defendant who commits the offense for the purpose of achieving a specific, identifiable non-monetary Federal benefit that does not rise to the level of a bribe or a gratuity. Subsection (b)(3)(B) is not intended to apply to offenses under this guideline in which the defendant’s only motivation for commission of the offense is generally to achieve increased visibility with, or heightened access to, public officials. Rather, subsection (b)(3)(B) is intended to apply to defendants who commit the offense to obtain a specific, identifiable non-monetary Federal benefit, such as a Presidential pardon or information proprietary to the government.
3. Application of Subsection (b)(4).—Subsection (b)(4) shall apply if the defendant engaged in any combination of 30 or more illegal transactions during the course of the offense, whether or not the illegal transactions resulted in a conviction for such conduct.
4. Departure Provision.—In a case in which the defendant’s conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted."

Section 3D1.2(d) is amended by inserting ", 2C1.8" after "2C1.7".

The Commentary to §5E1.2 captioned "Application Notes" is amended in the second sentence of Note 5 by striking "and" after "Control Act," and by inserting before the period at the end the following:

"; and 2 U.S.C. § 437g(d)(1)(D), which authorizes, for violations of the Federal Election Campaign Act under 2 U.S.C. § 441f, a fine up to the greater of \$50,000 or 1,000 percent of the amount of the violation, and which requires, in the case of such a violation, a minimum fine of not less than 300 percent of the amount of the violation.

There may be cases in which the defendant has entered into a conciliation agreement with

the Federal Election Commission under section 309 of the Federal Election Campaign Act of 1971 in order to correct or prevent a violation of such Act by the defendant. The existence of a conciliation agreement between the defendant and Federal Election Commission, and the extent of compliance with that conciliation agreement, may be appropriate factors in determining at what point within the applicable fine guideline range to sentence the defendant, unless the defendant began negotiations toward a conciliation agreement after becoming aware of a criminal investigation".

Appendix A (Statutory Index) is amended by inserting before the line referenced to 7 U.S.C. § 6 the following new lines:

"2 U.S.C. § 437g(d)	2C1.8
2 U.S.C. § 439a	2C1.8
2 U.S.C. § 441a	2C1.8
2 U.S.C. § 441a-1	2C1.8
2 U.S.C. § 441b	2C1.8
2 U.S.C. § 441c	2C1.8
2 U.S.C. § 441d	2C1.8
2 U.S.C. § 441e	2C1.8
2 U.S.C. § 441f	2C1.8
2 U.S.C. § 441g	2C1.8
2 U.S.C. § 441h(a)	2C1.8
2 U.S.C. § 441i	2C1.8
2 U.S.C. § 441k	2C1.8".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 597 the following new line:

"18 U.S.C. § 607            2C1.8".

**Reason for Amendment:** This amendment implements the directive from Congress contained in the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, (the "BCRA") to the effect that the Commission "promulgate a guideline, or amend an existing guideline ..., for penalties for violations of the Federal Election Campaign Act of 1971 (the "FECA") and related election laws ... ". The BCRA significantly increased statutory penalties for campaign finance crimes, formerly misdemeanors under the FECA. The new statutory maximum term of imprisonment for even the least serious of these offenses is now two years and for more serious offenses, the maximum term of imprisonment is five years.

To effectively punish these offenses, the Commission chose to create a new guideline at §2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property). The Commission opted against simply amending an existing guideline because it determined after review that the characteristics of election-violation cases did not bear sufficient similarity to cases sentenced under any existing guideline. The offenses which will be sentenced under §2C1.8 include: violations of the statutory prohibitions against "soft money" (2 U.S.C. § 441i); restrictions on "hard money" contributions (2 U.S.C. § 441a); contributions by foreign nationals (2 U.S.C. § 441e); restrictions on "electioneering communications" as defined at 2 U.S.C. § 434(f)(3)(C)); certain fraudulent misrepresentations (2 U.S.C. § 441h); and "conduit contributions" (2 U.S.C. § 441f).

The new guideline has a base offense level of level 8, which reflects the fact that these offenses, while they are somewhat similar to fraud offenses (sentenced under §2B1.1 (Theft, Property Destruction, and Fraud) at a base offense level of level 6), generally are more serious due to the additional harm, or the potential harm, of corrupting the elective process.

The new guideline provides five specific offense characteristics to ensure appropriate penalty enhancements for aggravating conduct which may occur during the commission of certain campaign finance offenses. First, the new guideline provides a specific offense characteristic, at §2C1.8(b)(1), that uses the fraud loss table in §2B1.1 to incrementally increase the offense level in proportion to the monetary amounts involved in the illegal transactions. This both assures proportionality with penalties for fraud offenses and responds to Congress' directive to provide an enhancement for "a large aggregate amount of illegal contributions."

Second, the new guideline provides alternative enhancements, at §2C1.8(b)(2), if the offense involved a foreign national (two levels) or a foreign government (four levels). These enhancements respond to another specific directive in the BCRA and reflect the seriousness of foreign entities attempting to tamper with the United States' election processes.

Third, the new guideline provides alternative two level enhancements, at §2C1.8(b)(3), when the offense involves either "governmental funds," defined broadly to include Federal, State, or local funds, or an intent to derive "a specific, identifiable non-monetary Federal benefit" (e.g., a presidential pardon). Each of these enhancements responds to specific directives of the BCRA.

Fourth, the new guideline provides a two level enhancement, at subsection (b)(4), when the offender engages in "30 or more illegal transactions." After a review of all campaign finance cases in the Commission's datafile, the Commission chose 30 transactions as the number best illustrative of a "large number" in that context. This enhancement also responds to a specific directive in the BCRA to the effect that the Commission provide enhanced sentencing for cases involving "a large number of illegal transactions."

Fifth, the new guideline provides a 4 level enhancement, at §2C1.8(b)(5), if the offense involves the use of "intimidation, threat of pecuniary or other harm, or coercion." This enhancement responds to information received from the Federal Election Commission and the Public Integrity Section of the Department of Justice which characterizes offenses of this type as some of the most aggravated offenses committed under the FECA.

The new guideline also provides a cross reference, at subsection (c), which directs the sentencing court to apply either §2C1.1 or §2C1.2, as appropriate, if the offense involved a bribe or a gratuity and the resulting offense level would be greater than that determined under §2C1.8.

Section 3D1.2 (Groups of Closely Related Counts) has been amended, consistent with the principles underlying the rules for grouping multiple counts of conviction, to include §2C1.8 offenses among those in which the offense level is determined largely on the basis of the total amount of harm or loss or some other measure of aggregate harm. (See §3D1.2(d)).

Finally, §5E1.2 (Fines for Individual Defendants) has been amended to specifically reflect fine provisions unique to the FECA. This part of the amendment also provides that the defendant's participation in a conciliation agreement with the Federal Election Commission may be an appropriate factor for use in determining the specific fine within the applicable fine guideline range

unless the defendant began negotiations with the Federal Election Commission after the defendant became aware that he or it was the subject of a criminal investigation.

**Effective Date:** The effective date of this amendment is January 25, 2003.

**649. Amendment:** Section 2G2.2(b) is amended by adding at the end the following:

- "(6) If the offense involved—
  - (A) at least 10 images, but fewer than 150, increase by 2 levels;
  - (B) at least 150 images, but fewer than 300, increase by 3 levels;
  - (C) at least 300 images, but fewer than 600, increase by 4 levels; and
  - (D) 600 or more images, increase by 5 levels."

The Commentary to §2G2.2 is amended by adding at the end the following:

"Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (6), effective April 30, 2003."

Section 2G2.4(b) is amended by adding at the end the following:

- "(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
- (5) If the offense involved—
  - (A) at least 10 images, but fewer than 150, increase by 2 levels;
  - (B) at least 150 images, but fewer than 300, increase by 3 levels;
  - (C) at least 300 images, but fewer than 600, increase by 4 levels; and
  - (D) 600 or more images, increase by 5 levels."

The Commentary to §2G2.4 is amended by adding at the end the following:

"Background: Section 401(i)(1)(B) of Public Law 108–21 directly amended subsection (b) to add subdivisions (4) and (5), effective April 30, 2003."

Section 3E1.1(b) is amended by inserting "upon motion of the government stating that" before "the defendant has assisted authorities"; and by striking "taking one or more" and all that follows through "1 additional level" and inserting "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level".

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 6 by striking "one or both of"; by striking "(1) or (2)"; by striking "(b)(2)" and inserting "(b)"; and by adding at the end



the following new paragraph:

" Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of Pub. L. 108–21."

The Commentary to §3E1.1 captioned "Background" is amended by striking "one or more of" both places it appears; and by adding at the end the following:

" Section 401(g) of Public Law 108–21 directly amended subsection (b), Application Note 6 (including adding the last paragraph of that application note), and the Background Commentary, effective April 30, 2003."

The Commentary to §4B1.5 captioned "Application Notes" is amended in Note 4(B) by striking subdivision (i) as follows:

- "(i) In General.—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if—
- (I) on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor; and
  - (II) there were at least two minor victims of the prohibited sexual conduct.

For example, the defendant engaged in a pattern of activity involving prohibited sexual conduct if there were two separate occasions of prohibited sexual conduct and each such occasion involved a different minor, or if there were two separate occasions of prohibited sexual conduct involving the same two minors.";

and inserting:

- "(i) In General.—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor."

The Commentary to §4B1.5 captioned "Background" is amended by striking "section 632 of Pub. L. 102–141 and section 505 of Pub. L. 105–314" and inserting "section 632 of Public Law 102–141 and section 505 of Public Law 105–314"; and by adding at the end the following:

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

Section 5H1.6 is amended by striking "Family ties" and inserting "In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties";

and by inserting after the first sentence the following new paragraph:

"In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of

title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range."

Section 5H1.6 is amended by adding at the end the following:

"Commentary

Background: Section 401(b)(4) of Public Law 108–21 directly amended this policy statement to add the second paragraph, effective April 30, 2003."

Section 5K2.0 is amended by striking "Under" and inserting the following:

"(a) DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.—Under";

and by adding at the end the following:

(b) DOWNWARD DEPARTURES IN CHILD CRIMES AND SEXUAL OFFENSES.—Under 18 U.S.C. § 3553(b)(2), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—

- (1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;
- (2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and
- (3) should result in a sentence different from that described.

The grounds enumerated in this Part K of chapter 5 are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted."

The Commentary to §5K2.0 is amended by inserting an asterisk after "Commentary" and by inserting the following new paragraph before "The United":

"[\*Section 401(m)(2)(C) of Public Law 108–21 directs the Commission to revise §5K2.0, within 180 days after the date of the enactment of that Public Law, or October 27, 2003, to conform §5K2.0 to changes made by that Public Law, including changes to the appellate standard of review for decisions to depart from the guidelines. That directive has not been

implemented yet in the following commentary.]".

The Commentary to §5K2.0 is amended by striking "of this policy statement" and inserting "of subsection (a)".

The Commentary to §5K2.0 is amended by adding at the end the following:

" Section 401(b)(1) of Public Law 108–21 directly amended this policy statement to add subsection (b), effective April 30, 2003."

Section 5K2.13 is amended by striking "or" before "(3)"; and by striking "public." and inserting "public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code."

The Commentary to §5K2.13 is amended by adding at the end the following:

"Background: Section 401(b)(5) of Public Law 108–21 directly amended this policy statement to add subdivision (4), effective April 30, 2003."

Section 5K2.20 is amended by striking "A sentence" and inserting "Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, a sentence".

The Commentary to §5K2.20 is amended by adding at the end the following:

"Background: Section 401(b)(3) of Public Law 108–21 directly amended this policy statement, effective April 30, 2003."

Chapter Five, Part K, is amended by adding at the end the following:

"§5K2.22. Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code:

- (1) Age may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by §5H1.1.
- (2) An extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by §5H1.4.
- (3) Drug, alcohol, or gambling dependence or abuse is not a reason for imposing a sentence below the guidelines.

Commentary

Background: Section 401(b)(2) of Public Law 108–21 directly amended Chapter Five, Part

K, to add this policy statement, effective April 30, 2003."

**Reason for Amendment:** This amendment implements amendments to the guidelines made directly by the PROTECT Act, Pub. L. 108–21. In addition to amendments made directly by the PROTECT Act, this amendment makes technical and conforming amendments to those direct congressional amendments, pursuant to the Commission’s authority to promulgate such technical and conforming amendments under section 401(m) of the PROTECT Act and 28 U.S.C. § 994.

**Effective Date:** The effective date of this amendment is April 30, 2003.

**650. Amendment:** Section 2A4.1 is amended in subsection (a) by striking "24" and inserting the following:

"(1) 24 (effective before, but not on or after, May 30, 2003).

(1) 32 (effective on and after May 30, 2003).";

in subsection (b)(4)(C), by inserting "(effective before, but not on or after, May 30, 2003)" after "level";

and by striking subsection (b)(5) as follows:

"(5) If the victim was sexually exploited, increase by 3 levels."

and inserting the following:

"(5) If the victim was sexually exploited:

(A) increase by 3 levels (effective before, but not on or after, May 30, 2003).

(A) increase by 6 levels (effective on and after May 30, 2003)."

The Commentary to §2A4.1 captioned "Application Notes" is amended in Note 3 by inserting "(effective before, but not on or after, May 30, 2003)" after "resistance".

The Commentary to §2A4.1 captioned "Background" is amended by adding at the end the following:

" Subsections (a) and (b)(5), and the deletion of subsection (b)(4)(C), effective May 30, 2003, implement the directive to the Commission in section 104 of Public Law 108–21."

**Reason for Amendment:** This amendment implements the directive to the Commission in section 104 of the PROTECT Act, Pub. L. 108–21.

**Effective Date:** The effective date of this amendment is May 30, 2003.