APPENDIX C (VOLUME III) - AMENDMENTS TO THE GUIDELINES MANUAL

This volume of Appendix C presents amendments to the guidelines, policy statements, and official commentary effective November 1, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; November 1, 2006; May 1, 2007; November 1, 2007; February 6, 2008; March 3, 2008; May 1, 2008; November 1, 2008; November 1, 2009; November 1, 2010; and November 1, 2011.

For amendments to the guidelines, policy statements, and official commentary effective November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; and November 5, 2003, see Appendix C, Volume II. For amendments effective November 1, 1997, and earlier, see Appendix C, Volume I.

The format under which the amendments are presented in Appendix C, including this volume, 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.

AMENDMENTS

663. Amendment: The Commentary to §2A1.1 captioned "Application Notes" is amended by striking Notes 1 and 2 as follows:

"1. The Commission has concluded that in the absence of capital punishment life imprisonment is the appropriate punishment for premeditated killing. However, this guideline also applies when death results from the commission of certain felonies. Life imprisonment is not necessarily appropriate in all such situations. For example, if in robbing a bank, the defendant merely passed a note to the teller, as a result of which she had a heart attack and died, a sentence of life imprisonment clearly would not be appropriate.

If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. The extent of the departure should be based upon the defendant's state of mind (e.g., recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, the Commission does not envision that departure below that specified in §2A1.2 (Second Degree Murder) is likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.

2. If the defendant is convicted under 21 U.S.C. § 848(e), a sentence of death may be imposed under the specific provisions contained in that statute. This guideline applies when a sentence of death is not imposed.",

and inserting the following:

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

2. Imposition of Life Sentence.—

(A) Offenses Involving Premeditated Killing.—In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. § 3553(e).

(B) Felony Murder.—If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. For example, a downward departure may be warranted if in robbing a bank, the defendant merely passed a note to the teller, as a result of which the teller had a heart attack and died. The extent of the departure should be based upon the defendant's state of mind (e.g., recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, departure below the minimum guideline sentence provided for second degree murder in §2A1.2 (Second Degree Murder) is not likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.

3. Applicability of Guideline When Death Sentence Not Imposed.—If the defendant is sentenced pursuant to 18 U.S.C. § 3591 et seq. or 21 U.S.C. § 848(e), a sentence of death may be imposed under the specific provisions contained in that statute. This guideline applies when a sentence of death is not imposed under those specific provisions.".

Section 2A1.2(a) is amended by striking "33" and inserting "38".

Section 2A1.2 is amended by striking the commentary captioned "Background" as follows:

"Background: The maximum term of imprisonment authorized by statute for second degree murder is life.",

and inserting the following:

"Application Note:

1. Upward Departure Provision.—If the defendant's conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).".

Section 2A1.3(a) is amended by striking "25" and inserting "29".

Section 2A1.3 is amended by striking the commentary captioned "Background" as follows:

"Background: The maximum term of imprisonment authorized by statute for voluntary manslaughter is ten years.".

Section 2A1.4(a) is amended in subdivision (1) by striking "conduct was criminally negligent" and inserting "offense involved criminally negligent conduct"; and by striking subdivision (2) as follows:

"(2) 18, if the conduct was reckless.",

and inserting the following:

"(2) (Apply the greater):

(A) 18, if the offense involved reckless conduct; or

(B) 22, if the offense involved the reckless operation of a means of transportation.".

Section 2A1.4 is amended by adding at the end the following:

"(b) Special Instruction

(1) If the offense involved the involuntary manslaughter of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the involuntary manslaughter of each person had been contained in a separate count of conviction.".

The Commentary to §2A1.4 captioned "Application Notes" is amended in the heading by striking "Notes" and inserting "Note"; and by striking Notes 1 and 2 as follows:

"1. 'Reckless' refers to a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation. The term thus

includes all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. § 1112. A homicide resulting from driving, or similarly dangerous actions, while under the influence of alcohol or drugs ordinarily should be treated as reckless.

2. ‘Criminally negligent’ refers to conduct that involves a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is not reckless. Offenses with this characteristic usually will be encountered as assimilative crimes.".

and inserting the following:

"1. Definitions.—For purposes of this guideline:

‘Criminally negligent’ means conduct that involves a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is not reckless. Offenses with this characteristic usually will be encountered as assimilative crimes.

‘Means of transportation’ includes a motor vehicle (including an automobile or a boat) and a mass transportation vehicle. ‘Mass transportation’ has the meaning given that term in 18 U.S.C. § 1993(c)(5).

‘Reckless’ means a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation. ‘Reckless’ includes all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. § 1112. A homicide resulting from driving a means of transportation, or similarly dangerous actions, while under the influence of alcohol or drugs ordinarily should be treated as reckless.".

Section 2A1.5(a) is amended by striking "28" and inserting "33".

Section 2A2.1(a) is amended in subdivision (1) by striking "28" and inserting "33"; and in subdivision (2) by striking "22" and inserting "27".

Section 2A2.1(b)(1) is amended by striking "(A) If" and inserting "If (A)"; and by striking "if" each place it appears.

The Commentary to §2A2.1 captioned "Application Notes" is amended by striking Notes 1 through 3 as follows:

"1. Definitions of ‘serious bodily injury’ and ‘permanent or life-threatening bodily injury’ are found in the Commentary to §1B1.1 (Application Instructions).

2. ‘First degree murder,’ as used in subsection (a)(1), means conduct that, if committed within the special maritime and territorial jurisdiction of the

United States, would constitute first degree murder under 18 U.S.C. § 1111.

3. If the offense created a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted.",

and inserting the following:

"1. Definitions.—For purposes of this guideline:

‘First degree murder’ means conduct that, if committed within the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. § 1111.

‘Permanent or life-threatening bodily injury’ and ‘serious bodily injury’ have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. Upward Departure Provision.—If the offense created a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted.".

Section 2A2.2(a) is amended by striking "15" and inserting "14".

Section 2A2.2(b)(2) is amended by striking "(A) If" and inserting "If (A)"; and by striking "if" each place it appears.

Section 2A2.2(b)(3) is amended in subdivision (A) by striking "2" and inserting "3"; in subdivision (B) by striking "4" and inserting "5"; in subdivision (C) by striking "6" and inserting "7"; in subdivision (D) by striking "3" and inserting "4"; and in subdivision (E) by striking "5" and inserting "6".

Section 2A2.2(b)(3) is amended by striking "Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.", and inserting "However, the cumulative adjustments from application of subdivisions (2) and (3) shall not exceed 10 levels.".

Section 2A2.2(b) is amended by adding at the end the following:

"(6) If the defendant was convicted under 18 U.S.C. § 111(b) or § 115, increase by 2 levels.".

The Commentary to §2A2.2 captioned "Application Notes" is amended by striking Note 2 as follows:

"2. Application of Subsection (b)(2).—In a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).".

The Commentary to §2A2.2 captioned "Application Notes" is amended in Note 3 by

striking:

"3. More than Minimal Planning.—For purposes of subsection (b)(1),",

and inserting the following:

"2. Application of Subsection (b)(1).—For purposes of subsection (b)(1),".

The Commentary to §2A2.2 captioned "Application Notes" is amended by adding at the end the following:

"3. Application of Subsection (b)(2).—In a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).

4. Application of Official Victim Adjustment.—If subsection (b)(6) applies, §3A1.2 (Official Victim) also shall apply.".

The Commentary to §2A2.2 captioned "Background" is amended by adding at the end the following:

" Subsection (b)(6) implements the directive to the Commission in subsection 11008(e) of the 21st Century Department of Justice Appropriations Act (the 'Act'), Public Law 107–273. The enhancement in subsection (b)(6) is cumulative to the adjustment in §3A1.2 (Official Victim) in order to address adequately the directive in section 11008(e)(2)(D) of the Act, which provides that the Commission shall consider 'the extent to which sentencing enhancements within the Federal guidelines and the authority of the court to impose a sentence in excess of the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by' 18 U.S.C. §§ 111 and 115.".

Section 2A2.3(a) is amended in subdivision (1) by striking "6" and inserting "7", and by striking "conduct" and inserting "offense"; and in subdivision (2) by striking "3" and inserting "4".

Section 2A2.3(b)(1) is amended by inserting "(A) the victim sustained bodily injury, increase by 2 levels; or (B)" after "If".

Section 2A2.3 is amended by adding at the end the following:

"(c) Cross Reference

(1) If the conduct constituted aggravated assault, apply §2A2.2 (Aggravated Assault).".

The Commentary to §2A2.3 captioned "Application Notes" is amended by striking Notes 1 through 3 as follows:

"1. ‘Minor assault’ means a misdemeanor assault, or a felonious assault not covered by §2A2.2.

2. Definitions of ‘firearm’ and ‘dangerous weapon’ are found in the Commentary to §1B1.1 (Application Instructions).

3. ‘Substantial bodily injury’ means ‘bodily injury which involves - (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.’ 18 U.S.C. § 113(b)(1).",

and inserting the following:

"1. Definitions.—For purposes of this guideline:

‘Bodily injury’, ‘dangerous weapon’, and ‘firearm’ have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

‘Minor assault’ means a misdemeanor assault, or a felonious assault not covered by §2A2.2 (Aggravated Assault).

‘Substantial bodily injury’ means ‘bodily injury which involves (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.’ See 18 U.S.C. § 113(b)(1).

2. Application of Subsection (b)(1).—Conduct that forms the basis for application of subsection (a)(1) also may form the basis for application of the enhancement in subsection (b)(1)(A) or (B).".

Section 2A2.4(a) is amended by striking "6" and inserting "10".

Section 2A2.4(b) is amended by striking "Characteristic" and inserting "Characteristics"; by striking in subdivision (1) "If the conduct involved physical contact, or if" and inserting "If (A) the offense involved physical contact; or (B)"; and by adding at the end the following:

"(2) If the victim sustained bodily injury, increase by 2 levels.".

The Commentary to §2A2.4 captioned "Application Notes" is amended by striking Notes 1 and 2 as follows:

"1. The base offense level reflects the fact that the victim was a governmental officer performing official duties. Therefore, do not apply §3A1.2 (Official Victim) unless subsection (c) requires the offense level to be determined under §2A2.2 (Aggravated Assault). Conversely, the base offense level does not reflect the possibility that the defendant may create a substantial risk of death or serious bodily injury to another person in the course of

fleeing from a law enforcement official (although an offense under 18 U.S.C. § 758 for fleeing or evading a law enforcement checkpoint at high speed will often, but not always, involve the creation of that risk). If the defendant creates that risk and no higher guideline adjustment is applicable for the conduct creating the risk, apply §3C1.2 (Reckless Endangerment During Flight).

2. Definitions of 'firearm' and 'dangerous weapon' are found in the Commentary to §1B1.1 (Application Instructions).",

and inserting the following:

"1. Definitions.—For purposes of this guideline, 'bodily injury', 'dangerous weapon', and 'firearm' have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. Application of Certain Chapter Three Adjustments.—The base offense level incorporates the fact that the victim was a governmental officer performing official duties. Therefore, do not apply §3A1.2 (Official Victim) unless, pursuant to subsection (c), the offense level is determined under §2A2.2 (Aggravated Assault). Conversely, the base offense level does not incorporate the possibility that the defendant may create a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement official (although an offense under 18 U.S.C. § 758 for fleeing or evading a law enforcement checkpoint at high speed will often, but not always, involve the creation of that risk). If the defendant creates that risk and no higher guideline adjustment is applicable for the conduct creating the risk, apply §3C1.2 (Reckless Endangerment During Flight).".

The Commentary to §2A2.4 captioned "Application Notes" is amended in Note 3 by inserting "Upward Departure Provision.—" before "The base".

The Commentary to §2A2.4 captioned "Background" is amended by striking the last sentence as follows:

"The guideline has been drafted to provide offense levels that are identical to those otherwise provided for assaults involving an official victim; when no assault is involved, the offense level is 6.".

Section 3A1.2 is amended by striking:

"§3A1.2. Official Victim

(a) If (1) the victim was (A) a government officer or employee; (B) a former government officer or employee; or (C) a member of the immediate family of a person described in subdivision (A) or (B); and (2) the offense of conviction was motivated by such status, increase by 3

levels.

(b) If, in a manner creating a substantial risk of serious bodily injury, the defendant or a person for whose conduct the defendant is otherwise accountable—

(1) knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom; or

(2) knowing or having reasonable cause to believe that a person was a prison official, assaulted such official while the defendant (or a person for whose conduct the defendant is otherwise accountable) was in the custody or control of a prison or other correctional facility,

increase by 3 levels.",

and inserting:

"§3A1.2. Official Victim

(Apply the greatest):

(a) If (1) the victim was (A) a government officer or employee; (B) a former government officer or employee; or (C) a member of the immediate family of a person described in subdivision (A) or (B); and (2) the offense of conviction was motivated by such status, increase by 3 levels.

(b) If subsection (a)(1) and (2) apply, and the applicable Chapter Two guideline is from Chapter Two, Part A (Offenses Against the Person), increase by 6 levels.

(c) If, in a manner creating a substantial risk of serious bodily injury, the defendant or a person for whose conduct the defendant is otherwise accountable—

(1) knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom; or

(2) knowing or having reasonable cause to believe that a person was a prison official, assaulted such official while the defendant (or a person for

whose conduct the defendant is otherwise accountable) was in the custody or control of a prison or other correctional facility,

increase by 6 levels.".

The Commentary to §3A1.2 captioned "Application Notes" is amended in Note 2 by striking the second sentence as follows: "In most cases, the offenses to which subdivision (a) will apply will be from Chapter Two, Part A (Offenses Against the Person)."; and by striking in the third sentence ", Part A,".

The Commentary to §3A1.2 captioned "Application Notes" is amended in Note 3 by striking "Subsection (a)" and inserting "Subsections (a) and (b)"; and by striking "in subsection (a)" and inserting ", for purposes of subsections (a) and (b),".

The Commentary to §3A1.2 captioned "Application Notes" is amended in Note 4 by striking "Subsection (b)" each place it appears and inserting "Subsection (c)"; by striking "subsection (b)" each place it appears and inserting "subsection (c)"; and by striking "and control" each place it appears and inserting "or control".

The Commentary to §3A1.2 captioned "Application Notes" is amended by striking Note 5 as follows:

"5. Upward Departure Provision.—Certain high level officials, e.g., the President and Vice President, although covered by this section, do not represent the heartland of the conduct covered. An upward departure to reflect the potential disruption of the governmental function in such cases typically would be warranted.",

and inserting the following:

"5. Upward Departure Provision.—If the official victim is an exceptionally high-level official, such as the President or the Vice President of the United States, an upward departure may be warranted due to the potential disruption of the governmental function.".

Reason for Amendment: This amendment increases the base offense levels for the homicide and manslaughter guidelines to address longstanding proportionality concerns and new proportionality issues prompted by changes to other Chapter Two guidelines pursuant to the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21 (the "PROTECT Act"). It also amends the assault guidelines and the adjustment at §3A1.2 (Official Victim) to implement the directive in section 11008(e) of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273 (the "Act").

First, this amendment makes a number of changes to the homicide guidelines. The amendment revises the commentary in guideline §2A1.1 (First Degree Murder) and deletes outdated language. One effect of this revision is to clarify that a downward departure from a mandatory statutory sentence of life imprisonment is permissible only in cases in which

the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. § 3553(e).

In addition, the Commission received public comment that the guideline penalties for all homicides, other than for first degree murder, were inadequate and in need of review. An examination of the homicide and manslaughter guidelines also was prompted by section 104 of the PROTECT Act, which directed the Commission to increase the base offense level for §2A4.1 (Kidnapping, Abduction, Unlawful Restraint). The Commission increased the base offense level for kidnapping by eight levels, from base offense level 24 to base offense level 32, effective May 30, 2003. This increase brought kidnapping without injury to within one level of the base offense of level 33 for second degree murder. The Commission examined data on second degree murder offenses and found that in 2002, courts departed upward from the guideline range in 34.3% of the cases. The Commission also received public comment expressing concern that an individual convicted of second degree murder who accepted responsibility might serve as little as eight years' imprisonment. By increasing the base offense level in §2A1.2 (Second Degree Murder) to level 38, the Commission has established an approximate 20-year sentence of imprisonment for second degree murder.

Data also showed a high level of upward departure sentences for some other homicide offenses, such as voluntary manslaughter, which had a 28.6% upward departure rate in 2002. Based upon such indications that the sentences may be inadequate for these offenses, the Commission increased the base offense levels of many of the homicide guidelines to punish them more appropriately and with an eye toward restoring the proportionality found in the original guidelines. For example, the original base offense level of 28 for attempted first degree murder, §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) is five levels lower than the original base offense level of level 33 for second degree murder. In this amendment, the five-level increase from a base offense level of level 28 to level 33 for attempted first degree murder mirrors the five-level increase for second degree murder from offense level of level 33 to level 38 and maintains the five-level difference that exists between the two. The amendment increases the base offense levels in the guidelines for §§2A1.2, 2A1.3 (Voluntary Manslaughter), 2A1.5 (Conspiracy or Solicitation to Commit Murder), and 2A2.1.

Additionally, the amendment adds a third alternative base offense level in §2A1.4 (Involuntary Manslaughter) of level 22 for reckless involuntary manslaughter offenses that involved the reckless operation of a means of transportation. This new offense level completes work undertaken in the previous amendment cycle to address disparities between federal and state sentences for vehicular manslaughter and to account for the 1994 increase in the statutory maximum term of imprisonment from three to six years. The new alternative offense level focusing on the reckless operation of a means of transportation addresses concerns raised by some members of Congress and comports with a recommendation from the Commission's Native American Advisory Group that vehicular manslaughter involving alcohol or drugs should be sentenced at offense level 22. The amendment also adds a special instruction to apply §3D1.2 (Groups of Closely Related Counts) as if there had been a separate count of conviction for each victim in cases in which more than one victim died. The purpose of the instruction is to ensure an incremental increase in punishment for single count offenses involving multiple victims.

Second, this amendment makes a number of changes to the assault guidelines and the

Chapter Three adjustment relating to official victims, to implement the congressional directive and the changes in statutory maximum terms of imprisonment in the 21st Century Department of Justice Appropriations Authorization Act. The Act increased the statutory maximum term of imprisonment for a number of offenses against current or former officers or employees of the United States, including Federal judges and magistrate judges, their families, or persons assisting in the performance of those official duties, or offenses committed on account of those duties. In response to the directive, the Commission added a new specific offense characteristic in §2A2.2 (Aggravated Assault) to provide a two-level increase if the defendant was convicted under 18 U.S.C. § 111(b) or § 115. The Commission also amended the guideline to decrease the base offense level from level 15 to level 14, based upon information received from the Native American Advisory Group and studies indicating that federal aggravated assault sentences generally are more severe than many state aggravated assault sentences. To ensure that individuals who cause bodily injury to victims do not benefit from this decrease in the base offense level, the specific offense characteristics addressing degrees of bodily injury each were increased by one level. To maintain proportionality, reflect increased statutory penalties, and comply with the directive, the two non-aggravated assault guidelines also were amended. For §2A2.3 (Minor Assault), the alternative base offense levels each were increased by one level, a specific offense characteristic was added to provide a two-level enhancement if the victim sustained bodily injury, and a cross-reference to §2A2.2 was added. Similarly, §2A2.4 (Obstructing or Impeding Officers) was amended by increasing the base offense level to level 10, and by adding a specific offense characteristic providing a two-level increase if the victim sustained bodily injury.

The amendment restructures §3A1.2 (Official Victim) and provides a two-tiered adjustment. The amendment maintains the three-level adjustment for offenses motivated by the status of the official victim, but increases the adjustment to six levels if that defendant's offense guideline was from Chapter Two, Part A (Offenses Against the Person). For example, a threat against a federal judge sentenced pursuant to §2A6.1 (Threatening or Harassing Communications) that is calculated at base offense level 12 could have received, before this amendment, a three-level enhancement under §3A1.2, which would have resulted in an adjusted offense level of level 15 and a guideline range of 18 to 24 months. Under this amendment, the defendant could receive a six-level adjustment, resulting in an enhanced offense level of level 18 and a guideline range of 27 to 33 months. The six level enhancement also applies to assaultive conduct against law enforcement officers or prison officials if the defendant committed the assault in a manner creating a substantial risk of serious bodily injury. This increase comports with the directive in the Act to "ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense" for offenses against federal officers, officials and employees.

Effective Date: The effective date of this amendment is November 1, 2004.

664. **Amendment:** Section 2A3.1(a) is amended by striking "27" and inserting "30".

Section 2A3.1(b)(1) is amended by striking "was committed by the means set forth" and inserting "involved conduct described".

Section 2A3.1(b)(6) is amended by striking "Internet-access device" and inserting "interactive computer service".

Section 2A3.1(c) is amended in the heading by striking "Cross Reference" and inserting "Cross References".

Section 2A3.1(c)(1) is amended by inserting ", if the resulting offense level is greater than that determined above" after "Murder)".

Section 2A3.1(c) is amended by adding at the end the following:

"(2) 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.".

Section 2A3.1(d)(1) is amended by striking "a correctional facility and the victim was a corrections employee" and inserting "the custody or control of a prison or other correctional facility and the victim was a prison official"; and by striking "(a)" and inserting "(c)(2)".

The Commentary to §2A3.1 captioned "Application Notes" is amended by striking Notes 1 through 3 as follows:

"1. For purposes of this guideline—

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

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

‘Permanent or life-threatening bodily injury,’ ‘serious bodily injury,’ and ‘abducted’ are defined 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 already is taken into account in the base offense level under subsection (a).

‘Prohibited sexual conduct’ means any sexual activity for which a person can be charged with a criminal offense. ‘Prohibited sexual conduct’ includes the production of child pornography, but does not include trafficking in, or possession of, child pornography. ‘Child pornography’ has the meaning given that term in 18 U.S.C. § 2256(8).

‘The means set forth in 18 U.S.C. § 2241(a) or (b)’ are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnaping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing

the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished.

2. Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

3. If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).",

and inserting the following:

"1. Definitions.—For purposes of this guideline:

‘Abducted’, ‘permanent or life-threatening bodily injury’, and ‘serious bodily injury’ have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, ‘serious bodily injury’ means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

‘Custody or control’ and ‘prison official’ have the meaning given those terms in Application Note 4 of the Commentary to §3A1.2 (Official Victim).

‘Child pornography’ has the meaning given that term in 18 U.S.C. § 2256(8).

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

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

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

‘Minor’ means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer

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

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

'Prohibited sexual conduct' (A) means any sexual activity for which a person can be charged with a criminal offense; (B) includes the production of child pornography; and (C) does not include trafficking in, or possession of, child pornography.

'Victim' includes an undercover law enforcement officer.

2. Application of Subsection (b)(1).—For purposes of subsection (b)(1), 'conduct described in 18 U.S.C. § 2241(a) or (b)' is engaging in, or causing another person to engage in, a sexual act with another person by: (A) using force against the victim; (B) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (C) rendering the victim unconscious; or (D) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.

3. Application of Subsection (b)(3).—

(A) Care, Custody, or Supervisory Control.—Subsection (b)(3) is to be construed broadly and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

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

The Commentary to §2A3.1 captioned "Application Notes" is amended in Note 4 by inserting before "The enhancement" the following:

"Application of Subsection (b)(6).—

(A) Misrepresentation of Participant's Identity.—";

and by striking the last paragraph as follows:

"Subsection (b)(6)(B) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.",

and inserting the following:

"(B) Use of a Computer or Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if a computer or an interactive computer service was used to (i) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (ii) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.".

The Commentary to §2A3.1 captioned "Application Notes" is amended by redesignating Note 5 as Note 6; and by inserting after Note 4 the following:

"5. Application of Subsection (c)(1).—

(A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes 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.

(B) Definition.—For purposes of subsection (c)(1), 'sexually explicit conduct' has the meaning given that term in 18 U.S.C. § 2256(2).".

The Commentary to §2A3.1 captioned "Application Notes" is amended in Note 6, as redesignated by this amendment, by inserting "Upward Departure Provision.—" before "If a victim".

Section 2A3.2 is amended by striking subsection (a) as follows:

"(a) Base Offense Level:

(1) 24, if the offense involved (A) a violation of chapter 117 of title 18, United States Code; and (B)(i) the commission of a sexual act; or (ii) sexual contact;

(2) 21, if the offense (A) involved a violation of chapter 117 of title 18, United States Code; but (B) did not involve (i) the commission of a sexual act; or (ii) sexual contact; or

(3) 18, otherwise.",

and inserting the following:

"(a) Base Offense Level: 18".

Section 2A3.2(b)(1) is amended by striking "victim" and inserting "minor"; and by striking "2 levels" and inserting "4 levels".

Section 2A3.2(b) is amended by striking subdivisions (2) through (4) as follows:

"(2) If subsection (b)(1) does not apply; and—

(A) the offense involved the knowing misrepresentation of a participant's identity to (i) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (ii) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct; or

(B) a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct, increase by 2 levels.

(3) If a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct, increase by 2 levels.

(4) If (A) subsection (a)(1) applies; and (B) none of subsections (b)(1) through (b)(3) applies, decrease by 6 levels.",

and inserting the following:

"(2) If (A) subsection (b)(1) does not apply; and (B)(i) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct; or (ii) a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct, increase by 4 levels.

(3) If a computer or an interactive computer service was used to persuade,

induce, entice, or coerce the minor to engage in prohibited sexual conduct, increase by 2 levels.".

The Commentary to §2A3.2 captioned "Application Notes" is amended in Note 1 by inserting after "Definitions.—For purposes of this guideline:" the following:

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

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

'Minor' means (A) an individual who had not attained the age of 16 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 16 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.";

and by striking the following :

"'Sexual act' has the meaning given that term in 18 U.S.C. § 2246(2).

'Sexual contact' has the meaning given that term in 18 U.S.C. § 2246(3).

'Victim' means (A) an individual who, except as provided in subdivision (B), had not attained the age of 16 years; or (B) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.".

The Commentary to §2A3.2 captioned "Application Notes" is amended in Note 2 by striking "Custody, Care, and Supervisory Control Enhancement.— Subsection (b)(1)" and inserting the following:

"Custody, Care, or Supervisory Control Enhancement.—

(A) In General.—Subsection (b)(1)";

by striking "victim" each place it appears and inserting "minor"; and by adding at the end the following:

"(B) Inapplicability of Chapter Three Adjustment.—If the enhancement in subsection (b)(1) applies, do not apply subsection (b)(2) or §3B1.3 (Abuse of Position of Trust or Use of Special Skill).".

The Commentary to §2A3.2 captioned "Application Notes" is amended by striking Notes 3 through 5 as follows:

"3. Abuse of Position of Trust.— If the enhancement in subsection (b)(1) applies, do not apply subsection (b)(2) or §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

4. Misrepresentation of Identity.—The enhancement in subsection (b)(2)(A) applies in cases involving the misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct. Subsection (b)(2)(A) is intended to apply only to misrepresentations made directly to the victim or to a person who exercises custody, care, or supervisory control of the victim. Accordingly, the enhancement in subsection (b)(2)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the victim.

   The misrepresentation to which the enhancement in subsection (b)(2)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

   In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the victim compromised the voluntariness of the victim's behavior.

   In a case in which a participant is at least 10 years older than the victim, there shall be a rebuttable presumption, for purposes of subsection (b)(2)(B), that such participant unduly influenced the victim to engage in prohibited sexual conduct. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the victim.

   If the victim was threatened or placed in fear, the cross reference in subsection (c)(1) will apply.

5. Use of Computer or Internet-Access Device.— Subsection (b)(3) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct. Subsection (b)(3) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with the victim or with a person who exercises custody, care, or supervisory control of the victim. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the victim from an airline's Internet site.",

and inserting the following:

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

(A) Misrepresentation of Identity.—The enhancement in subsection (b)(2)(B)(i) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. Subsection (b)(2)(B)(i) is intended to apply only to misrepresentations made directly to the minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(2)(B)(i) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(2)(B)(i) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) Undue Influence.—In determining whether subsection (b)(2)(B)(ii) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption, for purposes of subsection (b)(2)(B)(ii), that such participant unduly influenced the minor to engage in prohibited sexual conduct. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

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

The Commentary to §2A3.2 captioned "Application Notes" is amended by redesignating Notes 6 and 7 as Notes 5 and 6, respectively.

The Commentary to §2A3.2 captioned "Background" is amended by striking "or chapter 117 of title 18, United States Code"; by striking "victim" each place it appears and inserting "minor"; and by striking "victim's" and inserting "minor's".

Section 2A3.3(a) is amended by striking "9" and inserting "12".

Section 2A3.3(b)(1) is amended by striking "(A)"; and by striking "; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct".

Section 2A3.3(b)(2) is amended by striking "(A)"; by striking "; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct"; and by striking "Internet-access device" and inserting "interactive computer service".

The Commentary to §2A3.3 captioned "Application Notes" is amended in Note 1 by striking "For purposes of this guideline—" and inserting the following:

"Definitions.—For purposes of this guideline:

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

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

The Commentary to §2A3.3 captioned "Application Notes" is amended by striking Notes 2 and 3 as follows:

"2. The enhancement in subsection (b)(1) applies in cases involving the misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(1) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(1) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

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

3. Subsection (b)(2) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(2) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an

airline's Internet site.",

and inserting the following:

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

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

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

Section 2A3.4(a) is amended by striking subdivisions (1) through (3) as follows:

"(1) 16, if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b);

(2) 12, if the offense was committed by the means set forth in 18 U.S.C. § 2242;

(3) 10, otherwise.",

and inserting the following:

"(1) 20, if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b);

(2) 16, if the offense involved conduct described in 18 U.S.C. § 2242; or

(3) 12, otherwise.".

Section 2A3.4(b)(1) is amended by striking "16" each place it appears and inserting "20".

Section 2A3.4(b) is amended by striking subdivisions (4) through (6) as follows:

"(4) If the offense involved the knowing misrepresentation of a participant's

identity to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, increase by 2 levels.

(5) If a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, increase by 2 levels.

(6) If the offense involved a violation of chapter 117 of title 18, United States Code, increase by 3 levels.",

and inserting the following:

"(4) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by 2 levels.

(5) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by 2 levels.".

The Commentary to §2A3.4 captioned "Application Notes" is amended in Note 1 by striking the following:

"For purposes of this guideline—

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

and inserting the following:

"1. Definitions.—For purposes of this guideline:

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

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

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

The Commentary to §2A3.4 captioned "Application Notes" is amended by striking Notes 2 and 3 as follows:

"2. ‘The means set forth in 18 U.S.C. § 2241(a) or (b)’ are: by using force against the victim; by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.

3. ‘The means set forth in 18 U.S.C. § 2242’ are: by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or by victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.",

and inserting the following:

"2. Application of Subsection (a)(1).—For purposes of subsection (a)(1), ‘conduct described in 18 U.S.C. § 2241(a) or (b)’ is engaging in, or causing sexual contact with, or by another person by: (A) using force against the victim; (B) threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; (C) rendering the victim unconscious; or (D) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.

3. Application of Subsection (a)(2).—For purposes of subsection (a)(2), ‘conduct described in 18 U.S.C. § 2242’ is: (A) engaging in, or causing sexual contact with, or by another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or (B) engaging in, or causing sexual contact with, or by another person who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.".

The Commentary to §2A3.4 captioned "Application Notes" is amended in Note 4 by inserting before "Subsection (b)(3)" the following:

"Application of Subsection (b)(3).—

(A) Custody, Care, or Supervisory Control.—";

and by adding at the end the following:

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

The Commentary to §2A3.4 captioned "Application Notes" is amended by striking Note 5 as follows:

> "5. If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).";

and by redesignating Notes 6 and 7 as Notes 5 and 6, respectively.

The Commentary to §2A3.4 captioned "Application Notes" is amended in Note 5, as redesignated by this amendment, by inserting "Misrepresentation of a Participant's Identity.—" before "The enhancement"; by striking "(A)" each place it appears; and by striking "; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct" each place it appears.

The Commentary to §2A3.4 captioned "Application Notes" is amended in Note 6, as redesignated by this amendment, by striking the text as follows:

> "Subsection (b)(5) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(5) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.",

and inserting the following:

> "Application of Subsection (b)(5).—Subsection (b)(5) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(5) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.".

The Commentary to §2A3.4 captioned "Background" is amended by striking the following:

> "For cases involving consensual sexual contact involving victims that have achieved the age of 12 but are under age 16, the offense level assumes a substantial difference in sexual experience between the defendant and the victim. If the defendant and the victim are similar in sexual experience, a downward departure may be warranted. For such cases, the Commission recommends a downward departure to the equivalent of an offense level of level 6.".

Chapter Two, Part G, Subpart 1 is amended by striking §2G1.1 and its accompanying commentary as follows:

> "§2G1.1. Promoting A Commercial Sex Act or Prohibited Sexual Conduct

(a) Base Offense Level:

(1) 19, if the offense involved a minor; or

(2) 14, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved (A) a commercial sex act; and (B) the use of physical force, fraud, or coercion, increase by 4 levels.

(2) If the offense involved a victim who had (A) not attained the age of 12 years, increase by 4 levels; or (B) attained the age of 12 years but not attained the age of 16 years, increase by 2 levels.

(3) If subsection (b)(2) applies; and—

(A) the defendant was a parent, relative, or legal guardian of the victim; or

(B) the victim was otherwise in the custody, care, or supervisory control of the defendant,

increase by 2 levels.

(4) If subsection (b)(3) does not apply; and—

(A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act; or

(B) a participant otherwise unduly influenced a minor to engage in a commercial sex act,

increase by 2 levels.

(5) If a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor, increase by 2 levels.

(c) Cross References

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a person less than 18 years of age 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 criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the offense involved criminal sexual abuse of a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the 'consent' of the victim.

(3) If the offense did not involve promoting a commercial sex act, and neither subsection (c)(1) nor (c)(2) is applicable, apply §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate.

(d) Special Instruction

(1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328; 18 U.S.C. §§ 1591, 2421, 2422, 2423(a), 2425.

Application Notes:

1. For purposes of this guideline—

   'Commercial sex act' has the meaning given that term in 18 U.S.C. § 1591(c)(1).

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

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

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

   'Promoting a commercial sex act' means persuading, inducing, enticing, or coercing a person to engage in a commercial sex act, or to travel to engage in, a commercial sex act.

   'Victim' means a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct, whether or not the person consented to the commercial sex act or prohibited sexual conduct. Accordingly, 'victim' may include an undercover law enforcement officer.

2. Subsection (b)(1) provides an enhancement for physical force, fraud, or coercion, that occurs as part of a commercial sex act offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures). For purposes of subsection (b)(1)(B), 'coercion' includes any form of conduct that negates the voluntariness of the behavior of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of an adult victim, rather than a victim less than 18 years of age, this characteristic generally will not apply if the drug or alcohol was voluntarily taken.

3. For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.

4. For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of a commercial sex act or prohibited sexual conduct in respect to more than

one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.

5. Subsection (b)(3) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

6. If the enhancement in subsection (b)(3) applies, do not apply subsection (b)(4) or §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

7. The enhancement in subsection (b)(4)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act. Subsection (b)(4)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(4)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

   The misrepresentation to which the enhancement in subsection (b)(4)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

   In determining whether subsection (b)(4)(B) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.

   In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption, for purposes of subsection (b)(4)(B), that such participant unduly influenced the minor to engage in a commercial sex act. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

8. Subsection (b)(5) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct

with a minor. Subsection (b)(5)(A) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(5)(A) would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.

9. The cross reference in subsection (c)(1) is to be construed broadly to include all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a person less than 18 years of age to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), 'sexually explicit conduct' has the meaning given that term in 18 U.S.C. § 2256.

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

11. The cross reference in subsection (c)(3) addresses the case in which the offense did not involve promoting a commercial sex act, neither subsection (c)(1) nor (c)(2) is applicable, and the offense involved prohibited sexual conduct other than the conduct covered by subsection (c)(1) or (c)(2). In such case, the guideline for the underlying prohibited sexual conduct is to be used; i.e., §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact).

12. Upward Departure Provision.—An upward departure may be warranted if the offense involved more than 10 victims.

Background: This guideline covers offenses under chapter 117 of title 18, United States Code. Those offenses involve promoting prostitution or prohibited sexual conduct through a variety of means. Offenses that involve promoting prostitution under chapter 117 of such title are sentenced under this guideline, unless other prohibited sexual conduct occurs as part of the prostitution offense, in which case one of the cross references would apply. Offenses under chapter 117 of such title that do not involve promoting prostitution are to be sentenced under §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), §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate, pursuant to the cross references provided in subsection (c).

This guideline also covers offenses under section 1591 of title 18, United States Code. These offenses involve recruiting or transporting a person in interstate commerce knowing either that (1) force, fraud, or coercion will be used to cause the person to engage in a commercial sex act; or (2) the person (A) had not attained the age of 18 years; and (B) will be caused to engage in a commercial sex act.",

and inserting the following:

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

(a) Base Offense Level: 14

(b) Specific Offense Characteristic

(1) If the offense involved fraud or coercion, increase by 4 levels.

(c) Cross Reference

(1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18 U.S.C. § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(d) Special Instruction

(1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a victim other than a minor); 18 U.S.C. §§ 1591 (only if the offense involved a victim other than a minor), 2421 (only if the offense involved a victim other than a minor), 2422(a) (only if the offense involved a victim other than a minor).

Application Notes:

1. Definitions.—For purposes of this guideline:

   'Commercial sex act' has the meaning given that term in 18 U.S.C. § 1591(c)(1).

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

   'Promoting a commercial sex act' means persuading, inducing, enticing, or coercing a person to engage in a commercial sex act, or to travel to engage in, a commercial sex act.

   'Victim' means a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct, whether or not the person consented to the commercial sex act or prohibited sexual conduct. Accordingly, 'victim' may include an undercover law enforcement officer.

2. Application of Subsection (b)(1).—Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures). For purposes of subsection (b)(1), 'coercion' includes any form of conduct that negates the voluntariness of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. This characteristic generally will not apply if the drug or alcohol was voluntarily taken.

3. Application of Chapter Three Adjustment.—For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.

4. Application of Subsection (c)(1).—

   (A) Conduct Described in 18 U.S.C. § 2241(a) or (b).—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person by: (i) using force against the victim; (ii) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the victim unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any

dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.

(B) Conduct Described in 18 U.S.C. § 2242.—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2242 is: (i) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (ii) engaging in, or causing another person to engage in, a sexual act with a victim who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

5. Special Instruction at Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.

6. Upward Departure Provision.—If the offense involved more than ten victims, an upward departure may be warranted.

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

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

Offenses of promoting prostitution or prohibited sexual conduct in which a minor victim is involved are to be sentenced under §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor).".

Chapter Two, Part G, Subpart 1, is amended by adding at the end the following new guideline and accompanying commentary:

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

(a) Base Offense Level: 24

(b) Specific Offense Characteristics

(1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by 2 levels.

(3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by 2 levels.

(4) If the offense involved (A) the commission of a sex act or sexual contact; or (B) a commercial sex act, increase by 2 levels.

(5) If the offense involved a minor who had not attained the age of 12 years, increase by 8 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), if the resulting offense level is greater than that determined above.

(2) If a minor 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), if the resulting offense level is greater than that determined above.

(3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the 'consent' of the minor.

(d) Special Instruction

(1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

'Commercial sex act' has the meaning given that term in 18 U.S.C. § 1591(c)(1).

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

'Illicit sexual conduct' has the meaning given that term in 18 U.S.C. § 2423(f).

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

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

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

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

'Sexual act' has the meaning given that term in 18 U.S.C. § 2246(2).

'Sexual contact' has the meaning given that term in 18 U.S.C. § 2246(3).

2. Application of Subsection (b)(1).—

(A) Custody, Care, or Supervisory Control.—Subsection (b)(1) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement under subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. Application of Subsection (b)(2).—

(A) Misrepresentation of Participant's Identity.—The enhancement in

subsection (b)(2)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Subsection (b)(2)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(2)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(2)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) Undue Influence.—In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption, for purposes of subsection (b)(2)(B), that such participant unduly influenced the minor to engage in prohibited sexual conduct. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

4. Application of Subsection (b)(3).—Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

5. Application of Subsection (c).—

(A) Application of Subsection (c)(1).—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice, advertisement or other method, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of

subsection (c)(1), 'sexually explicit conduct' has the meaning given that term in 18 U.S.C. § 2256(2).

(B) Application of Subsection (c)(3).—For purposes of subsection (c)(3), conduct described in 18 U.S.C. § 2241 means conduct described in 18 U.S.C. § 2241(a), (b), or (c). Accordingly, for purposes of subsection (c)(3):

(i) Conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person: (I) using force against the minor; (II) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (III) rendering the minor unconscious; or (IV) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

(ii) Conduct described in 18 U.S.C. § 2241(c) is: (I) interstate travel with intent to engage in a sexual act with a minor who has not attained the age of 12 years; (II) knowingly engaging in a sexual act with a minor who has not attained the age of 12 years; or (III) knowingly engaging in a sexual act under the circumstances described in 18 U.S.C. § 2241(a) and (b) with a minor who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging).

(iii) Conduct described in 18 U.S.C. § 2242 is: (I) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the minor in fear (other than by threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (II) engaging in, or causing another person to engage in, a sexual act with a minor who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

6. Application of Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each minor transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate minor. Consequently, multiple counts involving more than one minor are not to be

grouped together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes travel or transportation to engage in a commercial sex act or prohibited sexual conduct in respect to more than one minor, whether specifically cited in the count of conviction, each such minor shall be treated as if contained in a separate count of conviction.

7. Upward Departure Provision.—If the offense involved more than ten minors, an upward departure may be warranted.

Background: This guideline covers offenses under chapter 117 of title 18, United States Code, involving transportation of a minor for illegal sexual activity through a variety of means. This guideline also covers offenses involving a minor under section 1591 of title 18, United States Code. Offenses involving an individual who had attained the age of 18 years are covered under §2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor).".

Section 2G2.1(a) is amended by striking "27" and inserting "32".

Section 2G2.1(b) is amended in subdivision (1) by striking "victim" and inserting "minor"; by redesignating subdivisions (2) and (3) as subdivisions (5) and (6), respectively; and by inserting after subdivision (1) the following:

"(2) (Apply the greater) If the offense involved—

(A) the commission of a sexual act or sexual contact, increase by 2 levels; or

(B) (i) the commission of a sexual act; and (ii) conduct described in 18 U.S.C. § 2241(a) or (b), increase by 4 levels.

(3) If the offense involved distribution, 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.".

Section 2G2.1(b)(6), as redesignated by this amendment, is amended by striking "Internet-access device" and inserting "interactive computer service".

Section 2G2.1 is amended by redesignating subsection (c) as subsection (d); and by inserting after subsection (b) the following:

"(c) Cross Reference

(1) If the victim was killed in 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), if the resulting offense level is

greater than that determined above.".

The Commentary to §2G2.1 captioned "Statutory Provisions" is amended by striking "(a), (b), (c)(1)(B), 2260" and inserting ", 2260(b)".

The Commentary to §2G2.1 captioned "Application Notes" is amended by striking Notes 1 through 5 as follows:

"1. For purposes of this guideline, 'minor' means an individual who had not attained the age of 18 years.

2. For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate victim. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.

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

4. If the adjustment in subsection (b)(2) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

5. The enhancement in subsection (b)(3)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material. Subsection (b)(3)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(3)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the

enhancement.

Subsection (b)(3)(B)(i) provides an enhancement if a computer or an Internet-access device was used to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or otherwise to solicit participation by a minor in such conduct for such purpose. Subsection (b)(3)(B)(i) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.",

and inserting the following:

"1. Definitions.—For purposes of this guideline:

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

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

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

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

'Sexually explicit conduct' has the meaning given that term in 18 U.S.C. § 2256(2).

2. Application of Subsection (b)(2).—For purposes of subsection (b)(2):

'Conduct described in 18 U.S.C. § 2241(a) or (b)' is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for

example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

'Sexual act' has the meaning given that term in 18 U.S.C. § 2246(2).

'Sexual contact' has the meaning given that term in 18 U.S.C. § 2246(3).

3. Application of Subsection (b)(5).—

(A) In General.—Subsection (b)(5) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement in subsection (b)(5) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

4. Application of Subsection (b)(6).—

(A) Misrepresentation of Participant's Identity.—The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(6)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) Use of a Computer or an Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if the offense involved the use of a computer or an interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or otherwise to solicit participation by a minor in such conduct for such purpose. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

5. Application of Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.".

The Commentary to §2G2.1 captioned "Application Notes" is amended in Note 6 by striking "victims" and inserting "minors".

Chapter Two, Part G, Subpart 2, is amended by striking §2G2.2 and its accompanying commentary as follows:

"§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, receipt, or distribution 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.",

and inserting the following:

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

(a) Base Offense Level:

(1) 18, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), or § 2252A(a)(5).

(2) 22, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels.

(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels.

(3) (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, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.

(E) 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.

(F) Distribution other than distribution described in subdivisions (A) through (E), 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 defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, increase by 2 levels.

(7) 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. §§ 1466A, 2252, 2252A, 2260(b).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

'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.

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

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

'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 minor; 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 any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251, § 2251A, § 2260(b),

§ 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). 'Sexual abuse or exploitation' does not include possession, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

2. Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, receive, or distribute such materials.

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

4. Application of Subsection (b)(7).—

   (A) Definition of 'Images'.—'Images' means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8).

   (B) Determining the Number of Images.—For purposes of determining the number of images under subsection (b)(7):

      (i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.

      (ii) Each video, video-clip, movie, or similar recording shall be considered to have 75 images. If the length of the recording is substantially more than 5 minutes, an upward departure may be warranted.

5. Application of Subsection (c)(1).—

   (A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes 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.

   (B) Definition.—'Sexually explicit conduct' has the meaning given that term in 18 U.S.C. § 2256(2).

6. Upward Departure Provision.—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)(5) 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)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (7), effective April 30, 2003.".

Chapter Two, Part G, Subpart 2, is amended by striking §2G2.4 and its accompanying commentary as follows:

"§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.".

Section 2G3.1 is amended in the heading by adding at the end "; Misleading Domain Names".

Section 2G3.1(b)(1) is amended by redesignating subdivisions (D) and (E) as subdivisions (E) and (F), respectively; and by inserting after subdivision (C) the following:

"(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.";

and in subdivision (F), as redesignated by this amendment, by striking "(D)" and inserting "(E)".

Section 2G3.1(b) is amended by redesignating subdivision (2) as subdivision (4); and by inserting after subdivision (1) the following:

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

(3) If the offense involved the use of a computer or an interactive computer service, increase by 2 levels.".

The Commentary to §2G3.1 captioned "Statutory Provisions" is amended by inserting ", 2252B" after "1470".

The Commentary to §2G3.1 captioned "Application Note" is amended by striking "Note" in the heading and inserting "Notes"; and by striking Application Note 1 as follows:

"1. For purposes of this guideline—

'Distribution' means any act, including production, transportation, and possession with intent to distribute, related to the transfer of obscene matter.

'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.

'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 16 years.

'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).",

and inserting the following:

"1. Definitions.—For purposes of this guideline:

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

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

'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.

'Distribution to a minor' means the knowing distribution to an individual who is a minor at the time of the offense.

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

'Material that is harmful to minors' has the meaning given that term in 18 U.S.C. § 2252B(d).

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

'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).

'Sexually explicit conduct' has the meaning given that term in 18 U.S.C. § 2256(2).

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

3. Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, receive, or distribute such materials.".

Section 3D1.2(d) is amended by striking "2G2.4" and inserting "2G3.1".

Section 5B1.3(d)(7) is amended by striking:

"If the instant offense of conviction is a sex offense, as defined in §5D1.2 (Term of Supervised Release) -- a condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.",

and inserting the following:

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

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.".

Section 5D1.2 is amended by striking subsections (a) through (c) as follows:

"(a) Subject to subsection (b), if a term of supervised release is ordered, the length of the term shall be:

(1) at least three years but not more than five years for a defendant convicted of a Class A or B felony;

(2) at least two years but not more than three years for a defendant convicted of a Class C or D felony;

(3) one year for a defendant convicted of a Class E felony or a Class A misdemeanor.

Notwithstanding subdivisions (1) through (3), the length of the term of supervised release for any offense listed in 18 U.S.C. § 2332b(g)(5)(B) the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person (A) shall be not less than the minimum term of years specified for that class of offense under subdivisions (1) through (3); and (B) may be up to life.

(b) Except as otherwise provided, the term of supervised release imposed shall not be less than any statutorily required term of supervised release.

(c) (Policy Statement) If the instant offense of conviction is a sex offense, the statutory maximum term of supervised release is recommended.",

and inserting following:

"(a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:

(1) At least three years but not more than five years for a defendant convicted of a Class A or B felony.

(2) At least two years but not more than three years for a defendant convicted of a Class C or D felony.

(3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor.

(b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—

(1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or

(2) a sex offense.

(Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.

(c) The term of supervised release imposed shall be not less than any statutorily required term of supervised release.".

Section 5D1.3(d)(7) is amended by striking:

"If the instant offense of conviction is a sex offense, as defined in §5D1.2 (Term of Supervised Release) -- a condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.",

and inserting the following:

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

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.".

Section 7B1.3(g) is amended by striking "Where" each place it appears and inserting "If"; and in subdivision (2) by striking "and the term of imprisonment imposed is less than the maximum term of imprisonment imposable upon revocation".

The Commentary to §7B1.3 captioned "Application Notes" is amended in Note 2 by striking "and imposition of less than the maximum imposable term of imprisonment"; and by striking Note 6 as follows:

"6. ‘Maximum term of imprisonment imposable upon revocation,’ as used in subsection (g)(2), refers to the maximum term of imprisonment authorized by statute for the violation of supervised release, not to the maximum of the guideline range.".

Appendix A (Statutory Index) is amended in the line referenced to 8 U.S.C. § 1328 by inserting ", 2G1.3" after "2G1.1";

by inserting after the line referenced to 18 U.S.C. § 1466 the following:

"18 U.S.C. § 1466A 2G2.2";

in the line referenced to 18 U.S.C. § 1591 by inserting ", 2G1.3" after "2G1.1";

in the line referenced to 18 U.S.C. § 2252 by striking ", 2G2.4";

in the line referenced to 18 U.S.C. § 2252A by striking ", 2G2.4";

by inserting before the line referenced to 18 U.S.C. § 2257 the following new line:

"18 U.S.C. § 2252B 2G3.1";

by striking the following:

"18 U.S.C. § 2260 2G2.1, 2G2.2",

and inserting the following:

"18 U.S.C. § 2260(a) 2G2.1
18 U.S.C. § 2260(b) 2G2.2";

in the line referenced to 18 U.S.C. § 2421 by inserting ", 2G1.3" after "2G1.1";

in the line referenced to 18 U.S.C. § 2422 by inserting ", 2G1.3" after "2G1.1";

in the line referenced to 18 U.S.C. § 2423(a) by striking "2G1.1" and inserting "2G1.3";

in the line referenced to 18 U.S.C. § 2423(b) by striking "2A3.1, 2A3.2, 2A3.3" and inserting "2G1.3"; and

in the line referenced to 18 U.S.C. § 2425 by striking "2G1.1" and inserting "2G1.3".

Reason for Amendment: This amendment implements the directives to the Commission regarding child pornography and sexual abuse offenses in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, (the "PROTECT Act"), Pub. L. 108–21. This amendment makes changes to Chapter Two, Part A (Criminal Sexual Abuse), Chapter Two, Part G (Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity), §§3D1.2 (Groups of Closely Related Counts), 5B1.3 (Conditions of Probation), 5D1.2 (Term of Supervised Release), and 5D1.3 (Conditions of Supervised Release), and Appendix A (Statutory Index).

First, the amendment consolidates §§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), and 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), into one guideline, §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; Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct). Consolidation addresses concerns raised by judges, probation officers, prosecutors, and defense attorneys regarding difficulties in determining the appropriate guideline (§2G2.2 or §2G2.4) for cases involving convictions of 18 U.S.C. § 2252 or § 2252A. Furthermore, as a result of amendments directed by the PROTECT Act, these guidelines have a number of similar specific offense characteristics.

Section 103 of the PROTECT Act established five-year mandatory minimum terms of imprisonment for offenses related to trafficking and receipt of child pornography under 18 U.S.C. §§ 2252(a)(1)-(3) and 2252A(a)(1), (2), (3), (4) and (6). This section also increased the statutory maximum terms of imprisonment for these offenses from 15 years to 20 years. Furthermore, the PROTECT Act increased the statutory maximum penalty for possession offenses from five to ten years. As a result of these new mandatory minimum penalties and the increases in the statutory maxima for these offenses, the Commission increased the base offense level for these offenses.

The amendment provides two alternative base offense levels depending upon the statute of conviction. The base offense level is set at level 18 for a defendant convicted of the possession of child pornography under 18 U.S.C. § 2252(a)(4), 18 U.S.C. § 2252A(a)(5), or 18 U.S.C. § 1466A(b), and at level 22 for a defendant convicted of any other offense referenced to this guideline, primarily trafficking and receipt of child pornography. The Commission determined that a base offense level of level 22 is appropriate for trafficking offenses because, when combined with several specific offense characteristics which are expected to apply in almost every case (e.g., use of a computer, material involving children under 12 years of age, number of images), the mandatory minimum of 60 months'

imprisonment will be reached or exceeded in almost every case by the Chapter Two calculations. The Commission increased the base offense level for possession offenses from level 15 to level 18 because of the increase in the statutory maximum term of imprisonment from 5 to 10 years, and to maintain proportionality with receipt and trafficking offenses. The amendment also provides a two-level decrease at §2G2.2(b)(1) for a defendant whose base offense level is level 22, whose conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor, and whose conduct did not involve an intent to traffic in or distribute the material. Thus, individuals convicted of receipt of child pornography with no intent to traffic or distribute the material essentially will have an adjusted offense level of level 20, as opposed to an offense level of level 22, for receipt with intent to traffic, prior to application of any other specific offense characteristics. The Commission's review of these cases indicated the conduct involved in such "simple receipt" cases in most instances was indistinguishable from "simple possession" cases. The statutory penalties for "simple receipt" cases, however, are the same as the statutory penalties for trafficking cases. Reconciling these competing concerns, the Commission determined that a two-level reduction from the base offense level of level 22 is warranted, if the defendant establishes that there was no intent to distribute the material.

The amendment also provides a new, six-level enhancement at §2G2.2(b)(3)(D) for offenses that involve distribution to a minor with intent to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than sexual activity.

The amendment also makes a number of changes to the commentary at §2G2.2, as follows. The amendment adds several definitions, including definitions of "computer," "image," and "interactive computer service," to provide greater guidance for these terms and uniformity in application of the guideline. The amendment also broadens the "use of a computer" enhancement at §2G2.2(b)(5) in two ways. First, the amendment expands the enhancement to include an "interactive computer service" (e.g., Internet access devices), as defined in 47 U.S.C. § 230(f)(2). The Commission concluded that the term "computer" did not capture all types of Internet devices. Thus, the amendment expands the definition of "computer" to include other devices that involve interactive computer services (e.g., Web-Tv). In addition, the amendment broadens the enhancement by explicitly providing that the enhancement applies to offenses in which the computer or interactive computer service was used to obtain possession of child pornographic material. Prior to this amendment, the enhancement only applied if the computer was used for the transmission, receipt or distribution of the material.

The PROTECT Act directly amended §§2G2.2 and 2G2.4 to create a specific offense characteristic related to the number of child pornography images. That specific offense characteristic provides a graduated enhancement of two to five levels, depending on the number of images. However, the congressional amendment did not provide a definition of "image," which raised questions regarding how to apply the specific offense characteristic. This amendment defines the term "image" and provides an instruction regarding how to apply the specific offense characteristic to videotapes. Application Note 4 states that an "image" means any visual depiction described in 18 U.S.C. § 2256(5) and (8) and instructs that each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered one image. Furthermore, the application note provides that each video, video-clip, movie, or similar recording shall be considered to have 75 images for purposes of the specific offense characteristic. Application Note 4 also provides two possible grounds for an upward departure (if the number of images substantially under-

represents the number of minors or if the length of the videotape or recording is substantially more than five minutes). Because the image specific offense characteristic created directly by Congress in the PROTECT Act essentially supercedes an earlier directive regarding a specific offense characteristic relating to the number of items (see Pub. L. 102–141 and Amendment 436), the Commission deleted the specific offense characteristic for possessing ten or more child pornographic items (formerly §2G2.4(b)(3)). This deletion avoids potential litigation regarding issues of "double counting" if both specific offense characteristics were retained in the guideline.

In response to the increase in the use of undercover officers in child pornography investigations, the amendment expands the definition of "minor." "Minor" is defined as (1) an individual who had not attained the age of 18 years; (2) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (A) had not attained the age of 18 years, and (B) could be provided to a participant for the purposes of engaging in sexually explicit conduct; or (3) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

The amendment also makes clear that distribution includes advertising and posting material involving the sexual exploitation of a minor on a website for public viewing but does not include soliciting such material. In response to a circuit conflict, the amendment adds an application note to make clear that the specific offense characteristic for material portraying sadistic or masochistic conduct applies regardless of whether the defendant specifically intended to possess, receive, or distribute such material. The circuit courts have disagreed regarding whether a defendant must have specifically intended to receive the sadistic or masochistic images. Some circuit courts have required that the defendant must have intended to receive these images. See United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995); United States v. Tucker, 136 F.3d 763 (11th Cir. 1998). The Seventh Circuit has held that this specific offense characteristic is applied based on a strict liability standard, and that no proof of intent is necessary. See United States v. Richardson, 238 F.3d 837 (7th Cir. 2001). The Commission followed the Seventh Circuit's holding that the enhancement applies regardless of whether the defendant specifically intended to possess, receive, or distribute such material.

Second, section 103 of the PROTECT Act increased the mandatory minimum term of imprisonment from 10 to 15 years for offenses related to the production of child pornography under 18 U.S.C. § 2251. In response, the amendment increases the base offense level at §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) from level 27 to level 32. A base offense level of level 32 is appropriate for production offenses because, combined with the application of several specific offense characteristics that are expected to apply in almost all production cases (e.g., age of the victim), this base offense level will ensure that the 15 year mandatory minimum (180 months) will be met in by the Chapter Two calculations almost every case.

The amendment adds three new specific offense characteristics that are associated with the production of child pornography. The amendment provides, at §2G2.1(b)(2), a two-level increase if the offense involved the commission of a sex act or sexual contact, or a four-level increase if the offense involved a sex act and conduct described in 18 U.S.C. § 2241(a) or

(b) (i.e., the use of force was involved). The Commission concluded that this type of conduct is more serious than the production of a picture without a sex act or the use of force, and therefore, a two- or four-level increase is appropriate. The amendment also adds a two-level increase if the production offense also involved distribution. The Commission concluded that because traffickers sentenced at §2G2.2 receive an increase for distributing images of child pornography, an individual who produces and distributes the image(s) also should be punished for distributing the item. Lastly, the amendment adds a new, four-level increase if the offense involved material portraying sadistic or masochistic conduct. Similar to the distribution specific offense characteristic, the Commission concluded that, because §2G2.2 contains a four-level increase for possessing, receiving or trafficking these images, the producers of such images also should receive comparable additional punishment.

Third, this amendment creates a new guideline, §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), to specifically address offenses under chapter 117 of title 18, United States Code (Transportation for Illegal Sexual Activity and Related Crimes). Prior to the amendment, chapter 117 offenses, primarily 18 U.S.C. §§ 2422 (Coercion and Enticement) and 2423 (Transportation of Minors), were referenced by Appendix A (Statutory Index) to either §2G1.1 or §2A3.2. Offenses under 18 U.S.C. §§ 2422 and 2423(a) (Transportation with Intent to Engage in Criminal Sexual Activity) are referenced to §2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct), but are then cross referenced from §2G1.1 to §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) in order to account for certain underlying behavior. Application of this cross reference has led to confusion among courts and practitioners. Offenses under 18 U.S.C. § 2423(b) (Travel with Intent to Engage in Sexual Act with a Juvenile) are referenced to §2A3.1, §2A3.2, or §2A3.3, but most are sentenced at §2A3.2. Until recently, the majority of cases sentenced under §2A3.2 were statutory rape cases that occurred on federal property (e.g., military bases) or Native American lands. In fiscal years 2001 and 2002, the majority of cases sentenced under the statutory rape guideline were coercion, travel, and transportation offenses. The creation of a new guideline for these cases is intended to address more appropriately the issues specific to these offenses. In addition, the removal of these cases from §2A3.2 will permit the Commission to more appropriately tailor that guideline to actual statutory rape cases. Furthermore, travel and transportation cases have a different statutory penalty structure than § 2243(a) statutory rape cases.

Prior to the amendment, §2A3.2 provided alternative base offense levels of (1) level 24 for a chapter 117 violation with a sexual act; (2) level 21 for a chapter 117 violation with no sexual act (e.g., a sting case); or (3) level 18 for statutory rape with no travel. The PROTECT Act created a five year mandatory minimum term of imprisonment for 18 U.S.C. §§ 2422(a) and 2423(a) and increased the statutory maximum term of imprisonment for these offenses from 15 to 30 years. The PROTECT Act, however, did not increase the statutory maximum penalty, nor did the Act add a mandatory minimum, for 18 U.S.C. § 2243(a) offenses.

This new guideline has a base offense level of level 24 to account for the new mandatory minimum terms of imprisonment established by the PROTECT Act. The new guideline

provides six specific offense characteristics to provide proportionate enhancements for aggravating conduct that may occur in connection with these cases. The guideline contains enhancements for commission of a sex act or commercial sex act, use of a computer, misrepresentations of identity, undue influence, custody issues, and involvement of a minor under the age of 12 years. The amendment also provides three cross references to account for certain more serious sexual abuse conduct, including a cross reference if the offense involved conduct described in 18 U.S.C. § 2241 or § 2242. Furthermore, the amendment makes conforming changes to §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct) as a result of the creation of the new travel guideline. Section 2G1.1 is expected to apply primarily to adult prostitution cases because of the creation of §2G1.3.

Fourth, section 521 of the PROTECT Act created a new offense at 18 U.S.C. § 2252B (Misleading Domain Names on the Internet). Section 2252B(a) prohibits the knowing use of a misleading domain name on the Internet with the intent to deceive a person into viewing material constituting obscenity. Offenses under this subsection are punishable by a maximum term of imprisonment of two years. Section 2252B(b) prohibits the knowing use of a misleading domain name with the intent to deceive a minor into viewing material that is harmful to minors, with a maximum term of imprisonment of four years. The amendment refers the new offense to §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor), modifies the title of the guideline to include "Misleading Domain Names", and provides a two-level enhancement at §2G3.1(b)(2), if "the offense involved the use of a misleading domain name on the Internet with the intent to deceive a minor into viewing material on the Internet that is harmful to minors." In addition, the amendment also provides enhancements for the following conduct: (1) distribution to a minor that was intended to persuade, induce, entice, or coerce a minor to engage in any illegal activity; and (2) use of a computer or interactive computer service. Finally, the amendment adds §2G3.1 to the list of guidelines at subsection (d) of §3D1.2 (Groups of Closely Related Counts). Grouping multiple counts of these offenses pursuant to §3D1.2(d) is appropriate because typically these offenses, as well as other pornography distribution offenses, are ongoing or continuous in nature. The amendment makes other minor technical changes to the commentary to make this guideline consistent with other Chapter Two, Part G guidelines.

Fifth, in response to a circuit conflict, this amendment adds a condition to §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) permitting the court to limit the use of a computer or an interactive computer service for sex offenses in which the defendant used such items. The circuit courts have disagreed over imposition of restrictive computer use and Internet-access conditions. Some circuit courts have refused to allow complete prohibitions on computer use and Internet access (see United States v. Sofsky, 287 F.3d 122 (2nd Cir. 2002) (invalidating restrictions on computer use and Internet use); United States v. Freeman, 316 F.3d 386 (3d Cir. 2003) (same)), but other circuit courts have upheld restrictions on computer use and Internet access with probation officer permission (see United States v. Fields, 324 F.3d 1025 (8th Cir. 2003) (upholding condition prohibiting defendant from having Internet service in his home and allowing possessing of a computer only if granted permission by his probation officer); United States v. Walser, 275 F.3d 981 (10th Cir. 2001) (prohibiting Internet use but allowing Internet use with probation officer's permission); United States v. Zinn, 321 F.3d 1084 (11th Cir. 2003) (same)). Other courts have permitted a complete ban on a convicted sex offender's Internet use while on supervised release. See United States v. Paul, 274 F.3d 155 (5th Cir. 2001)

(upholding complete ban on Internet use).

In addition, this amendment makes §5D1.2 (Term of Supervised Release) consistent with changes made by the PROTECT Act regarding the applicable terms of supervised release under 18 U.S.C. § 3583 for sex offenders.

Sixth, section 401(i)(2) of the PROTECT Act directs the Commission to "amend the Sentencing Guidelines to ensure that the Guidelines adequately reflect the seriousness of the offenses" under sections 2243(b) (Sexual Abuse of a Ward), 2244(a)(4) (Abusive Sexual Contact), and 2244(b) (Sexual Contact with a Person without that Person's Permission) of title 18, United States Code. This amendment makes several amendments to the guidelines in Chapter Two, Part A (Criminal Sexual Abuse) to address this directive and to account for proportionality issues created by the increases in the Chapter Two, Part G guidelines. In addition, the amendment makes changes to the commentary to make the definitions in these guidelines consistent with definitions in the pornography guidelines.

Seventh, the amendment increases the base offense level at §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) from level 27 to level 30 to maintain proportionality between this guideline and §2G2.1, the production of child pornography guideline, the base offense level of which was raised to level 32 by this amendment. Furthermore, the amendment adds the term "interactive computer service" to the computer enhancement in §2A3.1.

Eighth, the amendment increases the offense levels for two specific offense characteristics at §2A3.2. The amendment increases the custody, care, or supervisory control enhancement from two to four levels at §2A3.2(b)(1), and changes §2A3.2(b)(3), which involves the misrepresentation or undue influence by the defendant, from a two- to a four-level increase. The Commission concluded that an increase in the magnitude of these enhancements is appropriate because of the seriousness of such conduct. The amendment also deletes the alternative base offense level of level 21 or level 24 because these cases will be referenced to the new travel guideline at §2G1.3.

Ninth, in response to section 401 of the PROTECT Act, the amendment increases the base offense level at §2A3.3 (Criminal Sexual Abuse of a Ward) from level 9 to a level 12. Although 18 U.S.C. § 2243(b) offenses have only a one-year statutory maximum term of imprisonment, the Commission determined that these offenses were serious in nature and deserved punishment near that statutory maximum.

Finally, the amendment increases the alternative base offense levels in §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact) to level 20, 16, or 12, depending on the conduct involved in the offense. Prior to the amendment, these base offenses levels were level 16, 12, or 10. Base offense level 20 applies if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b). Base offense level 16 applies if the offense involved conduct described in 18 U.S.C. § 2242, and base offense level 12 applies for all other cases sentenced at this guideline. The Commission concluded that these increases were appropriate to account for the serious conduct committed by the defendant and to maintain proportionality with other Chapter Two, Part A guidelines.

Effective Date: The effective date of this amendment is November 1, 2004.

665. **Amendment:** Section 2B1.1(b) is amended by redesignating subdivisions (7) through (14) as subdivisions (8) through (15), respectively; and by inserting after subdivision (6) the following:

"(7) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by 2 levels.".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "1037," after "1031,".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 4 by redesignating subdivisions (B) and (C) as subdivisions (C) and (D), respectively; and by inserting after subdivision (A) the following:

"(B) Applicability to Transmission of Multiple Commercial Electronic Mail Messages.—For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.".

The Commentary to §2B1.1 captioned "Application Notes" is amended by redesignating Notes 6 through 18 as Notes 7 through 19, respectively; and by inserting after Note 5 the following:

"6. Application of Subsection (b)(7).—For purposes of subsection (b)(7), 'improper means' includes the unauthorized harvesting of electronic mail addresses of users of a website, proprietary service, or other online public forum.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1035 the following new line:

"18 U.S.C. § 1037 2B1.1".

Reason for Amendment: This amendment responds to the directive in section 4(b) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act) of 2003, Pub. L. 108–187. The Act creates five new felony offenses codified at 18 U.S.C. § 1037 and directs the Commission to review and as appropriate amend the sentencing guidelines and policy statements to establish appropriate penalties for violations of 18 U.S.C. § 1037 and other offenses that may be facilitated by sending large volumes of unsolicited electronic mail, including fraud, identity theft, obscenity, child pornography and sexual exploitation of children. The Act also requires that the Commission consider providing sentencing enhancements for several factors, including defendants convicted under 18 U.S.C. § 1037 who obtained electronic mail addresses through improper means.

The amendment refers violations of subsections of 18 U.S.C. § 1037 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). The Commission determined that reference to §2B1.1 is appropriate because subsection 18 U.S.C. § 1037(a)(1) involves misappropriation of another's computer, and 18 U.S.C. § 1037(a)(2) through (a)(5) involve deceit. Because each offense under 18 U.S.C. § 1037 contains as an element the transmission of multiple commercial electronic messages (where "multiple" is defined in the statute as "more than 100 electronic mail messages during a 24-hour period, more than 1,000 electronic mail messages during a 30-day period, or more than 10,000 electronic mail messages during a 1-year period"), the amendment provides in Application Note 4 that the mass-marketing enhancement in §2B1.1(b)(2)(A)(ii) shall apply automatically to any defendant who is convicted of 18 U.S.C. § 1037, or who committed an offense involving conduct described in 18 U.S.C. § 1037. Broadening application of the mass marketing enhancement to all defendants sentenced under §2B1.1 whose offense involves conduct described in 18 U.S.C. § 1037, whether or not the defendant is convicted under 18 U.S.C. § 1037, responds specifically to that part of the directive concerning offenses that are facilitated by sending large volumes of electronic mail.

Additionally, in response to the directive, a new specific offense characteristic in §2B1.1(b)(7) provides for a two-level increase if the defendant is convicted under 18 U.S.C. § 1037 and the offense involved obtaining electronic mail addressed through improper means. A corresponding application note provides a definition of "improper means." Finally, the Commission also responded to the directive concerning other offenses by making several modifications to other guidelines, as set forth in Amendment 2 of this document. For example, an amendment to the obscenity guideline, §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor), added a two-level enhancement if the offense involved the use of a computer or interactive computer service.

Effective Date: The effective date of this amendment is November 1, 2004.

666. **Amendment:** The Commentary to §1B1.5 captioned "Application Notes" is amended in Note 2 by striking "(Offering, Giving, Soliciting, or Receiving a Bribe); 2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials)" and inserting "(Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 15, as redesignated by Amendment 665, by adding at the end the following:

> "For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).".

The Commentary to §2B4.1 captioned "Application Notes" is amended in Note 2 by inserting "; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions" after "Official Right".

Chapter Two, Part C is amended by striking §§2C1.1 and 2C1.2 and their accompanying commentary as follows:

"§2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe or extortion, increase by 2 levels.

(2) (If more than one applies, use the greater):

(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(B) If the offense involved a payment for the purpose of influencing an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels.

(c) Cross References

(1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense if the resulting offense level is greater than that determined above.

(2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply §2X3.1

(Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense if the resulting offense level is greater than that determined above.

(3) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(d) Special Instruction for Fines - Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment.

Commentary

Statutory Provisions: 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3; 18 U.S.C. §§ 201(b)(1), (2), 872, 1951. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. 'Official holding a high-level decision-making or sensitive position' includes, for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility.

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

3. Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) except where the offense level is determined under §2C1.1(c)(1), (2), or

(3). In such cases, an adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.

4. In some cases the monetary value of the unlawful payment may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the adjustments in §2C1.1(b)(2), and §2C1.1(c)(1), (2), and (3). However, in cases in which the seriousness of the offense is still not adequately reflected, an upward departure is warranted. See Chapter Five, Part K (Departures).

5. Where the court finds that 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. See Chapter Five, Part K (Departures).

6. Subsection (b)(1) provides an adjustment for offenses involving more than one incident of either bribery or extortion. Related payments that, in essence, constitute a single incident of bribery or extortion (e.g., a number of installment payments for a single action) are to be treated as a single bribe or extortion, even if charged in separate counts.

7. For the purposes of determining whether to apply the cross references in this section, the 'resulting offense level' means the greater final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A-D).

Background: This section applies to a person who offers or gives a bribe for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence his official actions, or to a public official who solicits or accepts such a bribe. The maximum term of imprisonment authorized by statute for these offenses is fifteen years under 18 U.S.C. § 201(b) and (c), twenty years under 18 U.S.C. § 1951, and three years under 18 U.S.C. § 872.

The object and nature of a bribe may vary widely from case to case. In some cases, the object may be commercial advantage (e.g., preferential treatment in the award of a government contract). In others, the object may be issuance of a license to which the recipient is not entitled. In still others, the object may be the obstruction of justice. Consequently, a guideline for the offense must be designed to cover diverse situations.

In determining the net value of the benefit received or to be received, the value of the bribe is not deducted from the gross value of such benefit; the harm is the same regardless of value of the bribe paid to receive the benefit. Where the value of the bribe exceeds the value of the benefit or the value of the benefit cannot be determined, the value of the bribe is used because it is likely that the payer of

such a bribe expected something in return that would be worth more than the value of the bribe. Moreover, for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is higher.

Under §2C1.1(b)(2)(B), if the payment was for the purpose of influencing an official act by certain officials, the offense level is increased by 8 levels if this increase is greater than that provided under §2C1.1(b)(2)(A).

Under §2C1.1(c)(1), if the payment was to facilitate the commission of another criminal offense, the guideline applicable to a conspiracy to commit that other offense will apply if the result is greater than that determined above. For example, if a bribe was given to a law enforcement officer to allow the smuggling of a quantity of cocaine, the guideline for conspiracy to import cocaine would be applied if it resulted in a greater offense level.

Under §2C1.1(c)(2), if the payment was to conceal another criminal offense or obstruct justice in respect to another criminal offense, the guideline from §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, will apply if the result is greater than that determined above. For example, if a bribe was given for the purpose of concealing the offense of espionage, the guideline for accessory after the fact to espionage would be applied.

Under §2C1.1(c)(3), if the offense involved forcible extortion, the guideline from §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) will apply if the result is greater than that determined above.

When the offense level is determined under §2C1.1(c)(1), (2), or (3), an adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.

Section 2C1.1 also applies to extortion by officers or employees of the United States in violation of 18 U.S.C. § 872, and Hobbs Act extortion, or attempted extortion, under color of official right in violation of 18 U.S.C. § 1951. The Hobbs Act, 18 U.S.C. § 1951(b)(2), applies in part to any person who acts 'under color of official right.' This statute applies to extortionate conduct by, among others, officials and employees of state and local governments. The panoply of conduct that may be prosecuted under the Hobbs Act varies from a city building inspector who demands a small amount of money from the owner of an apartment building to ignore code violations to a state court judge who extracts substantial interest-free loans from attorneys who have cases pending in his court.

Section 2C1.1 also applies to offenses under 15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3. Such offenses generally involve a payment to a foreign public official, candidate for public office, or agent or intermediary, with the intent to influence an official act or decision of a foreign government or political party. Typically, a case prosecuted under these provisions will involve an intent to influence governmental action.

Offenses involving attempted bribery are frequently not completed because the victim reports the offense to authorities or is acting in an undercover capacity. Failure to complete the offense does not lessen the defendant's culpability in attempting to use public position for personal gain. Therefore, solicitations and attempts are treated as equivalent to the underlying offense.

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

(a) Base Offense Level: 7

(b) Specific Offense Characteristics

(1) If the offense involved more than one gratuity, increase by 2 levels.

(2) (If more than one applies, use the greater):

(A) If the value of the gratuity (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(B) If the gratuity was given, or to be given, to an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels.

(c) Special Instruction for Fines - Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the value of the unlawful payment.

Commentary

Statutory Provision: 18 U.S.C. § 201(c)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. 'Official holding a high-level decision-making or sensitive position' includes, for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility.

2. Do not apply the adjustment in §3B1.3 (Abuse of Position or Trust or Use

of Special Skill).

3. In some cases, the public official is the instigator of the offense. In others, a private citizen who is attempting to ingratiate himself or his business with the public official may be the initiator. This factor may appropriately be considered in determining the placement of the sentence within the applicable guideline range.

4. Related payments that, in essence, constitute a single gratuity (e.g., separate payments for airfare and hotel for a single vacation trip) are to be treated as a single gratuity, even if charged in separate counts.

Background: This section applies to the offering, giving, soliciting, or receiving of a gratuity to a public official in respect to an official act. A corrupt purpose is not an element of this offense. An adjustment is provided where the value of the gratuity exceeded $2,000, or where the public official was an elected official or held a high-level decision-making or sensitive position.",

and inserting the following:

"§2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

(a) Base Offense Level:

(1) 14, if the defendant was a public official; or

(2) 12, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe or extortion, increase by 2 levels.

(2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the

resulting offense level is less than level 18, increase to level 18.

(4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by 2 levels.

(c) Cross References

(1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense, if the resulting offense level is greater than that determined above.

(2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense, if the resulting offense level is greater than that determined above.

(3) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), if the resulting offense level is greater than that determined above.

(d) Special Instruction for Fines - Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment.

Commentary

Statutory Provisions: 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3; 18 U.S.C. §§ 201(b)(1), (2), 371 (if conspiracy to defraud by interference with governmental functions), 872, 1341 (if the scheme or artifice to defraud was to deprive another of the

intangible right of honest services of a public official), 1342 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1343 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1951. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

'Government identification document' means a document made or issued by or under the authority of the United States Government, a State, or a political subdivision of a State, which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

'Payment' means anything of value. A payment need not be monetary.

'Public official' shall be construed broadly and includes the following:

(A) 'Public official' as defined in 18 U.S.C. § 201(a)(1).

(B) A member of a state or local legislature. 'State' means a State of the United States, and any commonwealth, territory, or possession of the United States.

(C) An officer or employee or person acting for or on behalf of a state or local government, or any department, agency, or branch of government thereof, in any official function, under or by authority of such department, agency, or branch of government, or a juror in a state or local trial.

(D) Any person who has been selected to be a person described in subdivisions (A), (B), or (C), either before or after such person has qualified.

(E) An individual who, although not otherwise covered by subdivisions (A) through (D): (i) is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto authority to make governmental decisions (e.g., which may include a leader of a state or local political party who acts in the manner described in this subdivision).

2. More than One Bribe or Extortion.—Subsection (b)(1) provides an adjustment for offenses involving more than one incident of either bribery or extortion. Related payments that, in essence, constitute a single incident

of bribery or extortion (e.g., a number of installment payments for a single action) are to be treated as a single bribe or extortion, even if charged in separate counts.

In a case involving more than one incident of bribery or extortion, the applicable amounts under subsection (b)(2) (i.e., the greatest of the value of the payment, the benefit received or to be received, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government) are determined separately for each incident and then added together.

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

4. Application of Subsection (b)(3).—

   (A) Definition.—'High-level decision-making or sensitive position' means a position characterized by a direct authority to make decisions for, or on behalf of, a government department, agency, or other government entity, or by a substantial influence over the decision-making process.

   (B) Examples.—Examples of a public official in a high-level decision-making position include a prosecuting attorney, a judge, an agency administrator, and any other public official with a similar level of authority. Examples of a public official who holds a sensitive position include a juror, a law enforcement officer, an election official, and any other similarly situated individual.

5. Application of Subsection (c).—For the purposes of determining whether to apply the cross references in this section, the 'resulting offense level' means the final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A-D). See §1B1.5(d); Application Note 2 of the Commentary to §1B1.5 (Interpretation of References to Other Offense Guidelines).

6. Inapplicability of §3B1.3.—Do not apply §3B1.3 (Abuse of Position of

Trust or Use of Special Skill).

7. Upward Departure Provisions.—In some cases the monetary value of the unlawful payment may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the enhancements in §2C1.1(b)(2) and (c)(1), (2), and (3). However, in cases in which the seriousness of the offense is still not adequately reflected, an upward departure is warranted. See Chapter Five, Part K (Departures).

In a case in which the court finds that 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. See §5K2.7 (Disruption of Governmental Function).

Background: This section applies to a person who offers or gives a bribe for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence such individual's official actions, or to a public official who solicits or accepts such a bribe.

The object and nature of a bribe may vary widely from case to case. In some cases, the object may be commercial advantage (e.g., preferential treatment in the award of a government contract). In others, the object may be issuance of a license to which the recipient is not entitled. In still others, the object may be the obstruction of justice. Consequently, a guideline for the offense must be designed to cover diverse situations.

In determining the net value of the benefit received or to be received, the value of the bribe is not deducted from the gross value of such benefit; the harm is the same regardless of value of the bribe paid to receive the benefit. In a case in which the value of the bribe exceeds the value of the benefit, or in which the value of the benefit cannot be determined, the value of the bribe is used because it is likely that the payer of such a bribe expected something in return that would be worth more than the value of the bribe. Moreover, for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is greater.

Under §2C1.1(b)(3), if the payment was for the purpose of influencing an official act by certain officials, the offense level is increased by 4 levels.

Under §2C1.1(c)(1), if the payment was to facilitate the commission of another criminal offense, the guideline applicable to a conspiracy to commit that other offense will apply if the result is greater than that determined above. For example, if a bribe was given to a law enforcement officer to allow the smuggling of a quantity of cocaine, the guideline for conspiracy to import cocaine would be applied if it resulted in a greater offense level.

Under §2C1.1(c)(2), if the payment was to conceal another criminal offense or obstruct justice in respect to another criminal offense, the guideline from §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, will apply if the result is greater than that determined above. For example, if a bribe was given for the purpose of concealing the offense of espionage, the guideline for accessory after the fact to espionage would be applied.

Under §2C1.1(c)(3), if the offense involved forcible extortion, the guideline from §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) will apply if the result is greater than that determined above.

Section 2C1.1 also applies to offenses under 15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3. Such offenses generally involve a payment to a foreign public official, candidate for public office, or agent or intermediary, with the intent to influence an official act or decision of a foreign government or political party. Typically, a case prosecuted under these provisions will involve an intent to influence governmental action.

Section 2C1.1 also applies to fraud involving the deprivation of the intangible right to honest services of government officials under 18 U.S.C. §§ 1341-1343 and conspiracy to defraud by interference with governmental functions under 18 U.S.C. § 371. Such fraud offenses typically involve an improper use of government influence that harms the operation of government in a manner similar to bribery offenses.

Offenses involving attempted bribery are frequently not completed because the offense is reported to authorities or an individual involved in the offense is acting in an undercover capacity. Failure to complete the offense does not lessen the defendant's culpability in attempting to use public position for personal gain. Therefore, solicitations and attempts are treated as equivalent to the underlying offense.

§2C1.2. <u>Offering, Giving, Soliciting, or Receiving a Gratuity</u>

(a) Base Offense Level:

(1) 11, if the defendant was a public official; or

(2) 9, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved more than one gratuity, increase by 2 levels.

(2) If the value of the gratuity exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud)

corresponding to that amount.

(3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the resulting offense level is less than level 15, increase to level 15.

(4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by 2 levels.

(c) Special Instruction for Fines - Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the value of the unlawful payment.

Commentary

Statutory Provisions: 18 U.S.C. §§ 201(c)(1), 212-214, 217. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

'Government identification document' means a document made or issued by or under the authority of the United States Government, a State, or a political subdivision of a State, which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

'Public official' shall be construed broadly and includes the following:

(A) 'Public official' as defined in 18 U.S.C. § 201(a)(1).

(B) A member of a state or local legislature. 'State' means a State of the United States, and any commonwealth, territory, or possession of the United States.

(C) An officer or employee or person acting for or on behalf of a state or local government, or any department, agency, or branch of government thereof, in any official function, under or by authority of such department, agency, or

branch of government, or a juror.

(D) Any person who has been selected to be a person described in subdivisions (A), (B), or (C), either before or after such person has qualified.

(E) An individual who, although not otherwise covered by subdivisions (A) through (D): (i) is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto authority to make governmental decisions (e.g., which may include a leader of a state or local political party who acts in the manner described in this subdivision).

2. Application of Subsection (b)(1).—Related payments that, in essence, constitute a single gratuity (e.g., separate payments for airfare and hotel for a single vacation trip) are to be treated as a single gratuity, even if charged in separate counts.

3. Application of Subsection (b)(3).—

(A) Definition.—'High-level decision-making or sensitive position' means a position characterized by a direct authority to make decisions for, or on behalf of, a government department, agency, or other government entity, or by a substantial influence over the decision-making process.

(B) Examples.—Examples of a public official in a high-level decision-making position include a prosecuting attorney, a judge, an agency administrator, a law enforcement officer, and any other public official with a similar level of authority. Examples of a public official who holds a sensitive position include a juror, a law enforcement officer, an election official, and any other similarly situated individual.

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

Background: This section applies to the offering, giving, soliciting, or receiving of a gratuity to a public official in respect to an official act. It also applies in cases involving (1) the offer to, or acceptance by, a bank examiner of a loan or gratuity; (2) the offer or receipt of anything of value for procuring a loan or discount of commercial bank paper from a Federal Reserve Bank; and (3) the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt.".

Chapter Two, Part C, Subpart 1, is amended by striking §§2C1.6 and 2C1.7 and their accompanying commentary as follows:

"§2C1.6. Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper

(a) Base Offense Level: 7

(b) Specific Offense Characteristic

(1) If the value of the gratuity (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

Commentary

Statutory Provisions: 18 U.S.C. §§ 212-214, 217.

Application Note:

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

Background: Violations of 18 U.S.C. §§ 212 and 213 involve the offer to, or acceptance by, a bank examiner of a loan or gratuity. Violations of 18 U.S.C. § 214 involve the offer or receipt of anything of value for procuring a loan or discount of commercial paper from a Federal Reserve bank. Violations of 18 U.S.C. § 217 involve the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt. These offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.

§2C1.7. Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

(a) Base Offense Level: 10

(b) Specific Offense Characteristic

(1) (If more than one applies, use the greater):

(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater (i)

exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(B) If the offense involved an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels.

(c) Cross References

(1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense if the resulting offense level is greater than that determined above.

(2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense if the resulting offense level is greater than that determined above.

(3) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(4) If the offense is covered more specifically under §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), or §2C1.3 (Conflict of Interest), apply the offense guideline that most specifically covers the offense.

Commentary

Statutory Provisions: 18 U.S.C. §§ 371, 1341-1343.

Application Notes:

1. This guideline applies only to offenses committed by public officials or others acting with them that involve (A) depriving others of the intangible right to honest services (such offenses may be prosecuted under 18 U.S.C. §§ 1341-1343), or (B) conspiracy to defraud the United States by interfering with governmental functions (such offenses may be prosecuted under 18 U.S.C. § 371). 'Public official,' as used in this guideline, includes officers and employees of federal, state, or local government.

2. 'Official holding a high-level decision-making or sensitive position' includes, for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility.

3. 'Loss', for purposes of subsection (b)(1)(A), shall be determined in accordance with Application Note 3 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

4. Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) except where the offense level is determined under §2C1.7(c)(1), (2), or (3). In such cases, an adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.

5. Where the court finds that 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. See Chapter Five, Part K (Departures).

6. For the purposes of determining whether to apply the cross references in this section, the 'resulting offense level' means the greater final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A-D).

Background: The maximum term of imprisonment authorized by statute under 18 U.S.C. §§ 371 and 1341-1343 is five years.".

The Commentary to §2E5.1 captioned "Application Notes" is amended in Note 4 by inserting "; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions" after "Official Right".

The Commentary to §8C2.4 captioned "Application Notes" is amended in Note 5 by inserting "; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions" after "Official Right".

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 209 by striking "2C1.4" and inserting "2C1.3";

in the line referenced to 18 U.S.C. § 212 by striking "2C1.6" and inserting "2C1.2";

in the line referenced to 18 U.S.C. § 213 by striking "2C1.6" and inserting "2C1.2";

in the line referenced to 18 U.S.C. § 214 by striking "2C1.6" and inserting "2C1.2";

in the line referenced to 18 U.S.C. § 217 by striking "2C1.6" and inserting "2C1.2";

in the line referenced to 18 U.S.C. § 371 by striking "2C1.7" and inserting "2C1.1 (if conspiracy to defraud by interference with governmental functions)"; and by striking "924(c)" and inserting "924(c))";

in the line referenced to 18 U.S.C. § 1341 by striking "2C1.7" and inserting "2C1.1";

in the line referenced to 18 U.S.C. § 1342 by striking "2C1.7" and inserting "2C1.1";

in the line referenced to 18 U.S.C. § 1343 by striking "2C1.7" and inserting "2C1.1";

in the line referenced to 18 U.S.C. § 1909 by striking ", 2C1.4"; and

in the line referenced to 41 U.S.C. § 423(e) by striking ", 2C1.7".

Reason for Amendment: This amendment increases punishment for bribery, gratuity, and "honest services" cases while providing additional enhancements to address previously unrecognized aggravating factors inherent in some of these offenses. This amendment reflects the Commission's conclusion that, in general, public corruption offenses previously did not receive punishment commensurate with the gravity of such offenses. The amendment also ensures that punishment levels for public corruption offenses remain proportionate to those for closely analogous offenses sentenced under §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) and §2J1.2 (Obstruction of Justice). To simplify guideline application, this amendment also consolidates §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) with §2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions) and consolidates §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) with §2C1.6 (Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper).

Sections 2C1.1 and 2C1.2 each are amended to include alternative base offense levels, with an increase of two levels for public official defendants who violate their offices or responsibilities by accepting bribes, gratuities, or anything else of value. The higher alternative base offense levels for public officials reflect the Commission's view that offenders who abuse their positions of public trust are inherently more culpable than those who seek to corrupt them, and their offenses present a somewhat greater threat to the integrity of governmental processes.

A specific offense characteristic in the former §§2C1.1, 2C1.2, and 2C1.7 that raised offense levels incrementally with the financial magnitude of the offense or, if greater, by eight levels for the defendant's status as a "high-level decision-maker" is replaced by two separate specific offense characteristics in the amended guidelines. These new specific offense characteristics for "loss" and "status" are to be applied cumulatively when they both co-exist in the case. Their operation in tandem ensures that the offense level will always rise commensurate with the financial magnitude of the offense, and that all offenses involving "an elected public official or any public official in a high-level decision-making or sensitive position" will receive four additional offense levels and, when applicable, a minimum offense level of level 18 (in §2C1.1) or level 15 (in §2C1.2). The minimum offense level ensures that an offender sentenced under the amended guidelines will not receive a less severe sentence than a similarly situated offender under the former guidelines. Application notes and illustrative examples have been added to the amended guidelines to clarify the meaning of "high-level decision-making or sensitive position."

A new specific offense characteristic has been added to §§2C1.1 and 2C1.2 that provides two additional offense levels when the offender is a public official whose position involves the security of the borders of the United States or the integrity of the process for generating documents related to naturalization, legal entry, legal residence, or other government identification documents. This specific offense characteristic recognizes the extreme sensitivity of these positions in light of heightened threats from international terrorism.

Effective Date: The effective date of this amendment is November 1, 2004.

667. **Amendment:** Section 2D1.1(b) is amended by redesignating subdivisions (5) and (6) as subdivisions (6) and (7), respectively; and by inserting after subdivision (4) the following:

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

Section 2D1.1 is amended by adding after subsection (d) the following:

"(e) Special Instruction

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

Section 2D1.1(c) is amended in subdivision (10) by striking "or Schedule III substances" in the thirteenth entry; and by inserting after the thirteenth entry the following:

"40,000 or more units of Schedule III substances;";

in subdivision (11) by striking "or Schedule III substances" in the thirteenth entry; and by inserting after the thirteenth entry the following:

"At least 20,000 but less than 40,000 units of Schedule III substances;";

in subdivision (12) by striking "or Schedule III substances" in the thirteenth entry; and by inserting after the thirteenth entry the following:

"At least 10,000 but less than 20,000 units of Schedule III substances;";

in subdivision (13) by striking "or Schedule III substances" in the thirteenth entry; and by inserting after the thirteenth entry the following:

"At least 5,000 but less than 10,000 units of Schedule III substances;";

in subdivision (14) by striking "or Schedule III substances" in the thirteenth entry; and by inserting after the thirteenth entry the following:

"At least 2,500 but less than 5,000 units of Schedule III substances;";

in subdivision (15) by striking "or Schedule III substances" in the fourth entry; and by inserting after the fourth entry the following:

"At least 1,000 but less than 2,500 units of Schedule III substances;";

in subdivision (16) by striking "or Schedule III substances" in the fourth entry; and by inserting after the fourth entry the following:

"At least 250 but less than 1,000 units of Schedule III substances;"; and

in subdivision (17) by striking "or Schedule III substances" in the fourth entry; and by inserting after the fourth entry the following:

"Less than 250 units of Schedule III substances;".

Section 2D1.1 is amended in the subdivision captioned "*Notes to Drug Quantity Table" in Note (F) in the first sentence by inserting "(except gamma-hydroxybutyric acid)" after "Depressants"; and in the second sentence by inserting "(except gamma-hydroxybutyric acid)" after "substance", and by striking "gm" and inserting "ml".

The Commentary to §2D1.1 captioned "Application Notes" is amended by striking Note 5 as follows:

"5. Any reference to a particular controlled substance in these guidelines includes all salts, isomers, and all salts of isomers. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed.",

and inserting the following:

"5. <u>Analogues and Controlled Substances Not Referenced in this Guideline</u>.—Any reference to a particular controlled substance in these

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

In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the marihuana equivalency of the most closely related controlled substance referenced in this guideline. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:

(A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.

(B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.

(C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables by striking the subdivision captioned "Schedule I or II Depressants" as follows:

"Schedule I or II Depressants

1 unit of a Schedule I or II Depressant = 1 gm of marihuana",

and inserting the following new subdivisions:

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

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

Gamma-hydroxybutyric Acid

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

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 12 by striking the last sentence of the third paragraph as follows:

> "If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing.",

and inserting the following:

> "If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.".

The Commentary to §2D1.1 captioned "Application Notes" is amended by adding at the end the following:

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

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

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

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

Section 2D1.11(b)(2) is amended by striking "21 U.S.C. §§ 841(d)(2), (g)(1), or 960(d)(2)," and inserting "21 U.S.C. § 841(c)(2) or (f)(1), or § 960(d)(2), (d)(3), or (d)(4),".

Section 2D1.11(b) is amended by adding at the end the following:

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

Section 2D1.11(e) is amended in subdivision (1) by striking "10,000 KG or more of Gamma-butyrolactone;" and inserting "2271 L or more of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (2) by striking "At least 3,000 KG but less than 10,000 KG of Gamma-butyrolactone;" and inserting "At least 681.3 L but less than 2271 L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (3) by striking "At least 1,000 KG but less than 3,000 KG of Gamma-butyrolactone;" and inserting "At least 227.1 L but less than 681.3 L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (4) by striking "At least 700 KG but less than 1,000 KG of Gamma-butyrolactone;" and inserting "At least 159 L but less than 227.1 L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (5) by striking "At least 400 KG but less than 700 KG of Gamma-butyrolactone;" and inserting "At least 90.8 L but less than 159 L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (6) by striking "At least 100 KG but less than 400 KG of Gamma-butyrolactone;" and inserting "At least 22.7 L but less than 90.8 L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (7) by striking "At least 80 KG but less than 100 KG of Gamma-butyrolactone;" and inserting "At least 18.2 L but less than 22.7 L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (8) by striking "At least 60 KG but less than 80 KG of Gamma-butyrolactone;" and inserting "At least 13.6 L but less than 18.2 L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (9) by striking "At least 40 KG but less than 60 KG of Gamma-butyrolactone;" and inserting "At least 9.1 L but less than 13.6 L of Gamma-butyrolactone;";

and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus";

in subdivision (10) by striking "Less than 40 KG of Gamma-butyrolactone;" and inserting "Less than 9.1 L of Gamma-butyrolactone;"; and by inserting ", White Phosphorus, or Hypophosphorous Acid" after "Red Phosphorus".

The Commentary to §2D1.11 captioned "Statutory Provisions" is amended by inserting ", (3), (4)" after "(d)(1), (2)".

The Commentary to §2D1.11 captioned "Application Notes" is amended in Note 5 by striking "21 U.S.C. §§ 841(d)(2), (g)(1), and 960(d)(2)" and inserting "21 U.S.C. §§ 841(c)(2) and (f)(1), and 960(d)(2), (d)(3), and (d)(4)"; and by striking "Where" and inserting "In a case in which".

The Commentary to §2D1.11 captioned "Application Notes" is amended by adding at the end the following:

"7. Application of Subsection (b)(4).—For purposes of subsection (b)(4), 'mass-marketing by means of an interactive computer service' means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(4) would apply to a defendant who operated a web site to promote the sale of Gamma-butyrolactone (GBL) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. 'Interactive computer service', for purposes of subsection (b)(4) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).".

Section 2D1.12(b) is amended by adding at the end the following:

"(3) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed any prohibited flask, equipment, chemical, product, or material through mass-marketing by means of an interactive computer service, increase by 2 levels.

(4) If the offense involved stealing anhydrous ammonia or transporting stolen anhydrous ammonia, increase by 6 levels.".

The Commentary to §2D1.12 captioned "Application Notes" is amended by adding at the end the following:

"4. Application of Subsection (b)(3).—For purposes of subsection (b)(3), 'mass-marketing by means of an interactive computer service' means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(3) would apply to a defendant who operated a web site to promote the sale of prohibited flasks but would not apply to coconspirators who use an interactive computer service only to

communicate with one another in furtherance of the offense. 'Interactive computer service', for purposes of subsection (b)(3) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).".

Appendix A (Statutory Index) is amended by striking the following:

"21 U.S.C. § 957 2D1.1".

Reason for Amendment: This amendment makes several modifications to the guidelines in Chapter Two, Part D (Offenses Involving Drugs). First, this amendment implements section 608 of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, (the "PROTECT Act"), Pub. L. 108–21, which directs the Commission to review and consider amending the guidelines with respect to gamma-hydroxybutyric acid (GHB) to provide increased penalties that reflect the seriousness of offenses involving GHB and the need to deter them. The Commission identified several harms associated with GHB offenses and separately increased penalties for Internet trafficking and drug facilitated sexual assault, two harms associated with trafficking and use of this and other controlled substances. Specifically, the amendment modifies §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide an approximate five-year term of imprisonment (equivalent to base offense level 26, Criminal History Category I) for distribution of three gallons of GHB. The Commission determined, based on information provided by the Drug Enforcement Administration, that this quantity typically reflects a mid-level distributor. The trigger for the ten-year penalty (base offense level 32) is set at 30 gallons, reflecting quantities associated with a high-level distributor. This amendment also increases the penalties under §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) for offenses involving gamma-butyrolactone (GBL), a precursor for GHB. The quantities in §2D1.11 track the quantities used in §2D1.1.

Second, this amendment adds a two-level enhancement in §§2D1.1, 2D1.11, and 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy) for mass marketing of a controlled substance, listed chemical, or prohibited equipment, respectively, through the use of an interactive computer service. The Commission identified use of an interactive computer service as a tool providing easier access to illegal products. Use of an interactive computer service enables drug traffickers to market their illegal products more efficiently and anonymously to a wider audience than through traditional drug trafficking means, while making it more difficult for law enforcement authorities to discover the offense and apprehend the offenders.

Third, this amendment provides a special instruction in §2D1.1(e) that requires application of the vulnerable victim adjustment in §3A1.1(b)(1) (Hate Crime Motivation or Vulnerable Victim) if the defendant commits a sexual offense by distributing a controlled substance to another individual, with or without that individual's knowledge. The amendment addresses cases in which the cross reference in §2D1.1(d)(2) does not apply. The cross reference in §2D1.1(d)(2) is limited to cases involving a conviction under 21 U.S.C. § 841(b)(7), which prescribes a 20-year statutory maximum penalty for the distribution of a controlled

substance to another individual, without that individual's knowledge, with the intent to commit a crime of violence (including rape). Because the statute requires that the distribution occur without knowledge, the cross reference does not apply to drug facilitated sexual assaults when the victim of the sexual assault knowingly ingests the controlled substance. This amendment reflects the Commission's view that a defendant who commits a drug-facilitated sexual assault should receive increased punishment whether or not the victim knowingly ingested the controlled substance distributed by the defendant.

Fourth, this amendment modifies the existing rule at Application Note 5 of §2D1.1 to provide a uniform mechanism for determining sentences in cases involving analogues of controlled substances or controlled substances not specifically referenced in this guideline. The genesis of this amendment was the Commission's investigation of GHB, during which the Commission learned that analogues of GHB, specifically GBL and 1,4 Butanediol (BD), among others, often are used in its stead and cause the same effects as GHB. The Commission was concerned that analogues of other drugs might be similarly used. Additionally, the Commission became aware that courts employ a variety of means to determine the applicable guideline range for defendants charged with offenses involving controlled substances not specifically referenced in §2D1.1, resulting in disparate sentences. The purpose of the amendment is to provide a more uniform mechanism for determining sentences in cases involving analogues or controlled substances not specifically referenced in this guideline.

Fifth, this amendment corrects a technical error in the Drug Quantity Table at §2D1.1(c) with respect to Schedule III substances. Specifically, the maximum base offense level for Schedule III substances is level 20, but prior to the amendment there was no corresponding language in the Drug Quantity Table to so indicate.

Sixth, this amendment addresses a circuit conflict regarding the interpretation of the last sentence in Application Note 12 of §2D1.1. See United States v. Smack, 347 F.3d 533 (3rd Cir. 2003) (criticizing language of note); compare United States v. Gomez, 103 F.3d 249, 252-53 (2d Cir. 1997) (holding that the last sentence of the note is intended to apply only to sellers); United States v. Perez de Dios, 237 F.3d 1192 (10th Cir. 2001) (same); United States v. Brassard, 212 F.3d 54, 58 (1st Cir. 2000) (same), with United States v. Minore, 40 Fed. Appx. 536, 537 (9th Cir. 2002) (mem.op.) (applying the final sentence of the new Note 12 to a buyer in reverse sting operation); United States v. Estrada, 256 F.3d 466, 476 (7th Cir. 2001) (same). Application Note 12 covers offenses involving an agreement to sell a specific quantity of a controlled substance. This amendment makes clear that the court shall exclude from the offense level determination the amount of the controlled substance, if any, that the defendant establishes that he or she did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, regardless of whether the defendant agreed to be the seller or the buyer of the controlled substance.

Seventh, this amendment updates the statutory references in §2D1.11(b)(2) and accompanying commentary to conform to statutory redesignations of certain offenses, and also expands application of §2D1.11(b)(2) to include 21 U.S.C. § 960(d)(3) and (d)(4) among the statutes of conviction for which the three-level reduction at subsection (b)(2) is available. The reduction formerly applied in cases in which the defendant, convicted under 21 U.S.C. § 841(c)(2), (f)(1), or § 960(d)(2), as properly redesignated, did not have knowledge or actual belief that the listed chemical would be used to manufacture a

controlled substance. Section 841(c)(2) of title 21, United States Code, requires a finding of either knowledge or a reasonable cause to believe that the listed chemical would be used to manufacture a controlled substance. Sections 960(d)(3) and (d)(4) of title 21, United States Code, similarly require a finding that a person who imports, exports, or serves as a broker for, a listed chemical knows or has a reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance. Given that the reduction applies in 21 U.S.C. § 841(c)(2) cases in which the defendant had a reasonable cause to believe, but not knowledge or actual belief, that the listed chemical would be used to manufacture a controlled substance, and the mens rea in 21 U.S.C. § 841(c)(2) is the same as in 21 U.S.C. § 960(d)(3) and (d)(4), the amendment adds 21 U.S.C. § 960(d)(3) and (d)(4) to §2D1.11(b)(2).

Eighth, this amendment adds white phosphorus and hypophosphorous acid to the Chemical Quantity Table in §2D1.11(e). Both substances are List I chemicals that can be substituted for red phosphorus in the manufacture of methamphetamine. Red phosphorus was added to the Chemical Quantity Table effective November 1, 2003 (see Amendment 661), but notice and comment requirements prevented white phosphorus and hypophosphorous acid from being added contemporaneously.

Ninth, this amendment provides an enhancement of six levels at §2D1.12 if the offense involved stealing anhydrous ammonia or transporting stolen anhydrous ammonia. A widely used source of nitrogen fertilizer for crops, anhydrous ammonia also is used in the manufacture of methamphetamine. Anhydrous ammonia must be stored and handled under high pressure, which requires specially designed and well-maintained equipment. The improper handling and storage of anhydrous ammonia can result in permanent injury (such as cell destruction and severe chemical burns) and explosions. Methamphetamine manufacturers often obtain anhydrous ammonia by siphoning large-volume tanks at fertilizer plants and farms, and rarely have the knowledge or equipment required to properly handle it. This enhancement accounts for the inherent dangers created by such conduct, as well as the likely intended unlawful use.

Finally, this amendment modifies Appendix A (Statutory Index) by deleting the reference to 21 U.S.C. § 957, which is not a substantive criminal offense, but rather a registration provision for which violations are prosecuted under 21 U.S.C. § 960(a) or (b) (for controlled substances) or § 960(d)(6) (for listed chemicals).

Effective Date: The effective date of this amendment is November 1, 2004.

668. **Amendment:** Section 2D1.1(a) is amended by striking subdivision (3) as follows:

"(3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if the defendant receives an adjustment under §3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level 30.",

and inserting the following:

"(3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment

under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels.".

Section 2D1.11 is amended by striking subsection (a) as follows:

"(a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e), as appropriate.",

and inserting the following:

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

Reason for Amendment: The amendment modifies the maximum base offense level for certain offenders provided at §2D1.1(a)(3) (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Prior to the amendment, subsection (a)(3) limited the maximum base offense level to level 30 for all offenders sentenced under §2D1.1 who also received an adjustment under §3B1.2 (Mitigating Role). In order to address proportionality concerns arising from the "mitigating role cap," the amendment modifies §2D1.1(a)(3) to provide a graduated reduction for offenders whose quantity level under §2D1.1(c) results in a base offense level greater than level 30 and who qualify for a mitigating role adjustment under §3B1.2. Specifically, the amendment provides a two-level reduction if the defendant receives an adjustment under §3B1.2 and the base offense level determined at the Drug Quantity Table in §2D1.1 is level 32. If the base offense level determined at §2D1.1(c) is level 34 or 36, and the defendant receives an adjustment under §3B1.2, a three-level reduction is provided. A four-level reduction is provided if the defendant receives an adjustment under §3B1.2 and the base offense level under §2D1.1(c) is level 38. This amendment also provides an identical reduction in §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy).

Effective Date: The effective date of this amendment is November 1, 2004.

669. Amendment: Section 2K2.1(b) is amended by striking subdivision (3) as follows:

"(3) If the offense involved a destructive device, increase by 2 levels.",

and inserting the following:

"(3) If the offense involved—

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

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

Section 2K2.1(b) is amended by striking:

"Provided, that the cumulative offense level determined above shall not exceed level 29.",

and inserting the following:

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

The Commentary to §2K2.1 captioned "Application Notes" is amended by striking Notes 1 through 4 as follows:

"1. 'Firearm' includes (i) any weapon (including a starter gun) which will, or is designed to, or may readily be converted to, expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. See 18 U.S.C. § 921(a)(3).

2. 'Ammunition' includes ammunition or cartridge cases, primer, bullets, or propellent powder designed for use in any firearm. See 18 U.S.C. § 921(a)(17)(A).

3. A 'firearm described in 26 U.S.C. § 5845(a)' includes: (i) a shotgun having a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; a rifle having a barrel or barrels of less than 16 inches in length; or a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; and (v) certain unusual weapons defined in 26 U.S.C. § 5845(e) (that are not conventional, unaltered handguns, rifles, or shotguns). For a more detailed definition, refer to 26 U.S.C. § 5845.

A 'firearm described in 18 U.S.C. § 921(a)(30)' (pertaining to semiautomatic assault weapons) does not include a weapon exempted under the provisions of 18 U.S.C. § 922(v)(3).

4. 'Destructive device' is a type of firearm listed in 26 U.S.C. § 5845(a), and includes any explosive, incendiary, or poison gas -- (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses; any type of weapon which will, or which may be readily converted to, expel a projectile by the action of an explosive or other

propellant, and which has any barrel with a bore of more than one-half inch in diameter; or any combination of parts either designed or intended for use in converting any device into any destructive device listed above. For a more detailed definition, refer to 26 U.S.C. § 5845(f).",

and by redesignating Note 5 as Note 1.

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 1, as redesignated by this amendment, by inserting "Definitions.—" before "For purposes of this guideline:"; by inserting before "'Controlled substance offense'" the following paragraph:

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

by inserting after the paragraph that begins "'Crime of violence'" the following paragraph:

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

and by adding at the end the following paragraph:

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

The Commentary to §2K2.1 captioned "Application Notes" is amended by inserting after Note 1, as redesignated by this amendment, the following:

"2. Firearm Described in 18 U.S.C. § 921(a)(30).—For purposes of subsection (a), a 'firearm described in 18 U.S.C. § 921(a)(30)' (pertaining to semiautomatic assault weapons) does not include a weapon exempted under the provisions of 18 U.S.C. § 922(v)(3).".

The Commentary to §2K2.1 captioned "Application Notes" is amended by redesignating Notes 6 through 19 as Notes 3 through 16, respectively.

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 8, as redesignated by this amendment, by striking "a two-level" and inserting "the applicable"; and by adding at the end the following paragraph:

"Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. See also §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 13, as redesignated by this amendment, by inserting "(see Application Note 8)" after "multiple individuals".

Section 2X1.1 is amended by striking subsection (d) as follows:

"(d) Special Instruction

(1) Subsection (b) shall not apply to any of the following offenses, if such offense involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5):

18 U.S.C. § 81;
18 U.S.C. § 930(c);
18 U.S.C. § 1362;
18 U.S.C. § 1363;
18 U.S.C. § 1992;
18 U.S.C. § 2339A;
18 U.S.C. § 2340A;
49 U.S.C. § 46504;
49 U.S.C. § 46505; and
49 U.S.C. § 60123(b).",

and inserting the following:

"(d) Special Instruction

(1) Subsection (b) shall not apply to:

(A) Any of the following offenses, if such offense involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5):

18 U.S.C. § 81;
18 U.S.C. § 930(c);
18 U.S.C. § 1362;
18 U.S.C. § 1363;
18 U.S.C. § 1992;
18 U.S.C. § 2339A;
18 U.S.C. § 2340A;
49 U.S.C. § 46504;
49 U.S.C. § 46505; and
49 U.S.C. § 60123(b).

(B) Any of the following offenses:

18 U.S.C. § 32;
18 U.S.C. § 1993; and
18 U.S.C. § 2332a.".

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 1993(a)(8) by inserting "2A5.2 (if attempt or conspiracy to commit 18 U.S.C. § 1993(a)(4), (a)(5), or (a)(6))," before "2A6.1".

Reason for Amendment: Before promulgation of this amendment, subsection (b)(3) of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) generally provided a two-level enhancement if the offense involved a destructive device, without regard to the type of destructive device involved. This amendment increases that enhancement to 15 levels if the destructive device was a man-portable air defense system (MANPADS), portable rocket, missile, or device used for launching a portable rocket or missile. It maintains the two-level enhancement for all other destructive devices. MANPADS and similar weapons are highly regulated under chapter 53 of title 26, United States Code, and chapter 44 of title 18, United States Code, and are classified as "destructive devices" under 26 U.S.C. § 5845(f).

This amendment responds to concerns that these types of weapons, which have been used overseas, have the ability to inflict death or injury on large numbers of persons if fired at an aircraft, train, building, or similar target. Because of the inherent risks of such weapons and the fact that there is no legitimate reason to possess them, the Commission determined that the statutory maximum penalty for possession of such devices should apply in all such offenses, even after possible application of acceptance of responsibility. The amendment also re-designates Application Note 11 as Application Note 8, and adds an invited upward departure for non-MANPADS destructive devices in a case in which the two-level enhancement for such devices does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to public welfare, and the risk of death or serious bodily injury that the destructive device created. Furthermore, in response to concerns that it is unclear whether certain types of firearms qualify as "destructive devices" using the guideline definition of "destructive device," the amendment adopts the statutory definition provided in 26 U.S.C. § 5845(f). For consistency, similar statutory definitions are substituted for the definitions of "ammunition" and "firearm."

The amendment also increases guideline penalties for attempts and conspiracies to commit certain offenses if those offenses involved the use of a MANPADS or similar destructive device. Affected offenses include 18 U.S.C. § 32 (Destruction of aircraft or aircraft facilities), 18 U.S.C. § 1993 (Terrorist attacks and other acts of violence against mass transportation systems), and 18 U.S.C. § 2332a (Use of certain weapons of mass destruction). The Commission amended the special instruction in subsection (d) of §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)) to prohibit application of the three-level reduction for attempts and conspiracies for these offenses generally, and not just in the context of the use of a MANPADS or similar destructive device.

Finally, the amendment modifies the Statutory Index (Appendix A) reference for convictions under 18 U.S.C. § 1993(a)(8), relating to attempts, threats, or conspiracies to commit any of the substantive terrorist offenses in 18 U.S.C. § 1993(a). Under this amendment, these offenses will be referred to §2A5.2 (Interference with Flight Crew Member or Flight

Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry) rather than §2A6.1 (Threatening or Harassing Communications).

Effective Date: The effective date of this amendment is November 1, 2004.

670. Amendment: Chapter Two, Part K, Subpart 2, is amended by adding at the end the following new guideline and accompanying commentary:

"§2K2.6. Possessing, Purchasing, or Owning Body Armor by Violent Felons

(a) Base Offense Level: 10

(b) Specific Offense Characteristic

(1) If the defendant used the body armor in connection with another felony offense, increase by 4 levels.

Commentary

Statutory Provision: 18 U.S.C. § 931.

Application Notes:

1. Application of Subsection (b)(1).—

(A) Meaning of 'Defendant'.—Consistent with §1B1.3 (Relevant Conduct), the term 'defendant', for purposes of subsection (b)(1), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(B) Meaning of 'Felony Offense'.—For purposes of subsection (b)(1), 'felony offense' means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

(C) Meaning of 'Used'.—For purposes of subsection (b)(1), 'used' means the body armor was (i) actively employed in a manner to protect the person from gunfire; or (ii) used as a means of bartering. Subsection (b)(1) does not apply if the body armor was merely possessed. For example, subsection (b)(1) would not apply if the body armor was found in the trunk of a car but was not being actively used as protection.

2. Inapplicability of §3B1.5.—If subsection (b)(1) applies, do not apply the adjustment in §3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence).

3. Grouping of Multiple Counts.—If subsection (b)(1) applies (because the defendant used the body armor in connection with another felony offense) and the instant offense of conviction includes a count of conviction for that other felony offense, the counts of conviction for the 18 U.S.C. § 931 offense and that other felony offense shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely Related Counts).".

The Commentary to §3B1.5 captioned "Application Notes" is amended by adding at the end the following:

"3. Interaction with §2K2.6 and Other Counts of Conviction.—If the defendant is convicted only of 18 U.S.C. § 931 and receives an enhancement under subsection (b)(1) of §2K2.6 (Possessing, Purchasing, or Owning Body Armor by Violent Felons), do not apply an adjustment under this guideline. However, if, in addition to the count of conviction under 18 U.S.C. § 931, the defendant (A) is convicted of an offense that is a drug trafficking crime or a crime of violence; and (B) used the body armor with respect to that offense, an adjustment under this guideline shall apply with respect to that offense.".

Reason for Amendment: This amendment addresses the new offense at 18 U.S.C. § 931, which was created by section 11009 of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273. Section 931 of title 18, United States Code, prohibits the purchase, ownership, or possession of body armor by individuals who have been convicted of either a federal or state felony that is a crime of violence. The statutory maximum term of imprisonment for 18 U.S.C. § 931 is three years.

This amendment creates a new guideline at §2K2.6 (Possessing, Purchasing, or Owning Body Armor by Violent Felons) because there is no guideline that covers conduct sufficiently analogous to the conduct constituting a violation of 18 U.S.C. § 931.

The new guideline provides a base offense level of 10 because 18 U.S.C. § 931 offenses have lesser statutory maximum punishments than offenses involving weapon possession and trafficking. Those offenses, which are sentenced at §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), have a base offense level of 12 if there is no aggravating circumstance present in the case.

The new guideline provides a four-level increase at §2K2.6(b)(1) "[i]f the defendant used the body armor in connection with another felony offense" because violations in which the body armor was used in connection with another felony offense are more serious than those involving only possession, purchase, or ownership of body armor. "Felony offense" is defined as "any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year" and does not require that a charge be brought or a conviction sustained.

The commentary also provides guidance for the scope of the terms "defendant" and "used" for purposes of §2K2.6(b)(1). Use of the term "defendant" limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused. The term "used" requires that the body armor be actively used in order to protect from gunfire or be used as a means of bartering. Finally, the commentary provides that when subsection (b)(1) applies and the defendant also is convicted of the underlying offense (the offense with respect to which the body armor was used), the counts shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely Related Counts).

Section 3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence) has been amended so that the adjustment in that guideline does not apply with respect to the 18 U.S.C. § 931 offense. However, if the defendant is convicted of the offense with respect to which the body armor was used, §3B1.5 will apply to that offense.

Effective Date: The effective date of this amendment is November 1, 2004.

671. Amendment: Section 2L2.2(b) is amended by adding at the end the following:

"(3) If the defendant fraudulently obtained or used a United States passport, increase by 4 levels.".

The Commentary to §2L2.2 captioned "Application Notes" is amended by striking Note 1 as follows:

"1. For purposes of this guideline—

'Immigration and naturalization offense' means any offense covered by Chapter Two, Part L.",

and inserting the following:

"1. Definition.—For purposes of this guideline, 'immigration and naturalization offense' means any offense covered by Chapter Two, Part L.";

by striking Note 2 as follows:

"2. For the purposes of Chapter Three, Part D (Multiple Counts), a conviction for unlawfully entering or remaining in the United States (§2L1.2) arising from the same course of conduct is treated as a closely related count, and is therefore grouped with an offense covered by this guideline.";

and redesignating Note 3 as Note 2; and in Note 2, as redesignated by this amendment, by inserting "Application of Subsection (b)(2).—" before "Prior".

The Commentary to §2L2.2 captioned "Application Notes" is amended by adding at the end the following:

"3. Application of Subsection (b)(3).—The term 'used' is to be construed broadly and includes the attempted renewal of previously-issued passports.

4. Multiple Counts.—For the purposes of Chapter Three, Part D (Multiple Counts), a count of conviction for unlawfully entering or remaining in the United States covered by §2L1.2 (Unlawfully Entering or Remaining in the United States) arising from the same course of conduct as the count of conviction covered by this guideline shall be considered a closely related count to the count of conviction covered by this guideline, and therefore is to be grouped with the count of conviction covered by this guideline.

5. Upward Departure Provision.—If the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to engage in terrorist activity, an upward departure may be warranted. See Application Note 4 of the Commentary to §3A1.4 (Terrorism).".

Reason for Amendment: The purpose of this amendment is to provide increased punishment for defendants who fraudulently use or obtain United States passports. The amendment adds a new specific offense characteristic at subsection (b)(3) of §2L2.2 (Smuggling, Transporting, or Harboring an Unlawful Alien) that provides an increase of four levels if the defendant fraudulently obtained or used a United States passport. Application Note 3 clarifies that "use" is to be construed broadly and includes the attempted renewal of a previously issued United States passport. Application Note 5 invites an upward departure if the defendant fraudulently obtained or used a United States passport with the intent to engage in terrorist activity.

This amendment responds to comments received from the Departments of State and Justice to the effect that maintaining the integrity of United States passports is at the core of United States border and security efforts. Accordingly, this amendment ensures increased punishment for those defendants who threaten the security of the United States by their fraudulent abuse of United States passports.

Effective Date: The effective date of this amendment is November 1, 2004.

672. Amendment: Section 2Q1.2(b) is amended by adding at the end the following:

"(7) If the defendant was convicted under 49 U.S.C. § 5124 or § 46312, increase by 2 levels.".

The Commentary to §2Q1.2 captioned "Statutory Provisions" is amended by striking "; 49 U.S.C. § 60123(d)" and inserting "; 49 U.S.C. §§ 5124, 46312".

The Commentary to §2Q1.2 captioned "Application Notes" is amended by striking Note 9 as follows:

"9. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).",

and inserting the following:

"9. Other Upward Departure Provisions.—

(A) Civil Adjudications and Failure to Comply with Administrative Order.—In a case in which the defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

(B) Extreme Psychological Injury.—If the offense caused extreme psychological injury, an upward departure may be warranted. See §5K2.3 (Extreme Psychological Injury).

(C) Terrorism.—If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure would be warranted. See Application Note 4 of the Commentary to §3A1.4 (Terrorism).".

Reason for Amendment: This amendment adds a two-level enhancement in §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) for offenders convicted under 49 U.S.C. § 5124 or § 46312. These offenses pose an inherent risk to large populations in a manner not typically associated with other pollution offenses sentenced under the same guideline.

In addition, this amendment adds an application note inviting an upward departure if the offense was calculated to influence or affect the conduct of the government by intimidation or coercion, or to retaliate against government conduct. The Commission added this departure provision to address concerns that terrorists may commit hazardous material transportation offenses because of their potential to cause a one-time, catastrophic event. The upward departure provision would apply in cases in which a defendant who has a terrorist motive is not also convicted of a "federal crime of terrorism" that would trigger application of §3A1.4 (Terrorism).

This amendment also adds an upward departure provision that could apply if the offense resulted in extreme psychological injury. This provision conforms to the upward departure provision found at §2Q1.4 (Tampering or Attempted Tampering with a Public Water System; Threatening to Tamper with a Public Water System).

Effective Date: The effective date of this amendment is November 1, 2004.

673. Amendment: Chapter Eight is amended by striking the "Introductory Commentary" as follows:

" Introductory Commentary

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

This chapter reflects the following general principles: First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused. Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets. Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the highest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed. Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.",

and inserting the following:

" Introductory Commentary

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain

internal mechanisms for preventing, detecting, and reporting criminal conduct.

This chapter reflects the following general principles:

First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.

Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.

Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.

Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.

These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws.".

Section 8A1.2(a) is amended by inserting ", Subpart 1" after "Part B".

Section 8A1.2(b)(2)(D) is amended by adding at the end the following:

"To determine whether the organization had an effective compliance and ethics program for purposes of §8C2.5(f), apply §8B2.1 (Effective Compliance and Ethics Program).".

The Commentary to §8A1.2 captioned "Application Notes" is amended in Note 3(c) in the second sentence by inserting "of the organization" after "high-level personnel".

The Commentary to §8A1.2 captioned "Application Notes" is amended by striking Note 3(k)

as follows:

"(k) An 'effective program to prevent and detect violations of law' means a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. Due diligence requires at a minimum that the organization must have taken the following types of steps:

(1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.

(2) Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.

(3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.

(4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.

(5) The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.

(6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.

(7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense

and to prevent further similar offenses -- including any necessary modifications to its program to prevent and detect violations of law.

The precise actions necessary for an effective program to prevent and detect violations of law will depend upon a number of factors. Among the relevant factors are:

(i) Size of the organization -- The requisite degree of formality of a program to prevent and detect violations of law will vary with the size of the organization: the larger the organization, the more formal the program typically should be. A larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and other agents.

(ii) Likelihood that certain offenses may occur because of the nature of its business-- If because of the nature of an organization's business there is a substantial risk that certain types of offenses may occur, management must have taken steps to prevent and detect those types of offenses. For example, if an organization handles toxic substances, it must have established standards and procedures designed to ensure that those substances are properly handled at all times. If an organization employs sales personnel who have flexibility in setting prices, it must have established standards and procedures designed to prevent and detect price-fixing. If an organization employs sales personnel who have flexibility to represent the material characteristics of a product, it must have established standards and procedures designed to prevent fraud.

(iii) Prior history of the organization -- An organization's prior history may indicate types of offenses that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct. An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective program to prevent and detect violations of law.".

Chapter Eight, Part B is amended by striking the heading as follows:

"PART B - REMEDYING HARM FROM CRIMINAL CONDUCT",

and inserting the following:

"PART B - REMEDYING HARM FROM CRIMINAL CONDUCT,
AND EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

1. REMEDYING HARM FROM CRIMINAL CONDUCT";

and by adding at the end the following new subpart:

"2. EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

§8B2.1. Effective Compliance and Ethics Program

(a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—

(1) exercise due diligence to prevent and detect criminal conduct; and

(2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

(b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

(1) The organization shall establish standards and procedures to prevent and detect criminal conduct.

(2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific

individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(B) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;

(B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.

(c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

'Compliance and ethics program' means a program designed to prevent and detect criminal conduct.

'Governing authority' means the (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.

'High-level personnel of the organization' and 'substantial authority personnel' have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations).

'Standards and procedures' means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct.

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

(A) In General.—Each of the requirements set forth in this guideline shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that shall be considered include: (i) applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) similar misconduct.

(B) Applicable Governmental Regulation and Industry Practice.—An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program.

(C) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization.

(ii) Large Organizations.—A large organization generally shall devote more formal operations and greater resources in meeting the requirements of this guideline than shall a small organization. As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs.

(iii) Small Organizations.—In meeting the requirements of this guideline, small organizations shall demonstrate the same

degree of commitment to ethical conduct and compliance with the law as large organizations. However, a small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrated through more formally planned and implemented systems.

Examples of the informality and use of fewer resources with which a small organization may meet the requirements of this guideline include the following: (I) the governing authority's discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organization's compliance and ethics efforts; (II) training employees through informal staff meetings, and monitoring through regular 'walk-arounds' or continuous observation while managing the organization; (III) using available personnel, rather than employing separate staff, to carry out the compliance and ethics program; and (IV) modeling its own compliance and ethics program on existing, well-regarded compliance and ethics programs and best practices of other similar organizations.

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

3. Application of Subsection (b)(2).—High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program, shall perform their assigned duties consistent with the exercise of due diligence, and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

If the specific individual(s) assigned overall responsibility for the compliance and ethics program does not have day-to-day operational responsibility for the program, then the individual(s) with day-to-day operational responsibility for the program typically should, no less than annually, give the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance and ethics program.

4. Application of Subsection (b)(3).—

(A) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(B) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals so as to ensure that all individuals within the high-level personnel and substantial authority personnel of the organization will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law under subsection (a). With respect to the hiring or promotion of such individuals, an organization shall consider the relatedness of the individual's illegal activities and other misconduct (i.e., other conduct inconsistent with an effective compliance and ethics program) to the specific responsibilities the individual is anticipated to be assigned and other factors such as: (i) the recency of the individual's illegal activities and other misconduct; and (ii) whether the individual has engaged in other such illegal activities and other such misconduct.

5. Application of Subsection (b)(6).—Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.

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

(A) Assess periodically the risk that criminal conduct will occur, including assessing the following:

(i) The nature and seriousness of such criminal conduct.

(ii) The likelihood that certain criminal conduct may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of criminal conduct may occur, the organization shall take reasonable steps to prevent and detect that type of criminal conduct. For example, an organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish standards and procedures designed to prevent and detect

fraud.

(iii) The prior history of the organization. The prior history of an organization may indicate types of criminal conduct that it shall take actions to prevent and detect.

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

(C) Modify, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b) to reduce the risk of criminal conduct identified under subdivision (A) of this note as most serious, and most likely, to occur.

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

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

The Commentary to §8C2.4 captioned "Application Notes" is amended in Note 2 by striking "(Larceny, Embezzlement, and Other Forms of Theft)" and inserting "(Theft, Property Destruction, and Fraud)".

Section 8C2.5 is amended by striking subsection (f) as follows:

"(f) Effective Program to Prevent and Detect Violations of Law

If the offense occurred despite an effective program to prevent and detect violations of law, subtract 3 points.

Provided, that this subsection does not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual responsible for the administration or enforcement of a program to prevent and detect violations of law participated in, condoned, or was willfully ignorant of the offense. Participation of an individual within substantial authority personnel in an

offense results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law.

Provided, further, that this subsection does not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.",

and inserting the following:

"(f) Effective Compliance and Ethics Program

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

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

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

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

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

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

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

The Commentary to §8C2.5 captioned "Application Notes" is amended by striking Note 1 as follows:

"1. ‘Substantial authority personnel,’ ‘condoned,’ ‘willfully ignorant of the offense,’ ‘similar misconduct,’ ‘prior criminal adjudication,’ and ‘effective program to prevent and detect violations of law,’ are defined in the Commentary to §8A1.2 (Application Instructions - Organizations).",

and inserting the following:

"1. Definitions.—For purposes of this guideline, ‘condoned’, ‘prior criminal adjudication’, ‘similar misconduct’, ‘substantial authority personnel’, and ‘willfully ignorant of the offense’ have the meaning given those terms in Application Note 3 of the Commentary to §8A1.2 (Application Instructions - Organizations).

‘Small Organization’, for purposes of subsection (f)(3), means an organization that, at the time of the instant offense, had fewer than 200 employees.".

The Commentary to §8C2.5 captioned "Application Notes" is amended in Note 3 in the last sentence by striking "entire organization" and inserting "organization in its entirety".

The Commentary to §8C2.5 captioned "Application Notes" is amended in Note 10 by striking "The second proviso in subsection (f)" and inserting "Subsection (f)(2)"; and by striking "this proviso" and inserting "subsection (f)(2)".

The Commentary to §8C2.5 captioned "Application Notes" is amended in Note 12 by adding at the end the following:

"Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.".

Section 8C2.8(a) is amended in subdivision (9) by striking "and"; in subdivision (10) by striking the period at the end of the subdivision and inserting "; and"; and by adding at the end the following:

"(11) whether the organization failed to have, at the time of the instant offense, an effective compliance and ethics program within the meaning of §8B2.1 (Effective Compliance and Ethics Program).".

The Commentary to §8C2.8 captioned "Application Notes" is amended in Note 4 in the first sentence by inserting "within high-level personnel of" after "organization or".

Section 8C4.10 is amended by striking "(Effective Program to Prevent and Detect Violations of Law)" and inserting "(Effective Compliance and Ethics Program)"; and by adding at the end the following paragraph:

"Similarly, if, at the time of the instant offense, the organization was required by law to have an effective compliance and ethics program, but the organization did not have such a program, an upward departure may be warranted.".

Chapter Eight, Part D, is amended in the "Introductory Commentary" by striking "8D1.5" and inserting "8D1.4, and §8F1.1,".

Section 8D1.1(a) is amended by striking subdivision (3) as follows:

"(3) if, at the time of sentencing, an organization having 50 or more employees does not have an effective program to prevent and detect violations of law;",

and inserting the following:

"(3) if, at the time of sentencing, (A) the organization (i) has 50 or more employees, or (ii) was otherwise required under law to have an effective compliance and ethics program; and (B) the organization does not have such a program;".

Section 8D1.4(b)(4) is amended by striking "(1)" and inserting "(A)"; by striking "(2)" and inserting "(B)"; and by striking "(3)" and inserting "(C)".

Section 8D1.4(c) is amended by striking subdivision (1) as follows:

"(1) The organization shall develop and submit to the court a program to prevent and detect violations of law, including a schedule for implementation.",

and inserting the following:

"(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.";

and in subdivisions (2), (3), and (4) by striking "to prevent and detect violations of law" each place it appears and inserting "referred to in subdivision (1)".

The Commentary to §8D1.4 captioned "Application Notes" is amended by striking "Notes" in the heading and inserting "Note"; and in Note 1 by striking "a program to prevent and detect violations of law" and inserting "a compliance and ethics program"; and by striking the last sentence of the first paragraph as follows:

"The court should approve any program that appears reasonably calculated to prevent and detect violations of law, provided it is consistent with any applicable statutory or regulatory requirement.",

and inserting the following:

"The court should approve any program that appears reasonably calculated to prevent and detect criminal conduct, as long as it is consistent with §8B2.1 (Effective Compliance and Ethics Program), and any applicable statutory and regulatory requirements.".

Chapter Eight, Part D is amended by striking §8D1.5 and its accompanying commentary as

follows:

"§8D1.5. Violations of Conditions of Probation - Organizations (Policy Statement)

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.

Commentary

Application Note:

1. In the event of repeated, serious violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.".

Chapter Eight is amended by adding at the end the following Part:

"PART F - VIOLATIONS OF PROBATION - ORGANIZATIONS

§8F1.1. Violations of Conditions of Probation - Organizations (Policy Statement)

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.

Commentary

Application Notes:

1. Appointment of Master or Trustee.—In the event of repeated violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.

2. Conditions of Probation.—Mandatory and recommended conditions of probation are specified in §§8D1.3 (Conditions of Probation - Organizations) and 8D1.4 (Recommended Conditions of Probation - Organizations).".

Reason for Amendment: This amendment modifies existing provisions of Chapter Eight and provides a new guideline at §8B2.1 (Effective Compliance and Ethics Program). Most notably, §8B2.1 strengthens the existing criteria an organization must follow in order to establish and maintain an effective program to prevent and detect criminal conduct for purposes of mitigating its sentencing culpability for an offense. This amendment is the

culmination of a multi-year review of the organizational guidelines, implements several recommendations issued on October 7, 2003, by the Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Advisory Group), and responds to the Sarbanes-Oxley Act ("the Act"), Pub. L. 107–204, which in section 805 directed the Commission to review and amend the organizational guidelines and related policy statements to ensure that they are sufficient to deter and punish organizational misconduct.

Consistent with the Act's focus on deterring criminal misconduct, this amendment revises the introductory commentary to Chapter Eight to highlight the importance of structural safeguards designed to prevent and detect criminal conduct. First and foremost among these safeguards is a regime of internal crime prevention and self-policing ("an effective compliance and ethics program"). While Chapter Eight derives its authority and content from the federal criminal law, an effective compliance and ethics program not only will prevent and detect criminal conduct, but also should facilitate compliance with all applicable laws.

Under §8C2.5(g) (Culpability Score), an effective compliance and ethics program is one of the mitigating factors that can reduce an organization's fine punishment under Chapter Eight. The absence of an effective program may be a reason for the court to place an organization on probation, and the implementation of an effective program may be a condition of probation for organizations under §8D1.4(c) (Recommended Conditions of Probation-Organizations).

In order to emphasize the importance of compliance and ethics programs and to provide more prominent guidance on the requirements for an effective program, the amendment elevates the criteria for an effective compliance program previously set forth in the Commentary to §8A1.2 (Application Instructions - Organizations) into a separate guideline. Furthermore, the amendment elaborates upon these criteria, introducing additional rigor generally and imposing significantly greater responsibilities on the organization's governing authority and executive leadership.

Section 8B2.1(a)(1) sets forth the existing requirement that an organization exercise due diligence to prevent and detect criminal conduct, but adds the requirement that an organization "otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." This addition is intended to reflect the emphasis on ethical conduct and values incorporated into recent legislative and regulatory reforms, such as those provided by the Act.

Section 8B2.1(b) provides that due diligence and the promotion of desired organizational culture are indicated by the fulfilment of seven minimum requirements, which are the hallmarks of an effective program that encourages compliance with the law and ethical conduct. While the framework of requirements is derived from the existing criteria for an effective compliance program at Application Note 3(k) to §8A1.2, significant additional guidance is provided.

First, §8B2.1(b)(1) provides that organizations must establish "standards and procedures to prevent and detect criminal conduct." Application Note 1 establishes that "standards and procedures" encompass "standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct."

Second, the new guideline replaces the requirement in Application Note 3(k)(2) to §8A1.2 that "specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance" with more specific and exacting requirements. Section 8B2.1(b)(2) defines the specific roles and reporting relationships of particular categories of personnel with respect to compliance and ethics program responsibilities. Specifically, the Commission has determined that the organization's governing authority must "be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program." Application Note 1 defines "governing authority" as the "(A) Board of Directors, or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization."

Section 8B2.1(b)(2) provides that it is the organizational leadership, defined in the guidelines as "high-level personnel," who must ensure that the organization's program is effective. The accompanying commentary at Application Note 1 retains existing definitions for the terms "high-level personnel" and "substantial authority personnel" of the organization. Section 8B2.1(b)(2)(B) provides that the organization must assign someone in high-level personnel "overall responsibility" for the program. This prescription makes explicit that, while another individual or individuals may be assigned operational responsibility for the program, someone within high-level personnel must be assigned the ultimate responsibility for the program's effectiveness.

Section 8B2.1(b)(2)(C) requires that certain individual(s) have day-to-day responsibility for the compliance and ethics program and adequate resources to carry out the associated tasks. Specifically, §8B2.1 requires that the individual assigned day-to-day operational responsibility for the program, whether it be a high-level person or an employee to whom this task is assigned, report to organizational leadership and the governing authority on the program. If authority is delegated, the governing authority must receive reports from such individuals at least annually, according to the commentary in Application Note 3. In order to carry out such responsibility, the new guideline mandates that such individual or individuals, no matter the level, must "be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority."

Third, §8B2.1(b)(3) replaces the previous requirement that substantial authority personnel be screened for their "propensity to engage in violations of law" with the requirement that the organization "use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program." Application Note 4(A) makes explicit that this provision does not require any "conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices." Application Note 4(B) provides that the organization shall hire and promote individuals so as to ensure that all individuals within the organizational leadership will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages a commitment to compliance with ethics and the law. If an individual has engaged in illegal activities, the organization has an obligation to consider the relatedness of the individual's illegal activities and other misconduct to the specific responsibilities such individual is expected to be assigned. The recency of the

individual's illegal activities and other misconduct also should be considered.

Fourth, §8B2.1(b)(4) makes compliance and ethics training a requirement, and specifically extends the training requirement to the upper levels of an organization, including the governing authority and high-level personnel, in addition to all of the organization's employees and agents, as appropriate. Furthermore, subsection (b)(4) establishes that this communication and training obligation is ongoing, requiring "periodic" updates.

Fifth, §8B2.1(b)(5) expands the existing requirement regarding reasonable steps to achieve compliance. Specifically, the amendment mandates that organizations use auditing and monitoring systems designed to detect criminal conduct. It also adds the specific requirement that the organization periodically evaluate the effectiveness of its compliance and ethics program. Significantly, the new guideline expands the focus of internal reporting from simply reporting "the criminal conduct . . . of others" to using internal systems to either "report or seek guidance regarding potential or actual criminal conduct." The addition of "seeking guidance" is consistent with the increased focus of this guideline on the prevention and deterrence of wrongdoing within organizations. This section also replaces the existing reference to "reporting systems without fear of retribution" with the more specific requirement that the organization must have "a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation."

The Commission is aware that both anonymous and confidential mechanisms have inherent value and limitations. For example, anonymous mechanisms may hinder an organization from engaging in an effective dialogue with the potential whistleblower to discover additional information that might lead to a more efficient detection of the wrongdoing. Confidential mechanisms may permit the dialogue and development of maximum information, but the ability of organizations to ensure total confidentiality may be limited by legal obligations relating to self-disclosure, law enforcement subpoenas, and civil discovery requests. The Commission intends for an organization to have maximum flexibility in implementing a system that is best suited to its culture and conforms to applicable law. A responsible organization is expected, as appropriate, to communicate to its employees any applicable limitations of its internal reporting mechanisms.

Sixth, §8B2.1(b)(6) broadens the existing criterion that the compliance standards be enforced through disciplinary measures by adding that such standards also be encouraged through "appropriate incentives to perform in accordance with the compliance and ethics program." This addition articulates both a duty to promote proper conduct in whatever manner an organization deems appropriate, as well as a duty to sanction improper conduct.

Finally, §8B2.1(b)(7) retains the requirement that an organization take reasonable steps to respond to and prevent further similar criminal conduct. This dual duty underscores the organization's obligation to address both specific instances of misconduct and systemic shortcomings that compromise the deterrent effect of its compliance and ethics program.

In addition to the seven requirements for a compliance and ethics program, §8B2.1(c) expressly provides, as an essential component of the design, implementation, and modification of an effective program, that an organization must periodically assess the risk

of the occurrence of criminal conduct. The new guideline includes at Application Note 6 various factors that should be addressed when assessing relevant risks. Specifically, organizations should evaluate the nature and seriousness of potential criminal conduct, the likelihood that certain criminal conduct may occur because of the nature of the organization's business, and the prior history of the organization. To be effective, this process must be ongoing. Organizations must periodically prioritize their compliance and ethics resources to target those potential criminal activities that pose the greatest threat in light of the risks identified.

The amendment also provides additional guidance with respect to the implementation of compliance and ethics programs by small organizations by including frequent references to small organizations throughout the commentary of §8B2.1 and providing illustrations (see e.g., Application Note 2(C)(ii)). It also encourages larger organizations to promote the adoption of compliance and ethics programs by smaller organizations, including those with which they conduct or seek to conduct business.

This amendment also changes the automatic preclusion for compliance program credit provided in §8C2.5(f) (Culpability Score) for "small organizations." A "small organization" is defined, for this subsection only, as an organization having fewer than 200 employees. This modification is intended to assist smaller organizations that previously may have been automatically precluded, because of their size, from arguing for a culpability score reduction based upon an effective compliance and ethics program that fulfills all of the guideline requirements. Rather than precluding absolutely these small organizations from obtaining the reduction if certain categories of high-level personnel are involved in the offense of conviction, §8C2.5(f)(3) establishes that an offense by an individual within high-level personnel of the organization results in a rebuttable presumption for a small organization that it did not have an effective program. The small organization, however, can rebut that presumption by demonstrating that it had an effective program, despite the involvement in the offense of a person high in the organization's structure.

This amendment also addresses concerns about the relationship between obtaining credit under §8C2.5(g) and waiver of the attorney-client privilege and the work product protection doctrine. Pursuant to §8C2.5(g)(1) and (2), an organization's culpability score will be reduced if it "fully cooperated in the investigation" of its wrongdoing, among other factors. The Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines studied the relationship between waivers and §8C2.5(g) by obtaining testimony and conducting its own research, including a survey of United States Attorneys' Offices (all of which are described at Part V of the Advisory Group Report of October 7, 2003). The Commission addresses some of these concerns by providing at Application Note 12 that waiver of the attorney-client privilege and of work product protections "is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." The Commission expects that such waivers will be required on a limited basis. See "United States Attorneys' Bulletin", November 2003, Volume 51, Number 6, pp. 1, 8.

Effective Date: The effective date of this amendment is November 1, 2004.

674. Amendment: The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 5 by striking the fifth sentence as follows:

> "When not adequately taken into account by the applicable offense guideline, creation of a risk may provide a ground for imposing a sentence above the applicable guideline range.",

and inserting the following:

> "In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward departure may be warranted.".

The Commentary to §1B1.4 captioned "Background" is amended in the fifth sentence by striking "sentencing above the guideline range" and inserting "an upward departure".

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 1 in the third sentence by striking "increase the defendant's sentence above the applicable guideline range by upward departure" and inserting "depart upward"; and in the last sentence by striking "below the applicable guideline range" and inserting "downward".

Section 2B1.1(b)(10), as redesignated by Amendment 665, is amended in subdivision (A) by striking "device-making equipment" and inserting "(i) device-making equipment, or (ii) authentication feature"; in subdivision (B) by inserting "(i)" before "unauthorized access"; and by inserting ", or (ii) authentication feature" after "counterfeit access device"; and in subdivision (C)(i) by striking the semi-colon and inserting a comma.

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 4 by striking subdivision (C)(ii), as redesignated by Amendment 665, as follows:

> "(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 victims.",

and inserting the following:

> "(ii) Special Rule.—A case described in subdivision (C)(i) of this note that involved—
>
> (I) a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims.
>
> (II) a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 7, as redesignated by Amendment 665, by striking "(b)(7)" each place it appears and inserting "(b)(8)"; and in Note 8, as redesignated by Amendment 665, by striking "(b)(8)" each place it appears and inserting "(b)(9)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 9, as redesignated by Amendment 665, by striking "(b)(9)" each place it appears and inserting "(b)(10)"; in subdivision (A) by inserting before the paragraph that begins "'Counterfeit access device'" the following paragraph:

> "'Authentication feature' has the meaning given that term in 18 U.S.C. § 1028(d)(1).";

in the paragraph that begins "'Means of identification'" by striking "(d)(4)" and inserting "(d)(7)"; and in subdivision (B) by inserting "Authentication Features and" before "Identification Documents."; and by inserting "authentication features," after "involving".

The Commentary §2B1.1 captioned "Application Notes" is amended in Note 10, as redesignated by Amendment 665, by striking "(b)(10)" each place it appears and inserting "(b)(11)"; in Note 11, as redesignated by Amendment 665, by striking "(b)(12)" each place it appears and inserting "(b)(13)"; in Note 12, as redesignated by Amendment 665, by striking "(b)(12)" each place it appears and inserting "(b)(13)"; in Note 13, as redesignated by Amendment 665, by striking "(b)(13)" each place it appears and inserting "(b)(14)"; and by striking "(b)(12)(B)" each place it appears and inserting "(b)(13)(B)"; in Note 14, as redesignated by Amendment 665, by striking "(b)(14)" each place it appears and inserting "(b)(15)"; and in Note 19(B), as redesignated by Amendment 665, by striking "(b)(13)(iii)" and inserting "(b)(14)(iii)".

The Commentary to §2B1.1 captioned "Background" is amended in the ninth paragraph by striking "Subsection (b)(7)(D)" and inserting "Subsection (b)(8)(D)"; in the tenth paragraph by striking "Subsection (b)(8)" and inserting "Subsection (b)(9)"; in the eleventh paragraph by striking "Subsections (b)(9)(A) and (B)" and inserting "Subsections (b)(10)(A)(i) and (B)(i)"; in the twelfth paragraph by striking "Subsection (b)(9)(C)" and inserting "Subsection (b)(10)(C)"; in the thirteenth paragraph by striking "Subsection (b)(11)(B)" and inserting "Subsection (b)(12)(B)"; in the fourteenth paragraph by striking "Subsection (b)(12)(A)" and inserting "Subsection (b)(13)(A)"; in the fifteenth paragraph by striking "Subsection (b)(12)(B)" and inserting "Subsection (b)(13)(B)"; in the sixteenth paragraph by striking "Subsection (b)(13) implements" and inserting "Subsection (b)(14) implements"; and by striking "subsection (b)(13)(B)" and inserting "subsection (b)(14)(B)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 7 by striking "sentence below the applicable guideline range" and inserting "downward departure".

The Commentary to §2R1.1 captioned "Application Notes" is amended in Note 7 by striking ", or even above,"; and by inserting ", or an upward departure," after "guideline range".

The Commentary to §2T1.8 captioned "Application Note" is amended in Note 1 by striking "a sentence above the guidelines" and inserting "an upward departure".

Chapter Two, Part T, Subpart 3, is amended in the "Introductory Commentary" by striking "imposing a sentence above that specified in the guideline in this Subpart" and inserting "departing upward".

Chapter Two, Part X is amended by adding at the end the following new Subpart:

"6. OFFENSES INVOLVING USE OF A MINOR IN A CRIME OF VIOLENCE

§2X6.1. Use of a Minor in a Crime of Violence

(a) Base Offense Level: 4 plus the offense level from the guideline applicable to the underlying crime of violence.

Commentary

Statutory Provision: 18 U.S.C. § 25.

Application Notes:

1. Definition.—For purposes of this guideline, 'underlying crime of violence' means the crime of violence as to which the defendant is convicted of using a minor.

2. Inapplicability of §3B1.4.—Do not apply the adjustment under §3B1.4 (Using a Minor to Commit a Crime).

3. Multiple Counts.—

(A) In a case in which the defendant is convicted under both 18 U.S.C. § 25 and the underlying crime of violence, the counts shall be grouped pursuant to subsection (a) of §3D1.2 (Groups of Closely Related Counts).

(B) Multiple counts involving the use of a minor in a crime of violence shall not be grouped under §3D1.2.".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 5(b) by striking "3(g)" and inserting "4(g)".

Section 3D1.2(d) is amended by striking the period after "2P1.3" and inserting a semi-colon; and by inserting after the line that begins "§§2P1.1," the following new line:

"§2X6.1.".

The Commentary to §3D1.3 captioned "Application Notes" is amended in Note 4 by striking "a sentence above the guideline range" and inserting "an upward departure".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 in the first

sentence of the paragraph that begins "'Crime of violence' does not include" by inserting ", unless the possession was of a firearm described in 26 U.S.C. § 5845(a)" before the period.

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 by inserting before the paragraph that begins "Unlawfully possessing a prohibited flask" the following paragraph:

> "Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence'.".

The Commentary to §4B1.4 captioned "Application Note" is amended by striking "Note" in the heading and inserting "Notes"; and by adding at the end the following:

> "2. Application of §4B1.4 in Cases Involving Convictions Under 18 U.S.C. § 844(h), § 924(c), or § 929(a).—If a sentence under this guideline is imposed in conjunction with a sentence for a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a), do not apply either subsection (b)(3)(A) or (c)(2). A sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a) accounts for the conduct covered by subsections (b)(3)(A) and (c)(2) because of the relatedness of the conduct covered by these subsections to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).
>
> In a few cases, the rule provided in the preceding paragraph may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (i.e., the guideline range that would have resulted if subsections (b)(3)(A) and (c)(2) had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).".

Section 5C1.2(a) is amended by striking "verbatim".

The Commentary to §5G1.2 captioned "Application Notes" is amended in Note 3(B)(iii) in the first sentence by striking "2113(a) (20 year" and inserting "113(a)(3) (10 year"; in the second sentence by striking "400" and inserting "460", and by striking "360-life" and inserting "460-485 months"; and in the third sentence by striking "40" and inserting"100", and by striking "2113(a)" and inserting "113(a)(3)".

Section 5H1.1 is amended by striking "sentence should be outside the applicable guideline range" and inserting "departure is warranted"; by striking "impose a sentence below the

applicable guideline range when" and inserting "depart downward in a case in which"; and by inserting "; Gambling Addiction" after "Abuse".

Section 5H1.2 is amended by striking "sentence should be outside the applicable guideline range" and inserting "departure is warranted".

Section 5H1.3 is amended by striking "sentence should be outside the applicable guideline range" and inserting "departure is warranted".

Section 5H1.5 is amended by striking "sentence should be outside the applicable guideline range" and inserting "departure is warranted".

Chapter Five, Part H is amended by striking §5H1.6 as follows:

"§5H1.6. Family Ties and Responsibilities (Policy Statement)

Family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

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.

*Note: Section 401(b)(4) of Public Law 108-21 (the "Protect Act") directly amended §5H1.6 to add the second paragraph, effective April 30, 2003. The Commission incorporated this direct amendment in the Supplement to the 2002 Guidelines Manual but inadvertently omitted the second paragraph in the Federal Register notice of amendments dated October 21, 2003. The policy statement should be read as containing the second paragraph, pursuant to the direct amendment made by Public Law 108–21.",

and inserting the following:

"§5H1.6. Family Ties and Responsibilities (Policy Statement)

In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

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.".

The Commentary to §5H1.6 is amended by adding at the end the following:

"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 5H1.11 is amended by striking "sentence should be outside the applicable guideline range" and inserting "departure is warranted".

Section 5H1.12 is amended by striking "grounds for imposing a sentence outside the applicable guideline range" and inserting "in determining whether a departure is warranted".

Section 5K2.12 is amended by striking "decrease the sentence below the applicable guideline range" and inserting "depart downward".

Section 5K2.13 is amended by striking "sentence below the applicable guideline range" and inserting "downward departure".

Section 5K2.14 is amended by striking "increase the sentence above the guideline range" and inserting "depart upward".

Section 5K2.16 is amended by striking "departure below the applicable guideline range for that offense" and inserting "downward departure".

Section 5K2.21 is amended by striking "increase the sentence above the guideline range" and inserting "depart upward".

Section 5K2.22 is amended by striking "impose a sentence below the applicable guideline range" each place it appears and inserting "depart downward"; and by striking "for imposing a sentence below the guidelines" and inserting "to depart downward".

Section 5K2.23 is amended by striking "sentence below the applicable guideline range" and inserting "downward departure".

Section 6A1.1 is amended by striking the following:

"A probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record. Rule 32(b)(1), Fed. R. Crim. P. The defendant may not waive preparation of the presentence report.",

and inserting the following:

"(a) The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless—

(1) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(2) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

Rule 32(c)(1)(A), Fed. R. Crim. P.

(b) The defendant may not waive preparation of the presentence report.".

The Commentary to §6A1.1 is amended by striking:

" A thorough presentence investigation is essential in determining the facts relevant to sentencing. In order to ensure that the sentencing judge will have information sufficient to determine the appropriate sentence, Congress deleted provisions of Rule 32(c), Fed. R. Crim. P., which previously permitted the defendant to waive the presentence report. Rule 32(b)(1) permits the judge to dispense with a presentence report, but only after explaining, on the record, why sufficient information is already available.",

and inserting the following:

" A thorough presentence investigation ordinarily is essential in determining the facts relevant to sentencing. Rule 32(c)(1)(A) permits the judge to dispense with a presentence report in certain limited circumstances, as when a specific statute requires or when the court finds sufficient information in the record to enable it to exercise its statutory sentencing authority meaningfully and explains its finding on the record.".

Chapter Six, Part A is amended by striking §6A1.2 and its accompanying commentary as follows:

"§6A1.2. Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

Courts should adopt procedures to provide for the timely disclosure of the presentence report; the narrowing and resolution, where feasible, of issues in dispute in advance of the sentencing hearing; and the identification for the court of issues remaining in dispute. Rule 32(b)(6), Fed. R. Crim. P.

Commentary

Application Note:

1. Under Rule 32, Fed. R. Crim. P., if the court intends to consider a sentence outside the applicable guideline range on a ground not identified as a ground for departure either in the presentence report or a pre-hearing submission, it shall provide reasonable notice that it is contemplating such ruling, specifically identifying the grounds for the departure. Burns v. United States, 501 U.S. 129, 135-39 (1991).

Background: In order to focus the issues prior to sentencing, the parties are required to respond in writing to the presentence report and to identify any issues in dispute. Rule 32(b)(6)(B), Fed. R. Crim. P.",

and inserting the following:

"§6A1.2. Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

(a) The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. Rule 32(e)(2), Fed. R. Crim. P.

(b) Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. An objecting party must provide a copy of its objections to the opposing party and to the probation officer. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report accordingly. Rule 32(f), Fed. R. Crim. P.

(c) At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them. Rule 32(g), Fed. R. Crim. P.

Background: In order to focus the issues prior to sentencing, the parties are required to respond in writing to the presentence report and to identify any issues in dispute. See Rule 32(f), Fed. R. Crim. P.".

Section 6A1.3(b) is amended by striking "Rule 32(c)(1)" and inserting "Rule 32(i)".

The Commentary to §6A1.3 is amended by striking the first paragraph as follows:

" In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation no longer exists under sentencing guidelines. The court's resolution of disputed sentencing factors usually has a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair.";

by striking "117 S. Ct. 633, 635" and inserting "519 U.S. 148, 154"; and by striking "117 S. Ct. at 637" and inserting "519 U.S. at 157".

Chapter Six, Part A is amended by adding at the end the following:

"§6A1.4. Notice of Possible Departure (Policy Statement)

Before the court may depart from the applicable sentencing guideline range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. Rule 32(h), Fed. R. Crim. P.

Commentary

Background: The Federal Rules of Criminal Procedure were amended, effective December 1, 2002, to incorporate into Rule 32(h) the holding in Burns v. United States, 501 U.S. 129, 138-39 (1991). This policy statement parallels Rule 32(h), Fed. R. Crim. P.".

Chapter Six, Part B is amended by striking the Introductory Commentary as follows:

" Introductory Commentary

Policy statements governing the acceptance of plea agreements under Rule 11(e)(1), Fed. R. Crim. P., are intended to ensure that plea negotiation practices:

(1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and

(2) do not perpetuate unwarranted sentencing disparity.

These policy statements are a first step toward implementing 28 U.S.C. § 994(a)(2)(E). Congress indicated that it expects judges 'to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines.' S. Rep. 98-225, 98th Cong., 1st Sess. 63, 167 (1983). In pursuit of this goal, the Commission shall study plea agreement practice under the guidelines and ultimately develop standards for judges to use in

determining whether to accept plea agreements. Because of the difficulty in anticipating problems in this area, and because the sentencing guidelines are themselves to some degree experimental, substantive restrictions on judicial discretion would be premature at this stage of the Commission's work.

The present policy statements move in the desired direction in two ways. First, the policy statements make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge. This is a reaffirmation of pre-guidelines practice. Second, the policy statements ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record. Explanations will be carefully analyzed by the Commission and will pave the way for more detailed policy statements presenting substantive criteria to achieve consistency in this aspect of the sentencing process.",

and inserting the following:

" Introductory Commentary

Policy statements governing the acceptance of plea agreements under Rule 11(c), Fed. R. Crim. P., are intended to ensure that plea negotiation practices: (1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and (2) do not perpetuate unwarranted sentencing disparity.

These policy statements make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge. The policy statements also ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record.".

Section 6B1.1 is amended by striking subsections (a), (b), and (c) as follows:

"(a) If the parties have reached a plea agreement, the court shall, on the record, require disclosure of the agreement in open court or, on a showing of good cause, in camera. Rule 11(e)(2), Fed. R. Crim. P.

(b) If the plea agreement includes a nonbinding recommendation pursuant to Rule 11(e)(1)(B), the court shall advise the defendant that the court is not bound by the sentencing recommendation, and that the defendant has no right to withdraw the defendant's guilty plea if the court decides not to accept the sentencing recommendation set forth in the plea agreement.

(c) The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under §6A1.1.",

and inserting the following:

"(a) The parties must disclose the plea agreement in open court when the plea

is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. Rule 11(c)(2), Fed. R. Crim. P.

(b) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. Rule 11(c)(3)(B), Fed. R. Crim. P.

(c) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. Rule 11(c)(3)(A), Fed. R. Crim. P.".

The Commentary to §6B1.1 is amended in the first paragraph by striking "Rule 11(e)" and inserting "Rule 11(c)";

and by striking the second paragraph as follows:

" Section 6B1.1(c) deals with the timing of the court's decision whether to accept the plea agreement. Rule 11(e)(2) gives the court discretion to accept the plea agreement immediately or defer acceptance pending consideration of the presentence report. Prior to the guidelines, an immediate decision was permissible because, under Rule 32(c), Fed. R. Crim. P., the defendant could waive preparation of the presentence report. Section 6B1.1(c) reflects the changes in practice required by §6A1.1 (Presentence Report) and amended Rule 32(c)(1). Since a presentence report normally will be prepared, the court must defer acceptance of the plea agreement until the court has had an opportunity to consider the presentence report.",

and inserting the following:

" Section 6B1.1(c) deals with the timing of the court's decision regarding whether to accept or reject the plea agreement. Rule 11(c)(3)(A) gives the court discretion to accept or reject the plea agreement immediately or defer a decision pending consideration of the presentence report. Given that a presentence report normally will be prepared, the Commission recommends that the court defer acceptance of the plea agreement until the court has reviewed the presentence report.".

Section 6B1.3 is amended by striking:

"If a plea agreement pursuant to Rule 11(e)(1)(A) or Rule 11(e)(1)(C) is rejected, the court shall afford the defendant an opportunity to withdraw the defendant's guilty plea. Rule 11(e)(4), Fed. R. Crim. P.",

and inserting the following:

"If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open

court (or, for good cause, in camera)—

(a) inform the parties that the court rejects the plea agreement;

(b) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(c) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

Rule 11(c)(5), Fed. R. Crim. P.".

The Commentary to §6B1.3 is amended by striking "Rule 11(e)(4)"and inserting "Rule 11(c)(5)"; and by striking "that would require dismissal of charges or imposition of a specific sentence." and inserting a period.

Appendix A is amended by inserting after the line referenced to 18 U.S.C. § 4 the following new line:

"18 U.S.C. § 25 2X6.1".

Reason for Amendment: This nine-part amendment consists of four technical and conforming amendments and five amendments of a more substantive nature, some of which are in response to new legislation.

First, this amendment corrects a typographical error in Application Note 4 to §3C1.1 (Obstructing or Impeding the Administration of Justice) by changing a reference to Application Note 3(g) to 4(g).

Second, this amendment makes a number of conforming changes to various guideline provisions and commentary as a result of departure amendments previously made in furtherance of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21 (the "PROTECT Act").

Third, this amendment corrects an error in an example provided in Application Note 3(B)(iii) of §5G1.2 (Sentencing on Multiple Counts of Conviction).

Fourth, this amendment generally updates Chapter Six (Sentencing Procedures and Plea Agreements) in response to a number of amendments that were made to the Federal Rules of Criminal Procedure effective December 1, 2002. While some of these changes to the Rules were substantive, the bulk of the changes to Rules 11 and 32 of the Federal Rules of Criminal Procedure were organizational and stylistic. These guideline amendments conform to those changes made to the Federal Rules of Criminal Procedure with respect to such issues as deadlines for disputed issues and requirements for disclosure of presentence reports, as well as procedures the court must follow in rejecting certain plea agreements. Certain outdated commentary also has been deleted.

Fifth, this amendment broadens the special multiple victim rule in Application Note 4(C)(ii) of §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), as redesignated by Amendment 3 of this document, for offenses involving stolen United States mail. The rule is expanded to include theft of mail from housing unit cluster boxes, whether owned by the United States Postal Service or otherwise. The amendment provides a presumption that a theft from such a cluster box involves the number of victims corresponding to the number of mailboxes contained in the cluster box. The same rationale for the original special rule applies to this expansion: (i) unique proof problems in that once entry is gained to such a cluster box and mail is removed, it is difficult to determine the number of persons from whom mail was stolen; (ii) the frequently significant, but difficult to quantify, non-monetary losses; and (iii) the importance of maintaining the integrity of the United States mail service. See USSG App. C (Vol. II) (Amendment 617). These reasons are equally valid whether the mail receptacle is owned by the United States Postal Service or is privately owned.

Sixth, this amendment modifies §2B1.1(b)(10), as redesignated by Amendment 3 of this document, which provides a two-level enhancement and a minimum offense level of 12, in response to the Secure Authentication Feature and Enhanced Identification Defense Act of 2003 (the "SAFE ID Act") (section 607 of the PROTECT Act, Pub. L. 108–21). That Act created a new offense at 18 U.S.C. § 1028(a)(8), prohibiting the trafficking of authentication features (e.g., a hologram or symbol used by a government agency to determine whether a document is counterfeit, altered, or otherwise falsified), and amended 18 U.S.C. § 1028 to prohibit the transfer or possession of authentication features. This amendment makes §2B1.1(b)(10) applicable to offenses involving authentication features.

Seventh, this amendment creates a new guideline at §2X6.1 (Use of a Minor to Commit a Crime of Violence). This new guideline is in response to a new offense provided at 18 U.S.C. § 25 (Use of Minors in Crimes of Violence), which was created by section 601 of the PROTECT Act. The new offense prohibits any person 18 years of age or older from intentionally using a minor to commit a crime of violence or to assist in avoiding detection or apprehension for such offense. For a first conviction, the penalty is twice the maximum term of imprisonment that would otherwise be authorized for the offense, and for each subsequent conviction, three times the maximum term of imprisonment that would otherwise be authorized for the offense.

While consideration was given to expanding the existing two-level adjustment at §3B1.4 (Using a Minor to Commit a Crime), the Commission determined it was more appropriate and consistent with guideline construction to create a new guideline for the new substantive offense created by Congress in the PROTECT Act. This new guideline at §2X6.1 directs the court to increase by 4 levels the offense level from the guideline applicable to the underlying crime of violence. Application notes are included to provide that the adjustment under §3B1.4 is inapplicable if §2X6.1 is used and to provide rules for the grouping of multiple counts.

Eighth, this amendment expands the definition of "crime of violence" in Application Note 1 to §4B1.2 (Definitions of Terms Used in Section 4B1.1) to include unlawful possession of any firearm described in 26 U.S.C. § 5845(a). The amendment also excepts possession

of those firearms described in 26 U.S.C. § 5845(a) from the rule that excludes felon in possession offenses from the definition of "crime of violence." Congress has determined that those firearms described in 26 U.S.C. § 5845(a) are inherently dangerous and when possessed unlawfully, serve only violent purposes. In the National Firearms Act, Pub. L. 90–618, Congress required that these firearms be registered with the National Firearms Registration and Transfer Record. A number of courts have held that possession of certain of these firearms, such as a sawed-off shotgun, is a "crime of violence" due to the serious potential risk of physical injury to another person. The amendment's categorical rule incorporating 26 U.S.C. § 5845(a) firearms includes short-barreled rifles and shotguns, machine guns, silencers, and destructive devices. It will affect determinations both of career offender status under Chapter Four, Part B and also of appropriate base offense levels in §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).

Ninth, this amendment provides an application note in §4B1.4 (Armed Career Criminal) to address an apparent "double counting" issue that appears to be present when a defendant is convicted both of 18 U.S.C. § 922(g) (Felon in Possession) and also of an offense such as 18 U.S.C. § 924(c) (Use of a Firearm in Relation to Any Crime of Violence or Drug Trafficking Crime) or a similar offense carrying a mandatory minimum consecutive penalty, such as 18 U.S.C. § 844(h) relating to use of explosives, or 18 U.S.C. § 929(a) relating to use of restricted ammunition.

The basis for the mandatory minimum, consecutive penalties in these offenses is the same as the basis for the enhanced guideline offense level 34 at §4B1.4(b)(3)(A) and the enhanced Criminal History Category VI at §4B1.4(c)(2); i.e., the use or possession of the firearm in connection with a crime of violence or controlled substance offense. The Commission determined that the mandatory minimum, consecutive sentences in these statutes are sufficient to take into account the aggravated conduct referenced in §4B1.4.

An upward departure is provided for those cases that result in a total maximum penalty that is less than the maximum of the guideline range that would have resulted if the enhanced offense level under §4B1.4(b)(3)(A) and the criminal history enhancement under §4B1.4(c)(2) had been applied. However, the extent of the upward departure shall not exceed the maximum of the guideline range that would have resulted had there not been a conviction under 18 U.S.C. § 924(c), § 844(h), or § 929(a).

Effective Date: The effective date of this amendment is November 1, 2004.

675. **Amendment:** Section 2B5.3(b) is amended by redesignating subsections (b)(2) through (b)(4) as subsections (b)(3) through (b)(5), respectively; and by inserting after subsection (b)(1) the following:

> "(2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by 2 levels.".

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 1 by striking the last paragraph as follows:

"'Uploading' means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item.",

and inserting the following:

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

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

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 2 in subdivision (A) by inserting after subdivision (v) the following:

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

and by inserting after subdivision (D) the following:

"(E) Indeterminate Number of Infringing Items.—In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records.".

The Commentary to §2B5.3 captioned "Application Notes" is amended by striking Note 3 as follows:

"3. Uploading.—With respect to uploading, subsection (b)(2) applies only to uploading with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item. For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant's personal computer.";

and by redesignating Notes 4 and 5 as Notes 3 and 4, respectively.

Appendix A (Statutory Index) is amended by inserting after the line reference to "18 U.S.C. § 2319A" the following:

"18 U.S.C. § 2319B 2B5.3".

Reason for Amendment: This amendment implements the directive in section 105 of the Family Entertainment and Copyright Act of 2005, Pub. L. 109–9. The directive, which requires the Commission to promulgate an amendment under emergency amendment authority by October 24, 2005, instructs the Commission to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes..."

> "In carrying out [the directive], the Commission shall—
>
> (1) take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements...are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes;
>
> (2) determine whether to provide a sentencing enhancement for those convicted of the offenses [involving intellectual property rights], if the conduct involves the display, performance, publication, reproduction, or distribution of a copyrighted work before it has been authorized by the copyright owner, whether in the media format used by the infringing party or in any other media format;
>
> (3) determine whether the scope of 'uploading' set forth in application note 3 of section 2B5.3 of the Federal sentencing guidelines is adequate to address the loss attributable to people who, without authorization, broadly distribute copyrighted works over the Internet; and
>
> (4) determine whether the sentencing guideline and policy statements applicable to the offenses [involving intellectual property rights] adequately reflect any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed."

Pre-Release Works

The amendment provides a separate two-level enhancement if the offense involved a pre-release work. The enhancement and the corresponding definition use language directly from 17 U.S.C. § 506(a) (criminal infringement). The amendment adds language to Application Note 2 that explains that in cases involving pre-release works, the infringement amount should be determined by using the retail value of the infringed item, rather than any premium price attributed to the infringing item because of its pre-release status. The amendment addresses concerns that distribution of an item before it is legally available to the consumer is more serious conduct than distribution of other infringing items and involves a harm not addressed by the current guideline.

Uploading

The concern underlying the uploading directive pertains to offenses in which the copyrighted work is transferred through file sharing. The amendment builds on the current definition of "uploading" to include making an infringing item available on the Internet by storing an infringing item in an openly shared file. The amendment also clarifies that uploading does not include merely downloading or installing infringing items on a hard drive of the defendant's computer unless the infringing item is in an openly shared file. By clarifying the definition of uploading in this manner, Application Note 3, which is a restatement of the uploading definition, is no longer necessary and the amendment deletes the application note from the guideline.

Indeterminate Number

The amendment addresses the final directive by amending Application Note 2, which sets forth the rules for determining the infringement amount. The note provides that the court may make a reasonable estimate of the infringement amount using any relevant information including financial records in cases in which the court cannot determine the number of infringing items.

New Offense

Finally, the amendment provides a reference in Appendix A (Statutory Index) for the new offense at 18 U.S.C. § 2319B. This offense is to be referenced to §2B5.3.

Effective Date: The effective date of this amendment is October 24, 2005.

676. Amendment: Section 2J1.2(b) is amended by striking subdivision (1) as follows:

"(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.",

and inserting the following:

"(1) (Apply the greater):

(A) 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.

(B) If (i) defendant was convicted under 18 U.S.C. § 1001 or § 1505; and (ii) the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, increase by 12 levels.".

The Commentary to §2J1.2 captioned "Statutory Provisions" is amended by striking "18 U.S.C. §§ 1503" and inserting the following:

"18 U.S.C. §§ 1001 when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, 1503".

The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 1 by inserting after "Definitions.—For purposes of this guideline:" the following:

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

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

The Commentary to §2J1.2 captioned "Application Notes" is amended by striking Note 2 as follows:

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

and inserting the following:

"2. Chapter Three Adjustments.—

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

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

Appendix A (Statutory Index) is amended in the line referenced to "18 U.S.C. § 1001" by inserting ", 2J1.2 when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable" after 2B1.1".

Reason for Amendment: This amendment implements section 6703 of the Intelligence Reform and Terrorism Prevention Act of 2004 (the "Act"), Pub. L. 108–458. Section 6703(a) provides an enhanced penalty of not more than 8 years of imprisonment for offenses under sections 1001(a) and 1505 of title 18, United States Code, "if the offense involves international or domestic terrorism (as defined in section 2331)." Section 6703(b) requires the Sentencing Commission to amend the sentencing guidelines to provide for "an increased offense level for an offense under sections 1001(a) and 1505 of title 18, United States Code, if the offense involves international or domestic terrorism, as defined in section 2331 of such title." The Commission is directed under section 3 of the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–76, to promulgate this amendment as an emergency amendment.

First, the amendment references convictions under 18 U.S.C. § 1001 to §2J1.2 (Obstruction of Justice) "when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable." It also adds a new specific offense characteristic at §2J1.2(b)(1)(B) providing for a 12 level increase for a defendant convicted under 18 U.S.C. §§ 1001 and 1505 "when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable." This 12 level increase is applied in lieu of the current 8 level increase for injury or threats to persons or property. The increase of 12 levels is intended to provide parity with the treatment of federal crimes of terrorism within the limits of the 8 year statutory maximum penalty. It is also provided to ensure a 5 year sentence of imprisonment for offenses that involve international or domestic terrorism.

Second, the amendment adds to Application Note 1 definitions for "domestic terrorism" and "international terrorism," using the meanings given the terms at 18 U.S.C. § 2331(5) and (1), respectively.

Third, the amendment adds to Application Note 2 an instruction that if §3A1.4 (Terrorism)

applies, do not apply §2J1.2(b)(1)(B).

Effective Date: The effective date of this amendment is October 24, 2005.

677. Amendment: Chapter Two, Part B, Subpart 1 is amended by adding at the end the following new guideline and accompanying commentary:

"§2B1.6. Aggravated Identity Theft

(a) If the defendant was convicted of violating 18 U.S.C. § 1028A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

Commentary

Statutory Provision: 18 U.S.C. § 1028A. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Imposition of Sentence.—

(A) In General.—Section 1028A of title 18, United State Code, provides a mandatory term of imprisonment. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 1028A is the term required by that statute. Except as provided in subdivision (B), 18 U.S.C. § 1028A also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

(B) Multiple Convictions Under Section 1028A.—Section 1028A(b)(4) of title 18, United State Code, provides that in the case of multiple convictions under 18 U.S.C. § 1028A, the terms of imprisonment imposed on such counts may, in the discretion of the court, run concurrently, in whole or in part, with each other. See the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance regarding imposition of sentence on multiple counts of 18 U.S.C. § 1028A.

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

identification' has the meaning given that term in 18 U.S.C. § 1028(d)(7).

3. Inapplicability of Chapters Three and Four.—Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2.".

The Commentary to §3B1.3 captioned "Application Notes" is amended in Note 1 by inserting "Definition of 'Public or Private Trust'.—" before "'Public or private trust' refers to", and by striking the second paragraph as follows:

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

by redesignating Notes 2 through 4 as Notes 3 through 5, respectively; and by inserting after Note 1 the following:

"2. Application of Adjustment in Certain Circumstances.—Notwithstanding Application Note 1, or any other provision of this guideline, an adjustment under this guideline shall apply to the following:

(A) An employee of the United States Postal Service who engages in the theft or destruction of undelivered United States mail.

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

Section 3D1.1 is amended by striking subsection (b) as follows:

"(b) Exclude from the application of §§3D1.2-3D1.5 any count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the

provisions of §5G1.2(a).",

and inserting the following:

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

(1) Any count 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. Sentences for such counts are governed by the provisions of §5G1.2(a).

(2) Any count of conviction under 18 U.S.C. § 1028A. See Application Note 2(B) of the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance on how sentences for multiple counts of conviction under 18 U.S.C. § 1028A should be imposed.".

The Commentary to §5G1.2 captioned "Application Notes" is amended in Note 2 by inserting "(A) In General.—" before "Subsection (a) applies"; by inserting "and 18 U.S.C. § 1028A (requiring a mandatory term of imprisonment of either two or five years, based on the conduct involved, and also requiring, except in the circumstances described in subdivision (B), the sentence imposed to run consecutively to any other term of imprisonment)" after "imprisonment)"; by striking the following:

"Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e).";

and by adding at the end the following:

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

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

(i) The nature and seriousness of the underlying offenses. For

example, the court should consider the appropriateness of imposing consecutive, or partially consecutive, terms of imprisonment for multiple counts of 18 U.S.C. § 1028A in a case in which an underlying offense for one of the 18 U.S.C. § 1028A offenses is a crime of violence or an offense enumerated in 18 U.S.C. § 2332b(g)(5)(B).

(ii) Whether the underlying offenses are groupable under §3D1.2 (Multiple Counts). Generally, multiple counts of 18 U.S.C. § 1028A should run concurrently with one another in cases in which the underlying offenses are groupable under §3D1.2.

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

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

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1028 the following:

"18 U.S.C. § 1028A 2B1.6".

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

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

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

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

Third, the amendment adds a number of provisions at appropriate guidelines in order to provide guidance to courts in accordance with section 2 of the Act (18 U.S.C. § 1028A(b)(4)). That section states that "a term of imprisonment imposed on a person for violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission . . . ." The amendment states a general rule, at §5G1.2 (Sentencing on Multiple Counts of Conviction), Application Note 2(B), providing that the court has discretion to impose concurrent or consecutive, or partially concurrent and partially consecutive, terms of imprisonment for multiple violations of 18 U.S.C. § 1028A. A non-exhaustive list of factors for courts to consider in making this determination is provided, including the nature and seriousness of the underlying offenses and whether the offenses would be groupable under §3D1.2 (Group of Closely Related Counts).

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

Effective Date: The effective date of this amendment is November 1, 2005.

678. **Amendment:** Section 2R1.1(a) is amended by striking "10" and inserting "12".

Section 2R1.1(b) is amended by striking subdivision (2) as follows:

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

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

For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.",

and inserting the following:

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

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

For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.".

The Commentary to §2R1.1 captioned "Application Notes" is amended by striking Note 1 as follows:

"1. The provisions of §3B1.1 (Aggravating Role) and §3B1.2 (Mitigating Role) should be applied to an individual defendant as appropriate to reflect the

individual's role in committing the offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, a 4-level increase is called for under §3B1.1. An individual defendant should be considered for a downward adjustment under §3B1.2 for a mitigating role in the offense only if he was responsible in some minor way for his firm's participation in the conspiracy.",

and inserting the following:

"1. Application of Chapter Three (Adjustments).—Sections 3B1.1 (Aggravating Role), 3B1.2 (Mitigating Role), 3B1.3 (Abuse of Position of Trust or Use of Special Skill), and 3C1.1 (Obstructing or Impeding the Administration of Justice) may be relevant in determining the seriousness of the defendant's offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, the 4-level increase at §3B1.1(a) should be applied to reflect the defendant's aggravated role in the offense. For purposes of applying §3B1.2, an individual defendant should be considered for a mitigating role adjustment only if he were responsible in some minor way for his firm's participation in the conspiracy.".

The Commentary to §2R1.1 captioned "Application Notes" is amended in Note 2 by striking the first sentence as follows:

"In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, his role, and the degree to which he personally profited from the offense (including salary, bonuses, and career enhancement).",

and inserting the following:

"Considerations in Setting Fine for Individuals.—In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, the defendant's role, and the degree to which the defendant personally profited from the offense (including salary, bonuses, and career enhancement).".

The Commentary to §2R1.1 captioned "Background" is amended in the second paragraph by striking the following:

"The Commission believes that the most effective method to deter individuals from committing this crime is through imposing short prison sentences coupled with large fines. The controlling consideration underlying this guideline is general deterrence.";

in the third paragraph by striking "confinement of six months or longer" and inserting "some period of confinement"; and in the last paragraph by striking the last sentence as follows:

"The statutory maximum fine is $350,000 for individuals and $10,000,000 for organizations, but is increased when there are convictions on multiple counts.".

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

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

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

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

Effective Date: The effective date of this amendment is November 1, 2005.

679. **Amendment:** Section 2A2.4 is amended by striking the Commentary captioned "Background" as follows:

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

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 15 in the first sentence by inserting "involving fraudulent conduct that is" after "establishes an offense"; and in the second sentence by inserting "involves fraudulent conduct that" after

"the offense".

Section 2B3.3(c)(1) is amended by inserting "; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions" after "Official Right".

Section 2C1.3(c)(1) is amended by inserting "; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions" after "Official Right".

Section 2C1.8(c)(1) is amended by inserting "; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions" after "Official Right".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 5 in the first paragraph by striking "whether a greater quantity of the analogue is needed to produce a substantially similar effect on the central nervous system as" and inserting "whether the same quantity of analogue produces a greater effect on the central nervous system than".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 19 by striking "(b)(5)(A)" each place it appears and inserting "(b)(6)(A)"; in Note 20 by striking "(b)(5)(B) or (C)" and inserting "(b)(6)(B) or (C)"; and by striking "(b)(5)(C)" and inserting "(b)(6)(C)"; and in Note 21 by striking "(b)(6)" each place it appears and inserting "(b)(7)".

The Commentary to §2D1.1 captioned "Background" is amended in the ninth paragraph by striking "(b)(5)(A)" and inserting "(b)(6)(A)"; and in the last paragraph by striking "(b)(5)(B) and (C)" and inserting "(b)(6)(B) and (C)".

Section 2D1.11(e) is amended in subdivision (1) by striking "2271 L or more of Gamma-butyrolactone;" and inserting "1135.5 L or more of Gamma-butyrolactone;";

in subdivision (2) by striking "At least 681.3 L but less than 2271 L of Gamma-butyrolactone;" and inserting "At least 340.7 L but less than 1135.5 L of Gamma-butyrolactone;";

in subdivision (3) by striking "At least 227.1 L but less than 681.3 L of Gamma-butyrolactone;" and inserting "At least 113.6 L but less than 340.7 L of Gamma-butyrolactone;";

in subdivision (4) by striking "At least 159 L but less than 227.1 L of Gamma-butyrolactone;" and inserting "At least 79.5 L but less than 113.6 L of Gamma-butyrolactone;";

in subdivision (5) by striking "At least 90.8 L but less than 159 L of Gamma-butyrolactone;" and inserting "At least 45.4 L but less than 79.5 L of Gamma-butyrolactone;";

in subdivision (6) by striking "At least 22.7 L but less than 90.8 L of Gamma-butyrolactone;" and inserting "At least 11.4 L but less than 45.4 L of Gamma-butyrolactone;";

in subdivision (7) by striking "At least 18.2 L but less than 22.7 L of Gamma-butyrolactone;" and inserting "At least 9.1 L but less than 11.4 L of Gamma-butyrolactone;";

in subdivision (8) by striking "At least 13.6 L but less than 18.2 L of Gamma-butyrolactone;" and inserting "At least 6.8 L but less than 9.1 L of Gamma-butyrolactone;";

in subdivision (9) by striking "At least 9.1 L but less than 13.6 L of Gamma-butyrolactone;" and inserting "At least 4.5 L but less than 6.8 L of Gamma-butyrolactone;"; and

in subdivision (10) by striking "Less than 9.1 L of Gamma-butyrolactone;" and inserting "Less than 4.5 L of Gamma-butyrolactone;".

The Commentary to §2K2.1 captioned "Statutory Provisions" is amended by striking "(e)-(i), (k)-(o)" and inserting "(e)-(h), (j)-(n)".

Section 2M6.1 is amended by striking "(a)(4)*" in subsection (b)(1)(A) and inserting "(a)(4)(A)"; and by striking "*Note: The reference to ‘(a)(4)’ should be to ‘(a)(4)(A)’.".

Section 3D1.2(d) is amended by striking "2C1.7,".

The Commentary to §5D1.2 captioned "Application Notes" is amended in Note 2 by inserting "Limitation on" before "Applicability of Statutory".

Section 8C2.1(a) is amended by striking ", 2C1.7".

Appendix A (Statutory Index) is amended by striking the following:

"18 U.S.C. § 924(i)	2K2.1
18 U.S.C. § 924(j)(1)	2A1.1, 2A1.2
18 U.S.C. § 924(j)(2)	2A1.3, 2A1.4
18 U.S.C. § 924(k)-(o)	2K2.1",

and inserting the following:

"18 U.S.C. § 924(i)(1)	2A1.1, 2A1.2
18 U.S.C. § 924(i)(2)	2A1.3, 2A1.4
18 U.S.C. § 924(j)-(n)	2K2.1".

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

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

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

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

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

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

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

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

Eighth, this amendment corrects a typographical error in §2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy).

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

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

Effective Date: The effective date of this amendment is November 1, 2005.

680. **Amendment:** The Commentary to §2J1.6 captioned "Application Notes" is amended in Note 3 in the second paragraph in the fourth sentence by striking "See §3D1.1(b)" and inserting "See §3D1.1(b)(1)".

The Commentary to §2K2.1 captioned "Statutory Provisions", as amended by Amendment 679, is amended by striking "(e)-(h), (j)-(n)" and inserting "(e)-(i), (k)-(o)".

The Commentary to §2P1.2 captioned "Application Notes" is amended in Note 2 in the first paragraph in the fourth sentence by striking "See §3D1.1(b)" and inserting "See

§3D1.1(b)(1)".

The Commentary to §3D1.1 captioned "Application Notes" is amended in Note 1 in the first paragraph by striking "Subsection (b)" and inserting "Subsection (b)(1)"; in the fourth sentence by striking "subsection (b)" and inserting "subsection (b)(1)"; and in the second paragraph by striking "subsection (b)" and inserting "subsection (b)(1)".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 1 by striking "See §3D1.1(b)" and inserting "See §3D1.1(b)(1)".

The Commentary to §5G1.2 captioned "Application Notes", as amended by Amendment 677, is amended in Note 2 in subdivision (A) by striking "(A) specifies" and inserting "(i) specifies" and by striking "(B) requires" and inserting "(ii) requires"; and in subdivision (B)(ii) by striking "(Multiple Counts)" and inserting "(Groups of Closely Related Counts)".

Appendix A (Statutory Index), as amended by Amendment 679, is amended by striking the following:

"18 U.S.C. § 924(i)(1)	2A1.1, 2A1.2
18 U.S.C. § 924(i)(2)	2A1.3, 2A1.4
18 U.S.C. § 924(j)-(n)	2K2.1".

and inserting the following:

"18 U.S.C. § 924(i)	2K2.1
18 U.S.C. § 924(j)(1)	2A1.1, 2A1.2
18 U.S.C. § 924(j)(2)	2A1.3, 2A1.4
18 U.S.C. § 924(k)-(o)	2K2.1".

Reason for Amendment: This amendment makes various technical and conforming changes in order to more fully implement amendments submitted to Congress on April 29, 2005 (see Amendments 677 and 679).

Effective Date: The effective date of this amendment is November 1, 2005.

681. **Amendment**: Section 2D1.1 is amended by redesignating subsections (b)(6) and (b)(7) as subsections (b)(8) and (b)(9), respectively; and by inserting the following after subsection (b)(5):

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

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

Section 2D1.1(c) is amended in the "*Notes to Drug Quantity Table" in subdivision (F) by striking "(except anabolic steroids)"; and by adding at the end the following:

"For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (e.g.,

patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of an anabolic steroid is one 'unit'.".

Section 2D1.1(c) is amended in the "*Notes to Drug Quantity Table" by striking subdivision (G) as follows:

"(G) In the case of anabolic steroids, one 'unit' means a 10 cc vial of an injectable steroid or fifty tablets. All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g., one 50 cc vial is to be counted as five 10 cc vials).";

and by redesignating subdivisions (H) through (J) as subdivisions (G) through (I), respectively.

The Commentary to §2D1.1 captioned "Application Notes" is amended in the first paragraph of Note 8 by inserting "Interaction with §3B1.3.—" before "A defendant who"; by striking "enhancement" and inserting "adjustment"; and by adding at the end the following:

"Additionally, an enhancement under §3B1.3 ordinarily would apply in a case in which the defendant used his or her position as a coach to influence an athlete to use an anabolic steroid.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Notes 19 and 20 by striking "(b)(6)" each place it appears and inserting "(b)(8)"; and in Note 21 by striking "(b)(7)" each place it appears and inserting "(b)(9)".

The Commentary to §2D1.1 captioned "Application Notes" is amended by adding at the end the following:

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

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

The Commentary to §2D1.1 captioned "Background" is amended in the ninth paragraph by striking "(b)(6)(A)" and inserting "(b)(8)(A)"; and in the last paragraph by striking "(b)(6)(B) and (C)" and inserting "(b)(8)(B) and (C)".

Reason for Amendment: This amendment implements the directive in the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–76, which required the Commission, under emergency amendment authority, to

implement section 3 of the Anabolic Steroid Control Act of 2004, Pub. L. 108–358 (the "ASC Act"). The ASC Act directed the Commission to "review the Federal sentencing guidelines with respect to offenses involving anabolic steroids" and "consider amending the...guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use...."

The amendment implements the directives by increasing the penalties for offenses involving anabolic steroids. It does so by changing the manner in which anabolic steroids are treated under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The amendment eliminates the sentencing distinction between anabolic steroids and other Schedule III substances when the steroid is in a pill, capsule, tablet, or liquid form. For anabolic steroids in other forms (e.g., patch, topical cream, aerosol), the amendment instructs the court that it shall make a reasonable estimate of the quantity of anabolic steroid involved in the offense, and in making such estimate, the court shall consider that each 25 mg of anabolic steroid is one "unit".

In addition, the amendment addresses two harms often associated with anabolic steroid offenses by providing new enhancements in §2D1.1(b)(6) and (b)(7). Subsection (b)(6) provides a two-level enhancement if the offense involved the distribution of an anabolic steroid and a masking agent. Subsection (b)(7) provides a two-level enhancement if the defendant distributed an anabolic steroid to an athlete. Both enhancements address congressional concern with distribution of anabolic steroids to athletes, particularly the impact that steroids distribution and steroids use has on the integrity of sport, either because of the unfair advantage gained by the use of steroids or because of the concealment of such use.

The amendment also amends Application Note 8 of §2D1.1 to provide that an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) ordinarily would apply in the case of a defendant who used his or her position as a coach to influence an athlete to use an anabolic steroid.

Effective Date: The effective date of this amendment is March 27, 2006.

682. **Amendment:** The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 2(A) by adding at the end the following:

"(vii) A case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the 'infringed item' is the identifiable, genuine good or service.".

Reason for Amendment: This amendment implements the emergency directive in section 1(c) of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109–181. The

directive, which requires the Commission to promulgate an amendment under emergency amendment authority by September 12, 2006, instructs the Commission to "review, and if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 2318 or 2320 of title 18, United States Code . . .." The directive further provides that the Commission shall:

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

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

Effective Date: The effective date of this amendment is September 12, 2006.

683. Amendment: Chapter One, Part B is amended by adding at the end the following:

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

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

(1) (A) extraordinary and compelling reasons warrant the reduction; or

(B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

Commentary

Application Notes:

1. Application of Subsection (1)(A).—

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

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

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

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

Reason for Amendment: This amendment creates a new policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons) as a first step toward implementing the directive in 28 U.S.C. § 994(t) that the Commission "in promulgating general policy statements regarding the sentence modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." The policy statement restates the statutory bases for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A). In addition, the policy statement provides that in all cases there must be a determination made by the court that the defendant is not a danger to the safety of any other person or to the community. The amendment also provides background commentary that states the Commission's intent to develop criteria to be applied and a list of specific examples pursuant to 28 U.S.C. § 994(t).

Effective Date: The effective date of this amendment is November 1, 2006.

684. **Amendment:** The Commentary to §1B1.1 captioned "Application Notes" is amended by striking Note 6 as follows:

"6. In the case of a defendant subject to a sentence enhancement under 18

U.S.C. § 3147 (Penalty for an Offense Committed While on Release), see §2J1.7 (Commission of Offense While on Release).";

and by redesignating Note 7 as Note 6.

Section 2D1.1(c) is amended by striking "(or the equivalent amount of other Schedule I or II Opiates)" each place it appears; by striking "(or the equivalent amount of other Schedule I or II Stimulants)" each place it appears; and by striking "(or the equivalent amount of other Schedule I or II Hallucinogens)" each place it appears.

Section 2D1.1(d)(1) is amended by inserting "or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline" after "Murder)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the first paragraph by striking the third and fourth sentences as follows:

"The Drug Equivalency Tables set forth below provide conversion factors for other substances, which the Drug Quantity Table refers to as 'equivalents' of these drugs. For example, one gram of a substance containing oxymorphone, a Schedule I opiate, is to be treated as the equivalent of five kilograms of marihuana in applying the Drug Quantity Table.",

and inserting the following:

"In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:

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

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

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

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

Chapter Two, Part J is amended by striking §2J1.7 and its accompanying commentary as follows:

"§2J1.7. Commission of Offense While on Release

If an enhancement under 18 U.S.C. § 3147 applies, add 3 levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release.

Commentary

Statutory Provision: 18 U.S.C. § 3147.

Application Notes:

1. Because 18 U.S.C. § 3147 is an enhancement provision, rather than an offense, this section provides a specific offense characteristic to increase the offense level for the offense committed while on release.

2. Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the 'total punishment' (i.e., the sentence for the offense committed while on release plus the sentence enhancement under 18 U.S.C. § 3147) is in accord with the guideline range for the offense committed while on release, as adjusted by the enhancement in this section. For example, if the applicable adjusted guideline range is 30-37 months and the court determines 'total punishment' of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.

Background: An enhancement under 18 U.S.C. § 3147 may be imposed only after sufficient notice to the defendant by the government or the court, and applies only in the case of a conviction for a federal offense that is committed while on release on another federal charge.

Legislative history indicates that the mandatory nature of the penalties required by 18 U.S.C. § 3147 was to be eliminated upon the implementation of the sentencing guidelines. 'Section 213(h) [renumbered as §200(g) in the Crime Control Act of 1984] amends the new provision in title I of this Act relating to consecutive enhanced penalties for committing an offense on release (new 18 U.S.C. § 3147) by eliminating the mandatory nature of the penalties in favor of utilizing sentencing guidelines.' (Senate Report 98-225 at 186). Not all of the phraseology relating to the requirement of a mandatory sentence, however, was actually deleted from the statute. Consequently, it appears that the court is required to impose a consecutive sentence of imprisonment under this provision, but there is no requirement as to any minimum term. This guideline is drafted to enable the

court to determine and implement a combined 'total punishment' consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement. Guideline provisions that prohibit the grouping of counts of conviction requiring consecutive sentences (e.g., the introductory paragraph of §3D1.2; §5G1.2(a)) do not apply to this section because 18 U.S.C. § 3147 is an enhancement, not a count of conviction.".

Chapter 3, Part C is amended in the heading by adding at the end "AND RELATED ADJUSTMENTS".

Chapter Three, Part C is amended by adding at the end the following:

"§3C1.3. Commission of Offense While on Release

If a statutory sentencing enhancement under 18 U.S.C. § 3147 applies, increase the offense level by 3 levels.

Commentary

Application Note:

1. Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the 'total punishment' (i.e., the sentence for the offense committed while on release plus the statutory sentencing enhancement under 18 U.S.C. § 3147) is in accord with the guideline range for the offense committed while on release, as adjusted by the enhancement in this section. For example, if the applicable adjusted guideline range is 30-37 months and the court determines a 'total punishment' of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.

Background: An enhancement under 18 U.S.C. § 3147 applies, after appropriate sentencing notice, when a defendant is sentenced for an offense committed while released in connection with another federal offense.

This guideline enables the court to determine and implement a combined 'total punishment' consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement.".

Reason for Amendment: This amendment addresses several problematic areas of guideline application. First, the amendment adds language to the cross reference at subsection (d) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to allow the application of §2A1.2 (Second Degree Murder) in cases in which the conduct

involved is second degree murder, if the resulting offense level is greater than the offense level determined under §2D1.1.

Second, the amendment creates a new guideline at §3C1.3 (Commission of Offense While on Release), which provides a three-level adjustment in cases in which the statutory sentencing enhancement at 18 U.S.C. § 3147 (Penalty for an offense committed while on release) applies. The amendment also deletes §2J1.7 (Commission of Offense While on Release), the Chapter Two guideline to which the statutory enhancement at 18 U.S.C. § 3147 had been referenced prior to the amendment. Despite its reference in Appendix A (Statutory Index), 18 U.S.C. § 3147 is not an offense of conviction and thus does not require reference in Appendix A. Creating a Chapter Three adjustment for 18 U.S.C. § 3147 cases ensures the enhancement is not overlooked and is consistent with other adjustments in Chapter Three, all of which apply to a broad range of offenses.

Third, the amendment deletes from the Drug Quantity Table in §2D1.1(c) language that indicates the court should apply "the equivalent amount of other Schedule I or II Opiates" (in the line referenced to Heroin), "the equivalent amount of other Schedule I or II Stimulants" (in the line referenced to Cocaine), and "the equivalent amount of other Schedule I or II Hallucinogens" (in the line referenced to LSD). This language caused some guideline users to erroneously calculate the base offense level without converting the controlled substance to its marihuana equivalency, even though Application Note 10 of §2D1.1 sets forth the marihuana equivalencies for substances not specifically referenced in the Drug Quantity Table. For example, instead of converting 10 KG of morphine (an opiate) to 5000 KG of marihuana and determining the base offense level on that marihuana equivalency (resulting in a base offense level of 34), some guideline users determined the base offense level on the 10 KG of morphine by using the equivalent amount of heroin (resulting in a base offense level of 36). This amendment deletes the problematic language and also clarifies in Application Note 10 that, for cases involving a substance not specifically referenced in the Drug Quantity Table, the court is to determine the base offense level using the marihuana equivalency for that controlled substance.

Effective Date: The effective date of this amendment is November 1, 2006.

685. **Amendment:** The Commentary to §2A1.1 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1111,".

The Commentary to §2A1.2 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1111,".

The Commentary to §2A1.3 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1112,".

The Commentary to §2A1.4 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1112,".

The Commentary to §2A2.1 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1751(c),".

The Commentary to §2A2.2 captioned "Statutory Provisions" is amended by inserting

"1841(a)(2)(C)," after "1751(e),".

Section 2B1.1(b)(6) is amended by inserting "or veterans' memorial" after "national cemetery".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "1369," after "1363,".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "'Trade secret'" the following paragraph:

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

Section 2B1.5(b)(2)(E) is amended by inserting "or veterans' memorial" after "cemetery".

The Commentary to §2B1.5 captioned "Statutory Provisions" is amended by inserting "1369," after "1361,".

The Commentary to §2B1.5 captioned "Application Notes" is amended in Note 3 in subdivision (B) by striking "has the meaning given that term" and inserting "and 'veterans' memorial' have the meaning given those terms".

The Commentary to §2N2.1 captioned "Application Notes" is amended by striking Note 3 as follows:

> "3. If death or bodily injury, extreme psychological injury, property damage or monetary loss resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).",

and inserting the following:

> "3. Upward Departure Provisions.—The following are circumstances in which an upward departure may be warranted:
>
> (A) Death or bodily injury, extreme psychological injury, property damage, or monetary loss resulted. See Chapter Five, Part K (Departures).
>
> (B) The defendant was convicted under 7 U.S.C. § 7734.".

Chapter Two, Part T, Subpart 3 is amended in the "Introductory Commentary" in the first sentence by inserting "and 3907," after "1708(b),"; in the second sentence by striking "It is not intended to deal with the importation of contraband," and inserting "It is intended to deal with some types of contraband, such as certain uncertified diamonds, but is not intended to deal with the importation of other types of contraband,"; in the last sentence by inserting "not specifically covered by this Subpart" after "stolen goods"; and by inserting "if there is not another more specific applicable guideline" after "upward".

The Commentary to §2T3.1 captioned "Statutory Provisions" is amended by inserting ", 3907" after "1708(b)".

Chapter Two, Part X, Subpart 5 is amended in the heading by inserting "FELONY" after "OTHER"; and by adding at the end "AND CLASS A MISDEMEANORS".

Section 2X5.1 is amended in the heading by inserting "Felony" after "Other".

Section 2X5.1 is amended by striking "or Class A misdemeanor"; by striking "(b)" after "18 U.S.C. § 3553"; and by adding at the end the following paragraph:

> "If the defendant is convicted under 18 U.S.C. § 1841(a)(1), apply the guideline that covers the conduct the defendant is convicted of having engaged in, as that conduct is described in 18 U.S.C. § 1841(a)(1) and listed in 18 U.S.C. § 1841(b).".

The Commentary the §2X5.1 is amended by inserting before "Application Note:" the following:

> "Statutory Provision: 18 U.S.C. § 1841(a)(1).".

The Commentary the §2X5.1 captioned "Application Note" is amended by striking "Note" and inserting "Notes"; in Note 1 by inserting "In General.—" before "Guidelines"; and by adding at the end the following:

"2. Convictions under 18 U.S.C. § 1841(a)(1).—

(A) In General.—If the defendant is convicted under 18 U.S.C. § 1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in, i.e., the conduct of which the defendant is convicted that violates a specific provision listed in 18 U.S.C. § 1841(b) and that results in the death of, or bodily injury to, a child in utero at the time of the offense of conviction. For example, if the defendant committed aggravated sexual abuse against the unborn child's mother and it caused the death of the child in utero, the applicable Chapter Two guideline would be §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(B) Upward Departure Provision.—For offenses under 18 U.S.C. § 1841(a)(1), an upward departure may be warranted if the offense level under the applicable guideline does not adequately account for the death of, or serious bodily injury to, the child in utero.

3. Application of §2X5.2.—This guideline applies only to felony offenses not referenced in Appendix A (Statutory Index). For Class A misdemeanor offenses that have not been referenced in Appendix A, apply §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).".

The Commentary to §2X5.1 captioned "Background" is amended in the first paragraph by striking the following:

> "Where there is no sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) control. That statute provides in relevant part as follows: 'In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in [18 U.S.C. § 3553] subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.'",

and inserting the following:

> "In a case in which there is no sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553 control.".

Chapter Two, Part X, Subpart 5 is amended by adding at the end the following:

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

(a) Base Offense Level: 6

Commentary

Statutory Provisions: 7 U.S.C. § 2156; 18 U.S.C. §§ 1365(f), 1801; 42 U.S.C. §§ 1129(a), 14133.

Application Note:

1. In General.—This guideline applies to Class A misdemeanor offenses that are specifically referenced in Appendix A (Statutory Index) to this guideline. This guideline also applies to Class A misdemeanor offenses that have not been referenced in Appendix A. Do not apply this guideline to a Class A misdemeanor that has been specifically referenced in Appendix A to another Chapter Two guideline.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 7 U.S.C. § 2024(c) the following:

"7 U.S.C. § 2156 2X5.2";

by inserting after the line referenced to 18 U.S.C. § 1121 the following:

"18 U.S.C. § 1129(a) 2X5.2";

by inserting after the line referenced to 18 U.S.C. § 1365(e) the following:

"18 U.S.C. § 1365(f)	2X5.2";

by inserting after the line referenced to 18 U.S.C. § 1366 the following:

"18 U.S.C. § 1369	2B1.1, 2B1.5";

by inserting after the line referenced to 18 U.S.C. § 1792 the following:

"18 U.S.C. § 1801	2X5.2";

by inserting after the line referenced to 18 U.S.C. § 1832 the following:

"18 U.S.C. § 1841(a)(1)	2X5.1
18 U.S.C. § 1841(a)(2)(C)	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2";

by inserting after the line referenced to 19 U.S.C. § 2401f the following:

"19 U.S.C. § 3907	2T3.1"; and

by inserting after the line referenced to 42 U.S.C. § 9603(d) the following:

"42 U.S.C. § 14133	2X5.2".

Reason for Amendment: This five-part amendment makes several additions to various guideline provisions in response to recently-enacted legislation, and creates a new guideline at §2X5.2 to cover certain Class A misdemeanors.

First, this amendment responds to section 2 of the Veterans' Memorial Preservation and Recognition Act of 2003, Pub. L. 108–29. This Act created a new offense at 18 U.S.C. § 1369 that prohibits the destruction of veterans' memorials and imposes a ten-year statutory maximum term of imprisonment. This amendment refers this new offense to both §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources), and broadens the application of the two-level enhancement under both §§2B1.1(b)(6) and 2B1.5(b)(2) to include veterans' memorials. The two-level enhancement at §2B1.1(b)(6), combined with the cross reference at §2B1.1(c)(4), ensures that the penalty for the destruction of veterans' memorials will reflect the status of a veterans' memorial as a specially protected cultural heritage resource.

Second, this amendment addresses the Plant Protection Act of 2002, Pub. L. 107–171, which created a new offense under 7 U.S.C. § 7734 for knowingly importing or exporting plants, plant products, biological control organisms, and like products for distribution or sale. The statutory maximum term of imprisonment for the first offense is five years, and for subsequent offenses the statutory maximum term of imprisonment is ten years. This amendment modifies Application Note 3 of §2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) to provide that an upward departure may be warranted if a defendant is convicted

under 7 U.S.C. § 7734.

Third, this amendment addresses the Clean Diamond Trade Act of 2003, Pub. L. 108–19, and accompanying Executive Order 13312, which prohibits (1) "the importation into, or exportation from, the United States . . . of any rough diamond, from whatever source, unless the rough diamond has been controlled through the [Kimberley Process Certification Scheme]; and (2) any transaction by a United States person anywhere, or any transaction that occurs in whole or in part within the United States, that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this section," and conspiracies to commit such acts. This amendment references the new offense at 19 U.S.C. § 3907 to §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) because the offense involves importing into the United States "conflict" diamonds (so-called because the profits from their sale are frequently used to fund rebel and military activities) without proper certification or payment of duty fees according to the Kimberley Process Certification Scheme, a process that legitimizes the quality and original source of the diamond. Because the essence of this new statutory offense is to avoid proper certification and evade duty fees, penalties for its violation are appropriately covered by §2T3.1. This amendment also adds language referencing "contraband diamonds" to the introductory commentary of Chapter Two, Part T, Subpart Three to indicate that uncertified diamonds are contraband covered by §2T3.1 even if other types of contraband are covered by other, more specific guidelines.

Fourth, this amendment implements the Unborn Victims of Violence Act of 2004, Pub. L. 108–212, which created a new offense at 18 U.S.C. § 1841 for causing death or serious bodily injury to a child in utero while engaging in conduct violative of any of over 60 offenses enumerated at 18 U.S.C. § 1841(b). Under 18 U.S.C. § 1841(a)(1) and (a)(2)(A), the statutory maximum term of imprisonment for the conduct that "caused the death of, or bodily injury to a child in utero shall be the penalty provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother." Otherwise, under 18 U.S.C. § 1841(a)(2)(C), if the person "engaging in the conduct . . . intentionally kills or attempts to kill the unborn child, that person shall be punished . . . under sections 1111, 1112, and 1113 for intentionally killing or attempting to kill a human being." The amendment references 18 U.S.C. § 1841(a)(2)(C) to the guidelines designated in Appendix A for 18 U.S.C. §§ 1111, 1112, and 1113, which are §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), and 2A1.4 (Involuntary Manslaughter). This amendment also refers the provisions under 18 U.S.C. § 1841(a)(1) and (a)(2)(A) to 2X5.1 (Other Offenses) and adds a special instruction that the most analogous guideline for these offenses is the guideline that covers the underlying offenses.
Fifth, this amendment creates a new guideline at §2X5.2 (Class A Misdemeanors) that covers all Class A misdemeanors not otherwise referenced to a more specific Chapter Two guideline. The amendment assigns a base offense level of 6 for such offenses, consistent with the guidelines' treatment of many Class A misdemeanor and regulatory offenses. The amendment also references several new Class A Misdemeanors to this guideline. With the promulgation of this new guideline, the Commission will reference new Class A Misdemeanor offenses either to this guideline or to another, more specific Chapter Two guideline, as appropriate.

Effective Date: The effective date of this amendment is November 1, 2006.

686. **Amendment:** Chapter Two, Part A, Subpart 6 is amended in the heading by inserting "HOAXES," after "COMMUNICATIONS,".

Section 2A6.1 is amended in the heading by adding at the end "; Hoaxes".

Section 2A6.1 is amended by adding at the end the following:

"(c) Cross Reference

(1) If the offense involved any conduct evidencing an intent to carry out a threat to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), apply §2M6.1 (Weapons of Mass Destruction), if the resulting offense level is greater than that determined under this guideline.".

The Commentary to §2A6.1 captioned "Statutory Provisions" is amended by inserting "1038," after "879,".

The Commentary to §2K2.1 captioned "Statutory Provisions" is amended by inserting ", 2332g" after "(k)-(o)".

Section 2L1.1(b), as amended by Amendment 692, is further amended by adding at the end the following:

"(9) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by 2 levels.".

The Commentary to §2M6.1 captioned "Statutory Provisions" is amended by inserting "175c," after "175b,"; by inserting "832," after "831,"; and by inserting ", 2332h" before "; 42 U.S.C.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 175b the following:

"18 U.S.C. § 175c	2M6.1";

by inserting after the line referenced to 18 U.S.C. § 831 the following:

"18 U.S.C. § 832	2M6.1";

by inserting after the line referenced to 18 U.S.C. § 1037 the following:

"18 U.S.C. § 1038	2A6.1"; and

by inserting after the line referenced to 18 U.S.C. § 2332f the following:

"18 U.S.C. § 2332g	2K2.1
18 U.S.C. § 2332h	2M6.1".

Reason for Amendment: This amendment implements various provisions of the Intelligence Reform and Terrorism Prevention Act of 2004 (the "Act"), Pub. L. 108–458. Section 5401 of the Act adds a new subsection (a)(4) to 8 U.S.C. § 1324 that increases the otherwise applicable penalties by up to ten years' imprisonment for bringing aliens into the United States if (A) the conduct is part of an ongoing commercial organization or enterprise; (B) aliens were transported in groups of 10 or more; and (C)(i) aliens were transported in a manner that endangered their lives; or (ii) the aliens presented a life-threatening health risk to people in the United States. Offenses under 18 U.S.C. § 1324 are referenced to §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). In response to the new offense, the amendment adds a two-level specific offense characteristic at §2L1.1(b)(7) applicable to offenses of conviction under 8 U.S.C. § 1324(a)(4), to account for the increased statutory maximum penalty for such offenses.

Section 6702 of the Act creates a new offense at 18 U.S.C. § 1038 (False Information and Hoaxes). The amendment references the new offense to §2A6.1 (Threatening or Harassing Communications) and adds a cross reference to §2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy) if the conduct supports a threat to use a weapon of mass destruction. The Commission referenced the new offense to these guidelines because the conduct criminalized by the new statute is analogous to conduct already covered by other statutes referenced to these two guidelines.

Section 6803 of the Act creates a new offense at 18 U.S.C. § 832 (Participation in Nuclear and Weapons of Mass Destruction Threats in the United States), relating to participation in nuclear, and weapons of mass destruction, threats to the United States. Section 6803 also adds this new offense to the list of predicate offenses at 18 U.S.C. § 2332b(g)(5)(B)(i) and amends sections 57(b) and 92 of the Atomic Energy Act of 1954 (42 U.S.C. § 2077(b)) to cover the participation of an individual in the development of special nuclear material. The amendment references 18 U.S.C. § 832 to §2M6.1 because this offense is similar to other offenses referenced to this guideline.

Section 6903 of the Act creates a new offense at 18 U.S.C. § 2332g (Missile Systems Designed to Destroy Aircraft) prohibiting the production or transfer of missile systems designed to destroy aircraft. The amendment references 18 U.S.C. § 2332g to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) because the types of weapons described in the offense would be covered as destructive devices under 26 U.S.C. § 5845(a).

Section 6905 of the Act creates a new offense at 18 U.S.C. § 2332h (Radiological Dispersal Devices) prohibiting the production, transfer, receipt, possession, or threat to use, any radiological dispersal device. The amendment references 18 U.S.C. § 2332h to §2M6.1 because of the nature of the offense. Section 2M6.1 covers conduct dealing with the production of certain types of nuclear, biological, or chemical weapons or other weapons of mass destruction, including weapons of mass destruction that, as defined in 18 U.S.C. § 2332a, are designed to release radiation or radioactivity at levels dangerous to human life.

Section 6906 of the Act creates a new offense at 18 U.S.C. § 175c (Variola Virus) that

prohibits the production, acquisition, transfer, or possession of, or the threat to use, the variola virus. The amendment references the new offense to §2M6.1 because the variola virus may be used as a biological agent or toxin and, therefore, it is appropriate to reference this new offense to this guideline.

Effective Date: The effective date of this amendment is November 1, 2006.

687. **Amendment:** Section 2B5.3 and Appendix A (Statutory Index), effective October 24, 2005 (see USSC Guidelines Manual, Supplement to Appendix C, Amendment 675), are repromulgated with the following changes:

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 1, in the paragraph that begins 'Uploading' by striking "item in an openly shared file" and inserting "item as an openly shared file"; and by striking "placed in".

Reason for Amendment: This amendment re-promulgates as a permanent amendment the temporary, emergency amendment to §2B5.3 (Criminal Infringement of Copyright or Trademark), and Appendix A (Statutory Index), which became effective on October 24, 2005. The amendment implements the directive in section 105 of the Family Entertainment and Copyright Act of 2005, Pub. L. 109–9, which instructs the Commission, under emergency authority, to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes..."

> "In carrying out [the directive], the Commission shall—
>
> (1) take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements...are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes;
>
> (2) determine whether to provide a sentencing enhancement for those convicted of the offenses [involving intellectual property rights], if the conduct involves the display, performance, publication, reproduction, or distribution of a copyrighted work before it has been authorized by the copyright owner, whether in the media format used by the infringing party or in any other media format;
>
> (3) determine whether the scope of 'uploading' set forth in application note 3 of section 2B5.3 of the Federal sentencing guidelines is adequate to address the loss attributable to people who, without authorization, broadly distribute copyrighted works over the Internet; and
>
> (4) determine whether the sentencing guideline and policy statements applicable to the offenses [involving intellectual property rights] adequately reflect any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed."

Pre-Release Works

The amendment provides a separate two-level enhancement if the offense involved a pre-release work. The enhancement and the corresponding definition use language directly from 17 U.S.C. § 506(a) (criminal infringement). The amendment adds language to Application

Note 2 that explains that in cases involving pre-release works, the infringement amount should be determined by using the retail value of the infringed item, rather than any premium price attributed to the infringing item because of its pre-release status. The amendment addresses concerns that distribution of an item before it is legally available to the consumer is more serious conduct than distribution of other infringing items and involves a harm not addressed by the current guideline.

Uploading

The concern underlying the uploading directive pertains to offenses in which the copyrighted work is transferred through file sharing. The amendment builds on the current definition of "uploading" to include making an infringing item available on the Internet by storing an infringing item as an openly shared file. The amendment also clarifies that uploading does not include merely downloading or installing infringing items on a hard drive of the defendant's computer unless the infringing item is in an openly shared file. By clarifying the definition of uploading in this manner, Application Note 3, which is a restatement of the uploading definition, is no longer necessary and the amendment deletes the application note from the guideline.

Indeterminate Number

The amendment addresses the final directive by amending Application Note 2, which sets forth the rules for determining the infringement amount. The note provides that the court may make a reasonable estimate of the infringement amount using any relevant information including financial records in cases in which the court cannot determine the number of infringing items.

New Offense

Finally, the amendment provides a reference in Appendix A (Statutory Index) for the new offense at 18 U.S.C. § 2319B. This offense is to be referenced to §2B5.3.

Effective Date: The effective date of this amendment is November 1, 2006.

688. **Amendment:** Section 2D1.1, effective March 27, 2006 (USSC Guidelines Manual, Supplement to the 2005 Supplement to Appendix C, Amendment 681), is repromulgated without change.

Reason for Amendment: This amendment re-promulgates as a permanent amendment the temporary, emergency amendment that implemented the directive in the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–76. That Act requires the Commission, under emergency amendment authority, to implement section 3 of the Anabolic Steroid Control Act of 2004, Pub. L. 108–358 (the "ASC Act"), which directs the Commission to "review the Federal sentencing guidelines with respect to offenses involving anabolic steroids" and "consider amending the. . . guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use . . .." The emergency amendment became effective on March 27, 2006 (See Supplement to Appendix C, Amendment 681).

The amendment implements the directives by increasing the penalties for offenses involving anabolic steroids. It does so by changing the manner in which anabolic steroids are treated under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The amendment eliminates the sentencing distinction between anabolic steroids and other Schedule III substances when the steroid is in a pill, capsule, tablet, or liquid form. For anabolic steroids in other forms (e.g., patch, topical cream, aerosol), the amendment instructs the court that it shall make a reasonable estimate of the quantity of anabolic steroid involved in the offense, and in making such estimate, the court shall consider that each 25 mg of anabolic steroid is one "unit".

In addition, the amendment addresses two harms often associated with anabolic steroid offenses by providing new enhancements in §2D1.1(b)(6) and (b)(7). Subsection (b)(6) provides a two-level enhancement if the offense involved the distribution of an anabolic steroid and a masking agent. Subsection (b)(7) provides a two-level enhancement if the defendant distributed an anabolic steroid to an athlete. Both enhancements address congressional concern with distribution of anabolic steroids to athletes, particularly the impact that steroids distribution and steroids use has on the integrity of sport, either because of the unfair advantage gained by the use of steroids or because of the concealment of such use.

The amendment also amends Application Note 8 of §2D1.1 to provide that an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) ordinarily would apply in the case of a defendant who used his or her position as a coach to influence an athlete to use an anabolic steroid.

Effective Date: The effective date of this amendment is November 1, 2006.

689. **Amendment:** Section 2G2.5 is amended in the heading by adding at the end "; Failure to Provide Required Marks in Commercial Electronic Email".

The Commentary to §2G2.5 captioned "Statutory Provision" is amended by striking "Provision:" and inserting "Provisions: 15 U.S.C. § 7704(d);".

Chapter Three, Part C, as amended by Amendment 684 of this document, is further amended by adding at the end the following:

"§3C1.4. False Registration of Domain Name

If a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies, increase by 2 levels.

Commentary

Background: This adjustment implements the directive to the Commission in section 204(b) of Pub. L. 108–482.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 15 U.S.C. § 6821 the following:

"15 U.S.C. § 7704(d) 2G2.5".

Reason for Amendment: This amendment (A) implements the directive to the Commission in section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004, Pub. L 109–9; and (B) addresses the new offense in section 5(d) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub L. 108–187 ("CAN-SPAM Act")(15 U.S.C. § 7704(d)).

Section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004 directed the Commission to ensure that the applicable guideline range for a defendant convicted of any felony offense carried out online that may be facilitated through the use of a domain name registered with materially false contact information is sufficiently stringent to deter commission of such acts. The amendment implements this directive by creating a new guideline, at §3C1.4 (False Registration of Domain Names), which provides a two-level adjustment for cases in which a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies. Section 3559(f)(1), created by section 204(a) of the Intellectual Property Protection and Courts Administration Act of 2004, doubles the statutory maximum term of imprisonment, or increases the maximum sentence by seven years, whichever is less, if a defendant who is convicted of a felony offense knowingly falsely registered a domain name and used that domain name in the course of the offense. Basing the adjustment in the new guideline on application of the statutory enhancement in 18 U.S.C. § 3559(f)(1) satisfies the directive in a straightforward and uncomplicated manner.

Section 5(d)(1) of the CAN-SPAM Act prohibits the transmission of commercial electronic messages that contain "sexually oriented material" unless such messages include certain marks, notices, and information. The amendment references the new offense, found at 15 U.S.C. § 7704(d), to §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials). Prior to this amendment, §2G2.5 applied to violations of 18 U.S.C. § 2257, which requires producers of sexually explicit materials to maintain detailed records regarding their production activities and to make such records available for inspection by the Attorney General in accordance with applicable regulations. Although offenses under 15 U.S.C. § 7704(d) do not involve the same recording and reporting functions, section 7704(d) offenses essentially are regulatory in nature and in this manner are similar to other offenses sentenced under §2G2.5. In addition to the statutory reference changes, the amendment also expands the heading of §2G2.5 specifically to cover offenses under 15 U.S.C. § 7704(d).

Effective Date: The effective date of this amendment is November 1, 2006.

690. **Amendment:** Section 2J1.2 and Appendix A (Statutory Index), effective October 24, 2005 (see USSC Guidelines Manual, Supplement to Appendix C, Amendment 676), are repromulgated without change.

Reason for Amendment: This amendment repromulgates as a permanent amendment the temporary, emergency amendment to §2J1.2 and Appendix A (Statutory Index), which became effective on October 24, 2005 (see Supplement to Appendix C, Amendment 676). The amendment implements section 6703 of the Intelligence Reform and Terrorism Prevention Act of 2004 (the "Act"), Pub. L. 108–458, which provides an enhanced penalty of not more than 8 years of imprisonment for offenses under sections 1001(a) and 1505 of

title 18, United States Code, "if the offense involves international or domestic terrorism (as defined in section 2331)." Section 6703(b) requires the Sentencing Commission to amend the sentencing guidelines to provide for "an increased offense level for an offense under sections 1001(a) and 1505 of title 18, United States Code, if the offense involves international or domestic terrorism, as defined in section 2331 of such title." Section 3 of the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–76, directed the Commission, under emergency authority, to promulgate an amendment implementing section 6703(b).

First, the amendment references convictions under 18 U.S.C. § 1001 to §2J1.2 (Obstruction of Justice) "when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable." It also adds a new specific offense characteristic at §2J1.2(b)(1)(B) providing for a 12 level increase for a defendant convicted under 18 U.S.C. §§ 1001 and 1505 "when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable." This 12 level increase is applied in lieu of the current 8 level increase for injury or threats to persons or property. The increase of 12 levels is intended to provide parity with the treatment of federal crimes of terrorism within the limits of the 8 year statutory maximum penalty. It is also provided to ensure a 5 year sentence of imprisonment for offenses that involve international or domestic terrorism.

Second, the amendment adds to Application Note 1 definitions for "domestic terrorism" and "international terrorism," using the meanings given the terms at 18 U.S.C. § 2331(5) and (1), respectively.

Third, the amendment adds to Application Note 2 an instruction that if §3A1.4 (Terrorism) applies, do not apply §2J1.2(b)(1)(B).

Effective Date: The effective date of this amendment is November 1, 2006.

691. **Amendment:** Section 2K2.1(a) is amended by striking subdivision (1) as follows:

"(1) 26, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;",

and inserting the following:

"(1) 26, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;";

by striking subdivision (3) as follows:

"(3) 22, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of

violence or a controlled substance offense;",

and inserting the following:

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

by striking subdivision (4)(B) as follows:

"(B) the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); and the defendant (i) was a prohibited person at the time the defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. § 922(d);",

and inserting the following:

"(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; or (II) is convicted under 18 U.S.C. § 922(d);";

and in subdivision (5) by striking "or 18 U.S.C. § 921(a)(30)".

Section 2K2.1(b) is amended by striking subdivision (4) as follows:

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

and inserting the following:

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

Section 2K2.1(b) is amended by redesignating subdivisions (5) and (6) as subdivisions (6) and (7), respectively; and by inserting after "except if subsection (b)(3)(A) applies." the following subdivision:

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

The Commentary to §2K2.1 captioned "Application Notes" is amended by striking Note 2 as follows:

"2. Firearm Described in 18 U.S.C. § 921(a)(30).—For purposes of subsection (a), a 'firearm described in 18 U.S.C. § 921(a)(30)' (pertaining to

semiautomatic assault weapons) does not include a weapon exempted under the provisions of 18 U.S.C. § 922(v)(3).",

and inserting the following:

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

The Commentary to §2K2.1 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. 'Felony offense,' as used in subsection (b)(5), means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.";

by redesignating Notes 5 through 10 as Notes 4 through 9, respectively; by striking Note 11 as follows:

"11. Under subsection (c)(1), the offense level for the underlying offense (which may be a federal, state, or local offense) is to be determined under §2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).";

by redesignating Notes 12 through 14 as Notes 10 through 12, respectively; and by striking Notes 15 and 16 as follows:

"15. As used in subsections (b)(5) and (c)(1), 'another felony offense' and 'another offense' refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

16. The enhancement under subsection (b)(4) for a stolen firearm or a firearm with an altered or obliterated serial number applies whether or not the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.".

The Commentary to §2K2.1 captioned "Application Notes" is amended by striking Note 8,

as redesignated by this amendment, and inserting the following:

"8. Application of Subsection (b)(4).—

(A) Interaction with Subsection (a)(7).—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, it the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).

(B) Knowledge or Reason to Believe.—Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 4, as redesignated by this amendment, by inserting "Application of Subsection (a)(7).—" before "Subsection (a)(7)"; in Note 5, as redesignated by this amendment, by inserting "Application of Subsection (b)(1).—" before "For purposes of calculating"; in Note 6, as redesignated by this amendment, by inserting "Application of Subsection (b)(2).—" before "Under subsection (b)(2)"; in Note 7, as redesignated by this amendment, by inserting "Destructive Devices.—" before "A defendant"; in Note 9, as redesignated by this amendment, by inserting "Application of Subsection (b)(7).—" before "Under"; and by striking "(b)(6), if" and inserting "(b)(7), if"; in Note 10, as redesignated by this amendment, by inserting "Prior Felony Convictions.—" before "For purposes of"; in Note 11, as redesignated by this amendment, by inserting "Upward Departure Provisions.—" before "An upward departure"; in Note 12, as redesignated by this amendment, by inserting "Armed Career Criminal.—" before "A defendant who"; and by inserting at the end the following:

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

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

(i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or

more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and

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

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

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

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

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

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

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

(D) Interaction with Other Subsections.—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6) also would apply.

14. 'In Connection With'.—

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

(B) Application When Other Offense is Burglary or Drug

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

(C) Definitions.—

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

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

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

Chapter Five, Part K is amended by striking §5K2.17 as follows:

"§5K2.17. High-Capacity, Semiautomatic Firearms (Policy Statement)

If the defendant possessed a high-capacity, semiautomatic firearm in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A 'high-capacity, semiautomatic firearm' means a semiautomatic firearm that has a magazine capacity of more than ten cartridges. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.",

and inserting:

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

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

Reason for Amendment: This four part amendment addresses various issues pertaining to the primary firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). First, the amendment modifies four base offense levels that provide enhanced penalties for offenses involving a firearm described in 18 U.S.C. § 921(a)(30), the semiautomatic assault weapon ban that expired on September 13, 2004. The Commission received information regarding inconsistent application as to whether the enhanced base offense levels apply to these types of firearms in light of the ban's expiration. The amendment deletes the reference to 18 U.S.C. § 921(a)(30) at §2K2.1(a)(1), (a)(3), and (a)(4) and replaces the reference with the term, "a semiautomatic firearm capable of accepting a large capacity magazine," which is defined in Application Note 2.

While the amendment deletes the reference to 18 U.S.C. § 921(a)(30) at §2K2.1(a)(5), it does not include the phrase "a semiautomatic firearm that is capable of accepting a large capacity magazine" in this subsection because a defendant sentenced under subsection (a)(5) does not have the same "prohibited person" status as a defendant sentenced under subsections (a)(1), (a)(3), or (a)(4).

The amendment also amends §5K2.17 (High-Capacity, Semiautomatic Firearms) in a manner consistent with §2K2.1, as amended, except that it excludes the language pertaining to .22 caliber rim fire ammunition in order to remain in conformity with a prior congressional directive. As amended, §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine) provides that an upward departure may be warranted if a defendant possesses a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense.

Second, the amendment provides a 4-level enhancement at §2K2.1(b)(5) if the defendant engaged in the trafficking of firearms. The definition of trafficking encompasses transporting, transferring, or otherwise disposing of two or more firearms, or receipt of two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual. The definition also requires that the defendant know or have reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual whose possession or receipt would be unlawful or who intended to use or dispose of the firearm unlawfully. With respect to an individual whose possession would be unlawful, the amendment includes individuals who previously have been convicted of a

crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence, or who at the time of the offense were under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Additionally, the definition provides that the enhancement applies regardless of whether anything of value was exchanged.

Third, the amendment modifies §2K2.1(b)(4) to increase penalties for offenses involving altered or obliterated serial numbers. Prior to this amendment, §2K2.1(b)(4) provided a 2-level enhancement if the offense involved either a stolen firearm or a firearm with an altered or obliterated serial number. The amendment provides a 4-level enhancement for offenses involving altered or obliterated serial numbers. This increase reflects both the difficulty in tracing firearms with altered or obliterated serial numbers, and the increased market for these types of weapons.

Fourth, the amendment addresses a circuit conflict pertaining to the application of current §2K2.1(b)(5) (re-designated by this amendment as §2K2.1(b)(6)) and (c)(1)), specifically with respect to the use of a firearm "in connection with" burglary and drug offenses. The amendment, adopting the language from Smith v. United States, 508 U.S. 223 (1993), provides at Application Note 14 that the provisions apply if the firearm facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. Furthermore, the amendment provides that in burglary offenses, these provisions apply to a defendant who takes a firearm during the course of the burglary, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary. In addition, the provisions apply in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug manufacturing materials, or drug paraphernalia. The Commission determined that application of these provisions is warranted in these cases because of the potential that the presence of the firearm has for facilitating another felony offense or another offense.

Effective Date: The effective date of this amendment is November 1, 2006.

692. **Amendment:** Section 2L1.1 is amended by redesignating subsections (a)(1) and (a)(2) as subsections (a)(2) and (a)(3), respectively; and by inserting after "Base Offense Level:" the following:

"(1) 25, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);".

Section 2L1.1 is amended by redesignating subsections (b)(4) through (b)(6) as subsections (b)(5) through (b)(7), respectively; and by inserting after subsection (b)(3) the following:

"(4) If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent, increase by 2 levels.".

Subsection (b)(7), as redesignated by this amendment, is amended by striking "8 levels" and inserting "10 levels"; and by redesignating subdivisions (1) through (4) as subdivisions (A) through (D), respectively.

Section 2L1.1(b) is amended by adding at the end the following:

"(8) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (A) after the alien was smuggled into the United States; or (B) while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18.".

Section 2L1.1(c) is amended by striking "If any person" through the end of "Subpart 1." and inserting the following:

"(1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline.".

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 1 by striking "For purposes of this guideline—" and inserting "Definitions.—For purposes of this guideline:"; and by adding at the end the following:

"'Minor' means an individual who had not attained the age of 16 years.

'Parent' means (A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father.".

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 2 by inserting "Interaction with §3B1.1.—" before "For"; and by adding at the end the following:

"In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply.".

The Commentary to §2L1.1 captioned "Application Notes" is amended by striking Notes 3 and 4 as follows:

"3. Where the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior, an upward departure may be warranted.

4. If the offense involved substantially more than 100 aliens, an upward departure may be warranted.",

and inserting the following:

"3. Upward Departure Provisions.—An upward departure may be warranted in any of the following cases:

(A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious

criminal behavior.

(B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).

(C) The offense involved substantially more than 100 aliens.";

by redesignating Notes 5 and 6 as Notes 4 and 5, respectively; in Note 4, as redesignated by this amendment, by inserting "Prior Convictions Under Subsection (b)(3).—" before "Prior felony"; and in Note 5, as redesignated by this amendment, by inserting "Application of Subsection (b)(6).—" before "Reckless"; by striking "(b)(5)" each place it appears and inserting "(b)(6)"; and by striking "(b)(4)" and inserting "(b)(5)".

The Commentary to §2L1.1 captioned "Application Notes" is amended by adding at the end the following:

"6. Inapplicability of §3A1.3.—If an enhancement under subsection (b)(8) applies, do not apply §3A1.3 (Restraint of Victim).".

The Commentary to §2L1.1 captioned "Background" is amended by striking the last sentence as follows:

"In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 (Aggravating Role) typically will apply to the most culpable defendants.".

Section 2L2.1(b) is amended by adding at the end the following:

"(5) If the defendant fraudulently obtained or used (A) a United States passport, increase by 4 levels; or (B) a foreign passport, increase by 2 levels.".

Section 2L2.2(b)(3) is amended by inserting "(A)" after "used" and by inserting "; or (B) a foreign passport, increase by 2 levels" after "4 levels".

Reason for Amendment: This two-part amendment addresses various issues pertaining to §§2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport).

The first part of this amendment modifies §2L1.1. First, this amendment addresses national security concerns pertaining to the smuggling of illegal aliens. Specifically, a new base offense level of 25 at §2L1.1(a)(1) provides increased punishment for defendants convicted of 8 U.S.C. § 1327 involving an alien who is inadmissable because of "security or related grounds," as defined in 8 U.S.C. 1182(a)(3). To further address concerns related to national

security, an application note provides that an upward departure may be warranted if the defendant had specific knowledge that the alien the defendant smuggled, transported, or harbored was inadmissible for reasons of security and related grounds, as set forth in 8 U.S.C. § 1182(a)(3). This upward departure note applies regardless of whether the defendant is convicted of 8 U.S.C. § 1327.

Second, the amendment provides a two-level enhancement for a case in which the defendant smuggled, transported, or harbored a minor unaccompanied by the minor's parent or grandparent. This enhancement addresses concerns regarding the increased risk involved when unaccompanied minors are smuggled into, or harbored or transported within, the United States. Application Note 1 defines "minor" as "an individual who had not attained the age of 16 years" and defines "parent" as "(A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father."

Third, the amendment makes two changes with respect to offenses involving death. First, the amendment increases the enhancement from 8 levels to 10 levels if any person died as a result of the offense. Additionally, the cross reference at §2L1.1(c)(1) is expanded to cover homicides other than murder. This amendment ensures that any offense involving the death of an alien will be sentenced under the guideline appropriate for the particular type of homicide involved if the resulting offense level is greater than the offense level determined under §2L1.1.

Fourth, the amendment adds a two-level enhancement and a minimum offense level of 18 in a case in which an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, after the alien was smuggled into the United States, or while the alien was transported or harbored in the United States. This conduct may not be covered by §3A1.3 (Restraint of Victim) because an illegal alien, as a participant in the offense, may not be considered a "victim" for purposes of that adjustment. Additionally, application of §3A1.3 requires "physical restraint," as that term is defined in §1B1.1, and the involuntary detainment involved in offenses sentenced under §2L1.1 may not involve physical restraint. Finally, the amendment provides an application note, as a corollary to Application Note 2 in §3A1.3, that instructs the court not to apply §3A1.3 if the involuntary detainment enhancement applies

The second part of the amendment modifies §§2L2.1 and 2L2.2. First, this part of the amendment adds a new specific offense characteristic at §2L2.1(b)(5)(A) that provides a four-level enhancement in a case in which the defendant fraudulently used or obtained a United States passport. The same specific offense characteristic was added to §2L2.2, effective November 1, 2004 (see USSC Guidelines Manual Supplement to Appendix C, Amendment 671). The addition of this specific offense characteristic to §2L2.1 promotes proportionality between the document fraud guidelines, §§2L2.1 and 2L2.2.

Second, the amendment provides, at §2L2.1(b)(5)(B) and §2L2.2(b)(3)(B), a two-level enhancement if the defendant fraudulently obtained or used a foreign passport. This modification addresses concern regarding the threat to the security of the United States in document fraud offenses involving foreign passports.

Effective Date: The effective date of this amendment is November 1, 2006.

693. **Amendment:** Section 3C1.1 is amended by striking "during the course of" and inserting "with respect to".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 1 by inserting "In General.—" before "This adjustment"; by striking "during the course of" and inserting "with respect to"; and by inserting at the end the following:

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

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 2 by inserting "Limitations on Applicability of Adjustment.—" before "This provision"; in Note 3 by inserting "Covered Conduct Generally.—" before "Obstructive"; in Note 5 by inserting "Examples of Conduct Ordinarily Not Covered.—" before "Some types"; in Note 6 by inserting "'Material' Evidence Defined.—" before "'Material' evidence"; in Note 7 by inserting "Inapplicability of Adjustment in Certain Circumstances.—" before "If the defendant"; in Note 8 by inserting "Grouping Under §3D1.2(c).—" before "If the defendant"; and in Note 9 by inserting "Accountability for §1B1.3(a)(1)(A) Conduct.—" before "Under this section".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4 by inserting "Examples of Covered Conduct.—" before "The following"; in subdivision (b) by inserting ", including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction" after "suborn perjury"; by striking the period at the end of subdivision (j) and inserting a semi-colon; and by adding at the end the following subdivision:

> "(k) threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.".

Reason for Amendment: This amendment addresses a circuit conflict regarding the issue of whether pre-investigative conduct can form the basis of an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice). The First, Second, Seventh, Tenth, and District of Columbia Circuits have held that pre-investigation conduct can be used to support an obstruction adjustment under §3C1.1. Compare United States v. McGovern, 329 F.3d 247, 252 (1st Cir. 2003)(holding that the submission of false run sheets to Medicare and Medicaid representatives qualified for the enhancement even though "the fact that there was no pending federal criminal investigation at the time of the obstruction did not disqualify a defendant from an enhancement when there was a 'close connection between the obstructive conduct and the offense of conviction.'"(quoting United States v. Emery, 991 F.2d 907, 911(1st Cir. 1992))); United States v. Fiore, 381 F.3d 89, 94 (2nd Cir. 2004)(defendant's perjury in an SEC civil investigation into defendant's securities fraud constituted obstruction of justice of the criminal investigation of the same "precise conduct" for which defendant was criminally convicted, even though the perjury occurred before the criminal investigation commenced); United States v. Snyder, 189 F.3d 640, 649 (7th Cir. 1999)(holding the adjustment appropriate in case in which defendant made pre-investigation threat to victim and did not withdraw his threat after the investigation began, thus

obstructing justice during the course of the investigation); United States v. Mills, 194 F.3d 1108, 1115 (10th Cir. 1999)(holding that destruction of tape that occurred before an investigation began warranted application of the enhancement because the defendant knew an investigation would be conducted and understood the importance of the tape to that investigation); and United States v. Barry, 938 F.2d 1327, 1333-34 (D.C. Cir. 1991)("Given the commentary and the case law interpreting §3C1.1, we conclude that the enhancement applies if the defendant attempted to obstruct justice in respect to the investigation or prosecution of the offense of conviction, even if the obstruction occurred before the police or prosecutors began investigating or prosecuting the specific offense of conviction."), with United States v. Baggett, 342 F.3d 536, 542 (6th Cir. 2003)(holding that the obstruction of justice enhancement could not be justified on the basis of the threats that the defendant made to the victim prior to the investigation, prosecution, or sentencing of the offense); United States v. Stolba, 357 F.3d 850, 852-53 (8th Cir. 2004)(holding that an obstruction adjustment is not available when destruction of documents occurred before an official investigation had commenced); United States v. DeGeorge, 380 F.3d 1203,1222 (9th Cir. 2004)(perjury during a civil trial as part of a scheme to defraud was not an obstruction of justice of a criminal investigation of the fraudulent scheme because the criminal investigation had not yet begun at the time the defendant perjured himself); see also United States v. Clayton, 172 F.3d 347, 355 (5th Cir. 1999)(holding that defendant's threats to witnesses warrant the enhancement under §3C1.1, but stating in dicta that the guideline "specifically limits applicable conduct to that which occurs during an investigation. . . .").

The amendment, which adopts the majority view, permits application of the guideline to obstructive conduct that occurs prior to the start of the investigation of the instant offense of conviction by allowing the court to consider such conduct if it was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction. The amendment also adds, as examples of covered conduct in Application Note 4, (A) perjury that occurs during the course of a civil proceeding if such perjury pertains to the conduct that forms the basis of the offense of conviction; and (B) conduct involving threats to the victim of the offense if those threats were intended to prevent the victim from reporting the conduct constituting the offense of conviction. Finally, the amendment changes language in §3C1.1(A) from "during the course of" to "with respect to."

Effective Date: The effective date of this amendment is November 1, 2006.

694. **Amendment:** Chapter Six is amended in the heading by striking "AND" and inserting a comma; and by adding at the end ", AND CRIME VICTIMS' RIGHTS".

Chapter Six, Part A is amended by adding at the end the following:

"§6A1.5. Crime Victims' Rights (Policy Statement)

In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of Federal law pertaining to the treatment of crime victims.

Commentary

Application Note:

1. Definition.—For purposes of this policy statement, 'crime victim' has the meaning given that term in 18 U.S.C. § 3771(e).".

Reason for Amendment: This amendment creates a new policy statement at §6A1.5 (Crime Victims' Rights) in response to the Justice for All Act of 2004, Pub. L. 108-405, which sets forth at 18 U.S.C. § 3771 various rights for crime victims during the criminal justice process, including at subsection (a)(4) the right to be "reasonably heard at any public proceeding . . . involving release, plea, sentencing, or any parole proceeding." The amendment also changes the title of Chapter Six to reflect the addition of the policy statement.

Effective Date: The effective date of this amendment is November 1, 2006.

695. **Amendment:** The Commentary to §8C2.5 captioned "Application Notes" is amended in Note 12 by striking the last sentence as follows:

> "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.".

Reason for Amendment: This amendment deletes the last sentence of Application Note 12 to §8C2.5 (Culpability Score), which stated that "[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." The Commission added this sentence to address some concerns regarding the relationship between waivers and §8C2.5(g), and at the time stated that "[t]he Commission expects that such waivers will be required on a limited basis." See Supplement to Appendix C (Amendment 673, effective November 1, 2004). Subsequently, the Commission received public comment and heard testimony at public hearings on November 15, 2005, and March 15, 2006, that the sentence at issue could be misinterpreted to encourage waivers.

Effective Date: The effective date of this amendment is November 1, 2006.

696. **Amendment:** The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 7(C) by striking "§2J1.7" and inserting "§3C1.3".

The Commentary to §2K2.1 captioned "Application Notes", as amended by Amendment 691, is further amended in Note 3 by inserting "Definition of 'Prohibited Person'.—" before "For purposes"; and in Note 11, as redesignated by Amendment 691, by striking "Note 8" and inserting "Note 7".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4 by striking "(b)(5)" each place it appears and inserting "(b)(6)".

Reason for Amendment: This amendment makes various technical and conforming amendments in order to execute properly amendments submitted to the Congress on May 1, 2006, and that will become effective on November 1, 2006. Specifically, the amendment conforms guideline references in the commentary of §§2B1.1 (Theft, Property Destruction, and Fraud), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), and 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to redesignated guideline provisions and adds a heading to Application Note 3 in §2K2.1.

Effective Date: The effective date of this amendment is November 1, 2006.

697. **Amendment**: Section 2H3.1 is amended in the heading by striking "Tax Return Information" and inserting "Certain Private or Protected Information".

Section 2H3.1(b)(1) is amended by inserting "(A) the defendant is convicted under 18 U.S.C. § 1039(d) or (e); or (B)" after "If".

The Commentary to §2H3.1 captioned "Statutory Provisions" is amended by inserting "§ 1039," after "18 U.S.C. §".

The Commentary to §2H3.1 captioned "Application Notes" is amended by striking Note 1 as follows:

"1. Definitions.—For purposes of this guideline, 'tax return' and 'tax return information' have the meaning given the terms 'return' and 'return information' in 26 U.S.C. § 6103(b)(1) and (2), respectively.";

by redesignating Note 2 as Note 1; and by inserting after Note 1, as redesignated by this amendment, the following:

"2. Imposition of Sentence for 18 U.S.C. § 1039(d) and (e).—Subsections 1039(d) and (e) of title 18, United States Code, require a term of imprisonment of not more than 5 years to be imposed in addition to any sentence imposed for a conviction under 18 U.S.C. § 1039(a), (b), or (c). In order to comply with the statute, the court should determine the appropriate 'total punishment' and divide the sentence on the judgment form between the sentence attributable to the conviction under 18 U.S.C. § 1039(d) or (e) and the sentence attributable to the conviction under 18 U.S.C. § 1039(a), (b), or (c), specifying the number of months to be served for the conviction under 18 U.S.C. § 1039(d) or (e). For example, if the applicable adjusted guideline range is 15-21 months and the court determines a 'total punishment' of 21 months is appropriate, a sentence of 9 months for conduct under 18 U.S.C. § 1039(a) plus 12 months for 18 U.S.C. § 1039(d) conduct would achieve the 'total punishment' in a manner that satisfies the statutory requirement.

3. Upward Departure.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness

of the offense. In such a case, an upward departure may be warranted. The following are examples of cases in which an upward departure may be warranted:

(i) The offense involved confidential phone records information of a substantial number of individuals.

(ii) The offense caused or risked substantial non-monetary harm (e.g. physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.".

Section 2H3.1 is amended by striking the Commentary captioned "Background" as follows:

"Background: This section refers to conduct proscribed by 47 U.S.C. § 605 and the Electronic Communications Privacy Act of 1986, which amends 18 U.S.C. § 2511 and other sections of Title 18 dealing with unlawful interception and disclosure of communications. These statutes proscribe the interception and divulging of wire, oral, radio, and electronic communications. The Electronic Communications Privacy Act of 1986 provides for a maximum term of imprisonment of five years for violations involving most types of communication.

This section also refers to conduct relating to the disclosure and inspection of tax returns and tax return information, 26 U.S.C. §§ 7213(a)(1)-(3), (5), (d), 7213A, and 7216. These statutes provide for a maximum term of imprisonment of five years for most types of disclosure of tax return information, but provide a maximum term of imprisonment of one year for violations of 26 U.S.C. §§ 7213A and 7216.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1038 the following new line:

"18 U.S.C. § 1039 2H3.1".

Reason for Amendment: This amendment implements the emergency directive in section 4 of the Telephone Records and Privacy Protection Act of 2006, Pub. L. 109–476. The directive, which requires the Commission to promulgate an amendment under emergency amendment authority by July 11, 2007, instructs the Commission to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 1039 of title 18, United States Code." Section 1039 criminalizes the fraudulent acquisition or disclosure of confidential phone records. The penalties for violating the statute include fines and imprisonment for a term not to exceed 10 years. The statute also includes enhanced penalties for certain forms of aggravated conduct, providing for up to a five year term of imprisonment, in addition to the penalties for a violation of section 1039(a), (b), or (c). See 18 U.S.C. § 1039 (d), (e).

The amendment refers the new offense at 18 U.S.C. § 1039 to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Return Information). The Commission concluded that disclosure of telephone records is similar to the types of privacy offenses referenced to this guideline. In addition, this guideline includes a cross reference,

instructing that if the purpose of the offense was to facilitate another offense, that the guideline applicable to an attempt to commit the other offenses should be applied, if the resulting offense level is higher. The Commission concluded that operation of the cross reference would capture the harms associated with the aggravated forms of this offense referenced at 18 U.S.C. § 1039(d) or (e). Finally, the amendment expands the scope of the existing three-level enhancement in the guideline to include cases in which the defendant is convicted under 18 U.S.C. § 1039(d) or (e). Thus, in cases where the cross reference does not apply, application of the enhancement will capture the increased harms associated with the aggravated offenses.

Effective Date: The effective date of this amendment is May 1, 2007.

698. **Amendment:** The Commentary to §1B1.13 captioned "Application Notes" is amended in Note 1 by striking subdivision (A) as follows:

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

and inserting the following:

"(A) Extraordinary and Compelling Reasons.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the following circumstances:

(i) The defendant is suffering from a terminal illness.

(ii) The defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.

(iii) The death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children.

(iv) As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i), (ii), and (iii).".

The Commentary to §1B1.13 is amended by striking the commentary captioned "Background" as follows:

"Background: This policy statement is an initial step toward implementing 28 U.S.C. § 994(t). The Commission intends to develop further criteria to be applied and a list of

specific examples of extraordinary and compelling reasons for sentence reduction pursuant to such statute.",

and inserting the following:

"Background: This policy statement implements 28 U.S.C. § 994(t).".

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

Effective Date: The effective date of this amendment is November 1, 2007.

699. **Amendment:** The Commentary to §2A1.1 captioned "Statutory Provisions" is amended by inserting "1992(a)(7)," after "1841(a)(2)(C),"; and by inserting "2199, 2291," after "2118(c)(2),".

The Commentary to §2A1.2 captioned "Statutory Provisions" is amended by inserting "2199, 2291," after "1841(a)(2)(C),".

The Commentary to §2A1.3 captioned "Statutory Provisions" is amended by inserting "2199, 2291," after "1841(a)(2)(C),".

The Commentary to §2A1.4 captioned "Statutory Provisions" is amended by inserting "2199, 2291," after "1841(a)(2)(C),".

The Commentary to §2A1.4 captioned "Application Note" is amended in Note 1 by striking "18 U.S.C. § 1993(c)(5)" and inserting "18 U.S.C. § 1992(d)(7)".

The Commentary to §2A2.1 captioned "Statutory Provisions" is amended by striking "1993(a)(6)" and inserting "1992(a)(7), 2199, 2291".

The Commentary to §2A2.2 captioned "Statutory Provisions" is amended by striking "1993(a)(6)," and inserting "1992(a)(7), 2199, 2291,".

The Commentary to §2A2.3 captioned "Statutory Provisions" is amended by inserting ", 2199, 2291" after "1751(e)".

The Commentary to §2A2.4 captioned "Statutory Provisions" is amended by inserting "2237(a)(1), (a)(2)(A)," after "1502,".

Section 2A5.2 is amended in the heading by inserting "Navigation," after "Dispatch,"; and by striking "or Ferry".

Sections 2A5.2(a)(1) and (a)(2) are amended by striking the comma after "facility" each place it appears and inserting "or"; and by striking ", or a ferry" each place it appears.

The Commentary to §2A5.2 captioned "Statutory Provisions" is amended by striking "1993(a)(4), (5), (6), (b);" and inserting "1992(a)(1), (a)(4), (a)(5), (a)(6);".

The Commentary to §2A5.2 captioned "Application Note" is amended in Note 1 in the last paragraph by striking "18 U.S.C. § 1993(c)(5)" and inserting "18 U.S.C. § 1992(d)(7)".

The Commentary to §2A6.1 captioned "Statutory Provisions" is amended by striking "1993(a)(7), (8)," and inserting "1992(a)(9), (a)(10), 2291(a)(8), 2291(e), 2292,".

Section 2B1.1(b) is amended by striking subdivision (11) as follows:

> "(11) 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.",

and inserting the following:

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

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "(a)(1), (a)(5)" after "1992"; by striking "1993(a)(1), (a)(4),"; by inserting "2291," after "2113(b),"; and by inserting "14915," after "49 U.S.C. §§".

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

> "10. Chop Shop Enhancement under Subsection (b)(11).—Subsection (b)(11) 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.",

and inserting the following:

> "10. Application of Subsection (b)(11).—Subsection (b)(11) provides a minimum offense level in the case of an ongoing, sophisticated operation (e.g., an auto theft ring or 'chop shop') to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, 'vehicle' means motor vehicle, vessel, or aircraft. A 'cargo shipment' includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.".

Section 2B2.3(b)(1) is amended by striking "secured" each place it appears and inserting "secure"; and by inserting "or a seaport" after "airport".

The Commentary to §2B2.3 captioned "Statutory Provisions" is amended by inserting ", 2199" after "1036".

The Commentary to §2B2.3 captioned "Application Notes" is amended in Note 1 by adding at the end the following:

"'Seaport' has the meaning given that term in 18 U.S.C. § 26.".

The Commentary to §2B2.3 captioned "Background" is amended by striking "secured" before "government" and inserting "secure"; and by striking ", such as nuclear facilities," and inserting "(such as nuclear facilities) and other locations (such as airports and seaports)".

The Commentary to §2C1.1 captioned "Statutory Provisions" is amended by inserting "226," after "§§ 201(b)(1), (2),".

The Commentary to §2K1.4 captioned "Statutory Provisions" is amended by inserting "(a)(1), (a)(2), (a)(4)" after "1992"; by striking "1993(a)(1), (a)(2), (a)(3), (b),"; and by inserting "2291," after "2275,".

The Commentary to §2K1.4 captioned "Application Notes" is amended in Note 1 by striking "18 U.S.C. § 1993(c)(5)" and inserting "18 U.S.C. § 1992(d)(7)".

The Commentary to §2M6.1 captioned "Statutory Provisions" is amended by striking "1993(a)(2), (3), (b), 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D))," and inserting "1992(a)(2), (a)(3), (a)(4), (b)(2), 2291,".

The Commentary to §2Q1.1 captioned "Statutory Provisions" is amended by inserting "18 U.S.C. § 1992(b)(3);" before "33 U.S.C. § 1319(c)(3);".

Section 2X1.1 is amended in subsection (d)(1)(A) by inserting "(a)(1)-(a)(7), (a)(9), (a)(10)" after "1992"; and in subsection (d)(1)(B) by inserting "and" after "§ 32;"; and by striking "18 U.S.C. § 1993; and".

The Commentary to §2X5.2 captioned "Statutory Provisions" is amended by inserting "; 49 U.S.C. § 31310" after "14133".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 225 the following:

"18 U.S.C. § 226 2C1.1";

by inserting after the line referenced to 18 U.S.C. § 1035 the following:

"18 U.S.C. § 1036 2B2.3";

by striking the following:

"18 U.S.C. § 1992	2A1.1, 2B1.1, 2K1.4, 2X1.1
18 U.S.C. § 1993(a)(1)	2B1.1, 2K1.4
18 U.S.C. § 1993(a)(2)	2K1.4, 2M6.1
18 U.S.C. § 1993(a)(3)	2K1.4, 2M6.1
18 U.S.C. § 1993(a)(4)	2A5.2, 2B1.1
18 U.S.C. § 1993(a)(5)	2A5.2
18 U.S.C. § 1993(a)(6)	2A2.1, 2A2.2, 2A5.2
18 U.S.C. § 1993(a)(7)	2A6.1
18 U.S.C. § 1993(a)(8)	2A5.2 (if attempt or conspiracy to commit 18 U.S.C. § 1993(a)(4), (a)(5), or (a)(6)), 2A6.1
18 U.S.C. § 1993(b)	2A5.2, 2K1.4, 2M6.1",

and inserting the following:

"18 U.S.C. § 1992(a)(1)	2A5.2, 2B1.1, 2K1.4, 2X1.1
18 U.S.C. § 1992(a)(2)	2K1.4, 2M6.1, 2X1.1
18 U.S.C. § 1992(a)(3)	2M6.1, 2X1.1
18 U.S.C. § 1992(a)(4)	2A5.2, 2K1.4, 2M6.1, 2X1.1
18 U.S.C. § 1992(a)(5)	2A5.2, 2B1.1, 2X1.1
18 U.S.C. § 1992(a)(6)	2A5.2, 2X1.1
18 U.S.C. § 1992(a)(7)	2A1.1, 2A2.1, 2A2.2, 2X1.1
18 U.S.C. § 1992(a)(8)	2X1.1
18 U.S.C. § 1992(a)(9)	2A6.1, 2X1.1
18 U.S.C. § 1992(a)(10)	2A6.1, 2X1.1";

in the line referenced to 18 U.S.C. § 2199 by inserting "2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3," before "2B1.1";

by inserting after the line referenced to 18 U.S.C. § 2233 the following:

"18 U.S.C. § 2237(a)(1), (a)(2)(A)	2A2.4
18 U.S.C. § 2237(a)(2)(B)	2B1.1";

by inserting after the line referenced to 18 U.S.C. § 2281 the following:

"18 U.S.C. § 2291	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2K1.4, 2M6.1
18 U.S.C. § 2292	2A6.1";

by inserting after the line referenced to 49 U.S.C. § 14912 the following:

"49 U.S.C. § 14915	2B1.1"; and

by inserting after the line referenced to 49 U.S.C. § 30170 the following:

"49 U.S.C. § 31310	2X5.2".

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

The PATRIOT Reauthorization Act created several new offenses and increased the scope of or penalty for several existing offenses. SAFETEA-LU also created two new offenses. This amendment references both the new statutes and those with increased scope and penalties to existing guidelines. The amendment also provides a corresponding amendment to Appendix A (Statutory Index). The Commission concluded that referencing the new offenses to existing guidelines was appropriate because the type of conduct criminalized by the new statutes was adequately addressed and penalized by the guidelines.

Section 307(c) of the PATRIOT Reauthorization Act directed the Commission to review the guidelines to determine whether a sentencing enhancement is appropriate for any offense under sections 659 or 2311 of title 18, United States Code. This amendment responds to the directive by revising the enhancement at subsection (b)(11) of §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The amendment expands the scope of this enhancement to cover cargo theft and adds a reference to the receipt of stolen vehicles or goods to ensure application of the enhancement is consistent with the scope of 18 U.S.C. §§ 659 and 2313. The Commission determined that the two-level increase, and the minimum offense level of 14, appropriately responds to concerns regarding the increased instances of organized cargo theft operations.

Effective Date: The effective date of this amendment is November 1, 2007.

700. **Amendment:** The Commentary to §2A1.1 captioned "Statutory Provisions", as amended by Amendment 699, is further amended by inserting "2282A," after "2199,".

The Commentary to §2A1.2 captioned "Statutory Provisions", as amended by Amendment 699, is further amended by inserting "2282A," after "2199,".

The Commentary to §2B1.1 captioned "Statutory Provisions", as amended by Amendment 699, is further amended by inserting "2282A, 2282B," after "2113(b),".

The Commentary to §2B1.5 captioned "Statutory Provisions" is amended by inserting "554," before "641,".

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

"§2D1.14. <u>Narco-Terrorism</u>

(a) Base Offense Level:

(1) The offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or

Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applicable to the underlying offense, except that §2D1.1(a)(3)(A), (a)(3)(B), and (b)(11) shall not apply.

(b) Specific Offense Characteristic

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

Commentary

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

Chapter Two, Part E, Subpart Four, is amended in the heading by adding at the end "AND SMOKELESS TOBACCO".

Section 2E4.1 is amended in the heading by adding at the end "and Smokeless Tobacco".

The Commentary to §2E4.1 captioned "Background" is amended by striking "60,000" and inserting "10,000".

The Commentary to §2K1.3 captioned "Statutory Provisions" is amended by inserting ", 2283" after "1716".

Section 2K1.4 is amended in subsections (a)(1) and (a)(2) by striking "a ferry," each place it appears and inserting "a maritime facility, a vessel, or a vessel's cargo,"; in subsection (a)(2) by striking "or" the last place it appears; by redesignating subsection (a)(3) as subsection (a)(4); and by inserting the following after subsection (a)(2):

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

Section 2K1.4(b)(2) is amended by striking "(a)(3)" and inserting "(a)(4)".

The Commentary to §2K1.4 captioned "Statutory Provisions", as amended by Amendment 699, is further amended by inserting "2282A, 2282B," after "2275,".

The Commentary to §2K1.4 captioned "Application Notes" is amended in Note 1 by inserting after "For purposes of this guideline:" the following paragraph:

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

by inserting after "destructive device." the following paragraph:

"'Maritime facility' means any structure or facility of any kind located in, on, under,

> or adjacent to any waters subject to the jurisdiction of the United States and used, operated, or maintained by a public or private entity, including any contiguous or adjoining property under common ownership or operation.";

by striking "1993(c)(5)" and inserting "1992(d)(7)"; and by adding at the end the following:

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

The Commentary to §2M5.2 captioned "Statutory Provisions" is amended by inserting "18 U.S.C. § 554;" before "22 U.S.C. §§ 2778, 2780.".

Section 2M5.3 is amended in the heading by inserting "Specially Designated Global Terrorists, or" after "Organizations or"

The Commentary to §2M5.3 captioned "Statutory Provisions" is amended by inserting "2283, 2284," after "18 U.S.C. §§"; and by striking the period at the end and inserting "; 50 U.S.C. §§ 1701, 1705.".

The Commentary to §2M5.3 captioned "Application Notes" is amended in Note 1 by adding at the end the following paragraph:

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

Section 2M6.1 is amended in the heading by striking "Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of" and inserting "Activity Involving".

The Commentary to §2M6.1 captioned "Statutory Provisions", as amended by Amendment 699, is further amended by inserting "2283," before "2291,".

The Commentary to §2Q2.1 captioned "Statutory Provisions" is amended by inserting "§" before "545" and by inserting ", 554" after "545".

The Commentary to §2Q2.1 captioned "Background" is amended by striking "§ 545 where" and inserting "§§ 545 and 554 if".

The Commentary to §2X1.1 captioned "Statutory Provisions" is amended by inserting ", 2282A, 2282B" after "2271".

The Commentary to §2X2.1 captioned "Statutory Provisions" is amended by inserting "2284," after "2,".

The Commentary to §2X3.1 captioned "Statutory Provisions" is amended by inserting "2284," after "1072,".

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

"7. OFFENSES INVOLVING BORDER TUNNELS

§2X7.1. Border Tunnels and Subterranean Passages

(a) Base Offense Level:

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

(2) 16, if the defendant was convicted under 18 U.S.C. § 554(a); or

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

Commentary

Statutory Provision: 18 U.S.C. § 554.

Application Note:

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

Chapter Five, Part K is amended by adding at the end the following new policy statement and accompanying commentary:

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

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

Commentary

Application Note:

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

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 553(a)(2) the following:

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

Appendix A (Statutory Index), as amended by Amendment 699, is further amended by inserting after the line referenced to 18 U.S.C. § 2281 the following:

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

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 2339 by inserting "2M5.3," before "2X2.1";

by inserting after the line referenced to 21 U.S.C. § 960(d)(7) the following:

"21 U.S.C. § 960a	2D1.14".

by inserting after the line referenced to 50 U.S.C. § 783(c) the following:

"50 U.S.C. § 1701	2M5.1, 2M5.2, 2M5.3
50 U.S.C. § 1705	2M5.3"; and

by striking the following:

"50 U.S.C. App. § 1701	2M5.1, 2M5.2".

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

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

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

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

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

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

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

(B) The new offense in 18 U.S.C. § 2282A, pertaining to mining of United States navigable waters, is referenced to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), 2K1.4 (Arson; Property Damage by Use of Explosives), and 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)). The amendment also adds vessel, maritime facility, and a vessel's cargo to §2K1.4(a)(1) and (a)(2) to cover conduct described in 18 U.S.C. § 2282A. The definitions provided for "vessel," "maritime facility," and "aids to maritime navigation" come from title 33 of the Code of Federal Regulations pertaining to the United States Coast Guard, specifically Navigation and Navigable Waters.

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

(C) The new offense in 18 U.S.C. § 2283 pertaining to transporting biological and chemical weapons is referenced to §§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorism Organizations or For a Terrorist Purpose), and 2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy). The new offense in 18 U.S.C. § 2284 pertaining to transporting terrorists is referenced to §§2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or For a Terrorist Purpose), 2X2.1 (Aiding and Abetting), and 2X3.1 (Accessory After the Fact).

(D) Section 2341 of title 18, United States Code, which provides definitions for offenses involving contraband cigarettes and smokeless tobacco, was amended to reduce the number of contraband cigarettes necessary to violate the substantive offenses set forth in 18 U.S.C. §§ 2342 and 2344 from 60,000 to 10,000. The amendment makes conforming changes to the background commentary of §2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes) and expands the headings of Chapter Two, Part

E, Subpart 4 and §2E4.1 to include smokeless tobacco.

(E) The Patriot Reauthorization Act increased the statutory maximum term of imprisonment for offenses covered by the International Emergency Economic Powers Act (50 U.S.C. § 1705) from 10 years to 20 years' imprisonment. The amendment references 50 U.S.C. § 1705 to §2M5.3 and modifies the heading of the guideline to include "specially designated global terrorist".

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

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

Effective Date: The effective date of this amendment is November 1, 2007.

701. **Amendment:** Chapter Two, Part A, Subpart Three, is amended in the heading by adding at the end "AND OFFENSES RELATED TO REGISTRATION AS A SEX OFFENDER".

Section 2A3.1(a) is amended by striking "30" and inserting the following:

"(1) 38, if the defendant was convicted under 18 U.S.C. § 2241(c); or

(2) 30, otherwise.".

Section 2A3.1(b)(2) is amended by striking "(A) If" and inserting "If subsection (a)(2) applies and (A)"; and by striking "if" after "(B)".

The Commentary to §2A3.1 captioned "Application Notes" is amended in Note 2 by inserting "(A) Definitions.—" before "For purposes of"; and by adding at the end the following subdivision:

"(B) Application in Cases Involving a Conviction under 18 U.S.C. § 2241(c).—If the conduct that forms the basis for a conviction under 18 U.S.C. § 2241(c) is that the defendant engaged in conduct described in 18 U.S.C. § 2241(a) or (b), do not apply subsection (b)(1).".

Section 2A3.1 is amended by striking the Commentary captioned "Background" as follows:

"Background: Sexual offenses addressed in this section are crimes of violence. Because of their dangerousness, attempts are treated the same as completed acts of criminal sexual abuse. The maximum term of imprisonment authorized by statute is life imprisonment. The base offense level represents sexual abuse as set forth in 18 U.S.C. § 2242. An enhancement is provided for use of force; threat of death, serious bodily injury, or kidnapping; or certain other means as defined in 18 U.S.C. § 2241. This includes any use or threatened use of a dangerous weapon.

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

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

Section 2A3.3(a) is amended by striking "12" and inserting "14".

The Commentary to §2A3.3 captioned "Application Notes" is amended in Note 1 by striking "'Minor' means an individual who had not attained the age of 18 years." and inserting the following:

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

The Commentary to §2A3.3 captioned "Application Notes" is amended by adding at the end the following:

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

Section 2A3.3 is amended by striking the Commentary captioned "Background" as follows:

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

Section 2A3.4(b)(1) is amended by striking "20" each place it appears and inserting "22".

The Commentary to §2A3.4 captioned "Statutory Provisions" is amended by striking "(a)(1), (2), (3)" after "§ 2244".

The Commentary to §2A3.4 captioned "Background" is amended by striking the following:

> "Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years.".

Chapter Two, Part A, Subpart Three, is amended by adding at the end the following new guidelines and accompanying commentaries:

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

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

(1) 16, if the defendant was required to register as a Tier III offender;

(2) 14, if the defendant was required to register as a Tier II offender; or

(3) 12, if the defendant was required to register as a Tier I offender.

(b) Specific Offense Characteristics

(1) (Apply the greatest):

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

(A) a sex offense against someone other than a minor increase by 6 levels;

(B) a felony offense against a minor not otherwise covered by subdivision (C), increase by 6 levels; or

(C) a sex offense against a minor, increase by 8 levels.

(2) If the defendant voluntarily (A) corrected the failure to register; or (B) attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances, decrease by 3 levels.

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

'Sex offense' has the meaning given that term in 42 U.S.C. § 16911(5).

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

2. Application of Subsection (b)(2).—

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

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

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

If the defendant was convicted under—

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

(b) 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute.

Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to any count of conviction covered by this guideline.

Commentary

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

Application Notes:

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

2. Inapplicability of Chapters Three and Four.—Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

3. Inapplicability of Chapter Two Enhancement.—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic that is based on the same conduct as the conduct comprising the conviction under 18 U.S.C. § 2250(c) or § 2260A.

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

Section 2G1.1(a) is amended by striking "14" and inserting the following:

"(1) 34, if the offense of conviction is 18 U.S.C. § 1591(b)(1); or

(2) 14, otherwise.".

Section 2G1.1(b)(1) is amended by inserting "(A) subsection (a)(2) applies; and (B)" after "If".

Section 2G1.1 is amended by striking the Commentary captioned "Background" as follows:

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

This guideline also covers offenses under section 1591 of title 18, United

States Code, that involve recruiting or transporting a person, other than a minor, in interstate commerce knowing that force, fraud, or coercion will be used to cause the person to engage in a commercial sex act.

Offenses of promoting prostitution or prohibited sexual conduct in which a minor victim is involved are to be sentenced under §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor).".

Section 2G1.3(a) is amended by striking "24" and inserting the following:

"(1) 34, if the defendant was convicted under 18 U.S.C. § 1591(b)(1);

(2) 30, if the defendant was convicted under 18 U.S.C. § 1591(b)(2);

(3) 28, if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or

(4) 24, otherwise.".

Section 2G1.3(b) is amended by striking subdivision (4) as follows:

"(4) If the offense involved (A) the commission of a sex act or sexual contact; or (B) a commercial sex act, increase by 2 levels.".

and inserting the following:

"(4) If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.".

Section 2G1.3(b)(5) is amended by inserting "(A) subsection (a)(3) or (a)(4) applies; and (B)" after "If".

The Commentary to §2G1.3 captioned "Statutory Provisions" is amended by striking "2422(b),".

Section 2G1.3 is amended by striking the Commentary captioned "Background" as follows:

"Background: This guideline covers offenses under chapter 117 of title 18, United States Code, involving transportation of a minor for illegal sexual activity through a variety of means. This guideline also covers offenses involving a minor under section 1591 of title 18, United States Code. Offenses involving an individual who had attained the age of 18 years are covered under §2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor).".

The Commentary to §2G2.5 captioned "Statutory Provisions" is amended by inserting "§" after "18 U.S. C. §"; and by inserting ", 2257A" after "2257".

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

"§2G2.6. Child Exploitation Enterprises

(a) Base Offense Level: 35

(b) Specific Offense Characteristics

(1) If a victim (A) had not attained the age of 12 years, increase by 4 levels; or (B) had attained the age of 12 years but had not attained the age of 16 years, increase by 2 levels.

(2) If (A) the defendant was a parent, relative, or legal guardian of a minor victim; or (B) a minor victim was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(3) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by 2 levels.

(4) If a computer or an interactive computer service was used in furtherance of the offense, increase by 2 levels.

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

2. Application of Subsection (b)(2).—

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

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

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

Section 2G3.1(b) is amended by striking subdivision (2) as follows:

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

and inserting the following:

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

The Commentary to §2G3.1 captioned "Statutory Provisions" is amended by inserting ", 2252C" after "2252B".

The Commentary to §2G3.1 captioned "Application Notes" is amended in Note 2 by inserting "or § 2252C" after "2252B".

Section 2J1.2(b) is amended in subdivision (1) by striking "greater" and inserting "greatest";

by redesignating subdivisions (A) and (B) as subdivisions (B) and (C), respectively; by inserting before subdivision (B), as redesignated by this amendment, the following:

"(A) If the (i) defendant was convicted under 18 U.S.C. § 1001; and (ii) statutory maximum term of eight years' imprisonment applies because the matter relates to sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code, increase by 4 levels.";

and by striking subdivision (C), as redesignated by this amendment, as follows:

"(C) If (i) defendant was convicted under 18 U.S.C. § 1001 or § 1505; and (ii) the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, increase by 12 levels.",

and inserting the following:

"(C) If the (i) defendant was convicted under 18 U.S.C. § 1001 or § 1505; and (ii) statutory maximum term of eight years' imprisonment applies because the matter relates to international terrorism or domestic terrorism, increase by 12 levels.".

The Commentary to §2J1.2 captioned "Statutory Provisions" is amended by striking "when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable," and inserting the following:

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

The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 2(B) by striking "(b)(1)(B)" and inserting "(b)(1)(C)".

The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 4 by inserting "or a particularly serious sex offense" after "face)".

The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 5 by inserting "(B)" after "Subsection (b)(1)" each place it appears; and by inserting "(B)" after "under subsection (b)(1)".

Section 3D1.2(d) is amended by inserting as a new line "§2A3.5;" before the line that begins "§§2B1.1"; and by inserting "(except §2A3.5)" after "Chapter Two, Part A".

The Commentary to §4B1.5 captioned "Application Notes" is amended by striking Note 1 as follows:

"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.",

and inserting the following:

> "1. Definition.—For purposes of this guideline, ‘minor’ means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.".

The Commentary to §4B1.5 captioned "Application Notes" is amended in Note 2 by inserting "or (iv) 18 U.S.C. § 1591;" after "individual;"; and by striking "(iii)" after "through" and inserting "(iv)".

The Commentary to §4B1.5 captioned "Background" is amended by striking the following:

> "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.".

and inserting:

> "This guideline applies to offenders whose instant offense of conviction is a sex offense committed against a minor and who present a continuing danger to the public.".

Section 5B1.3(a)(9) is amended by inserting "(A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply," before "a defendant convicted"; by inserting "(Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997)" after "4042(c)(4)"; by inserting "or" after "student;" and by adding at the end the following:

> "(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;".

Section 5B1.3(d)(7) is amended by adding at the end the following:

"(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.".

Section 5B1.3 is amended by adding at the end the following:

" Commentary

Application Note:

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

The Commentary to §5D1.2 captioned "Application Notes" is amended by striking Note 1 as follows:

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

and inserting:

"1. Definitions.—For purposes of this guideline:

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

'Minor' means (A) an individual who had not attained the age of 18 years;

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

Section 5D1.3(a)(7) is amended by inserting "(A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply," before "a defendant"; by inserting "(Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997)" after "4042(c)(4)"; by inserting "or" after "student;" and by adding at the end the following:

"(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;".

Section 5D1.3(d)(7) is amended by adding at the end the following:

"(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.".

Section 5D1.3 is amended by adding at the end the following:

" Commentary

Application Note:

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

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 1001 by striking the following:

"when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable",

and inserting the following:

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

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 2245 the following:

"18 U.S.C. § 2250(a) 2A3.5
18 U.S.C. § 2250(c) 2A3.6";

by inserting after the line referenced to 18 U.S.C. § 2252B the following:

"18 U.S.C. § 2252C 2G3.1";

by inserting after the line referenced to 18 U.S.C. § 2257 the following:

"18 U.S.C. § 2257A 2G2.5"; and

by inserting after the line referenced to 18 U.S.C. § 2260(b) the following:

"18 U.S.C. § 2260A 2A3.6".

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

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

§2A3.1 in fiscal year 2006. Accordingly, the mandatory minimum 360 months' imprisonment is expected to be reached or exceeded in every case with a base offense level of 38.

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

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

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

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

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

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

as a Tier III offender; level 14 if the defendant was required to register as a Tier II offender; and level 12 if the defendant was required to register as a Tier I offender.

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

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

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

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

The guideline includes an application note that provides an upward departure stating that a sentence above the minimum term required by section 2250(c) is an upward departure

from the guideline sentence. An upward departure may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.

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

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

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

The amendment further provides a base offense level of 28 for convictions under 18 U.S.C. §§ 2422(b) and 2423(a). The two-level enhancement for the use of a computer at §2G1.3(b)(3) applied to 95 percent of offenders convicted under 18 U.S.C. § 2422(b) and sentenced under §2G1.3 in fiscal year 2006. In addition, the two-level enhancement for the offense involving a sexual act or sexual contact at §2G1.3(b)(4) applied to 95 percent of offenders convicted under 18 U.S.C. § 2423(a) and sentenced under this guideline in fiscal year 2006 . With application of either enhancement, the mandatory minimum term of imprisonment of 120 months will be reached in the majority of convictions under 18 U.S.C. §§ 2422(b) and 2423(a), before application of other guidelines adjustments.

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

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

Ninth, section 701 of the Adam Walsh Act created a new offense in 18 U.S.C. § 2252A(g) that prohibits engaging in child exploitation enterprises, defined as violating 18 U.S.C. §§ 1591, 1201 (if the victim is a minor), chapter 109A (involving a minor victim), chapter 110 (except for 18 U.S.C. §§ 2257 and 2257A), or chapter 117 (involving a minor victim), as part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and committing those offenses in concert with three or more other people. The statute provides a mandatory minimum term of imprisonment of 20 years.
The amendment creates a new guideline at §2G2.6 (Child Exploitation Enterprises) to cover this new offense. The guideline provides a base offense level of 35 and four specific offense characteristics. The Commission anticipates these offenses typically will involve conduct encompassing at least one of the specific offense characteristics, resulting in an offense level of at least level 37. Thus, the mandatory minimum term of imprisonment of 240 months typically is expected to be reached or exceeded, before application of other guideline adjustments.

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

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

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

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

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

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

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

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

Effective Date: The effective date of this amendment is November 1, 2007.

702. **Amendment:** Section 2B1.1(b)(13)(C) is amended by striking "(b)(12)(B)" and inserting "(b)(13)(B)".

Section 2L1.1(b)(1) is amended by striking "(a)(2)" and inserting "(a)(3)".

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

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

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

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

Effective Date: The effective date of this amendment is November 1, 2007.

703. **Amendment:** Section 2B2.3(b)(1) is amended by redesignating subdivision (F) as subdivision (G); and by inserting "(F) at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration;" after "residence;".

The Commentary to §2B2.3 captioned "Statutory Provisions", as amended by Amendment 699, is further amended by inserting "38 U.S.C. § 2413;" after "2199;".

The Commentary to §2E3.1 captioned "Statutory Provisions" is amended by inserting "; 31 U.S.C. § 5363" after "1955".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 31 U.S.C. § 5332 the following:

"31 U.S.C. § 5363 2E3.1"; and

by inserting after the line referenced to 38 U.S.C. § 787 the following:

"38 U.S.C. § 2413 2B2.3".

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

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

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

Effective Date: The effective date of this amendment is November 1, 2007.

704. **Amendment:** The amendment to §2B5.3, effective September 12, 2006 (see Appendix C amendment 682), is repromulgated with the following changes:

Section 2B5.3(b)(3) is amended by inserting "(A)" before "offense involved" and by inserting "; or (B) defendant was convicted under 17 U.S.C. §§ 1201 and 1204 for trafficking in circumvention devices" after "items".

The Commentary to §2B5.3 captioned "Statutory Provisions" is amended by inserting "§" after "17 U.S.C. §"; and by inserting ", 1201, 1204" after "506(a)".

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 1 by inserting after "Definitions.—For purposes of this guideline:" the following paragraph:

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

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 2(A) by adding at the end the following:

"(vii) A case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably

informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the 'infringed item' is the identifiable, genuine good or service.

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

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 3 by striking "shall" and inserting "may".

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 4 by striking "Upward" before "Departure"; by inserting "or overstates" after "understates"; and by striking "an upward" each place it appears and inserting "a"; and by adding at the end the following:

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

Appendix A (Statutory Index) is amended by inserting after the line referenced to 17 U.S.C. § 506(a) the following new lines:

"17 U.S.C. § 1201	2B5.3
17 U.S.C. § 1204	2B5.3".

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

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

The amendment adds subdivision (vii) to Application Note 2(A) of §2B5.3 (Criminal

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

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

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

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

Finally, the amendment modifies Application Note 4 to address downward departures. The addition of this language recognizes that in some instances the method for calculating the infringement amount may be based on a formula or extrapolation that overstates the actual pecuniary harm to the copyright or trademark owner. This language is analogous to departure language in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses

Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) and thus promotes consistency between these two economic crime guidelines.

Effective Date: The effective date of this amendment is November 1, 2007.

705. **Amendment:** Section 2D1.1(b) is amended by redesingating subdivisions (8) and (9), as subdivisions (10) and (11), respectively; by redesignating subdivisions (5) through (7) as subdivisions (6) through (8), respectively; by inserting after subdivision (4) the following:

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

and by inserting after subdivision (8), as redesignated by this amendment, the following:

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

Section 2D1.1(b) is amended in subdivision (10), as redesignated by this amendment, by striking "greater" and inserting "greatest"; by redesignating subdivision (C) as subdivision (D); and by striking subdivision (B) as follows:

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

and inserting the following:

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

(C) If—

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

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

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

Section 2D1.1(c)(1) is amended by inserting "30,000,000 units or more of Ketamine;" after the line referenced to "Hashish Oil".

Section 2D1.1(c)(2) is amended by inserting "At least 10,000,000 but less than 30,000,000 units of Ketamine;" after the line referenced to "Hashish Oil".

Section 2D1.1(c)(3) is amended by inserting "At least 3,000,000 but less than 10,000,000 units of Ketamine;" after the line referenced to "Hashish Oil".

Section 2D1.1(c)(4) is amended by inserting "At least 1,000,000 but less than 3,000,000 units of Ketamine;" after the line referenced to "Hashish Oil".

Section 2D1.1(c)(5) is amended by inserting "At least 700,000 but less than 1,000,000 units of Ketamine;" after the line referenced to "Hashish Oil".

Section 2D1.1(c)(6) is amended by inserting "At least 400,000 but less than 700,000 units of Ketamine;" after the line referenced to "Hashish Oil".

Section 2D1.1(c)(7) is amended by inserting "At least 100,000 but less than 400,000 units of Ketamine;" after the line referenced to "Hashish Oil".

Section 2D1.1(c)(8) is amended by inserting "At least 80,000 but less than 100,000 units of Ketamine;" after the line referenced to "Hashish Oil".

Section 2D1.1(c)(9) is amended by inserting "At least 60,000 but less than 80,000 units of Ketamine;" after the line referenced to "Hashish Oil".

Section 2D1.1(c)(10) is amended by inserting "At least 40,000 but less than 60,000 units of Ketamine;" after the line referenced to "Hashish Oil"; and by inserting "(except Ketamine)" after "Schedule III substances".

Section 2D1.1(c)(11) is amended by inserting "At least 20,000 but less than 40,000 units of Ketamine;" after the line referenced to "Hashish Oil"; and by inserting "(except Ketamine)" after "Schedule III substances".

Section 2D1.1(c)(12) is amended by inserting "At least 10,000 but less than 20,000 units of Ketamine;" after the line referenced to "Hashish Oil"; and by inserting "(except Ketamine)" after "Schedule III substances".

Section 2D1.1(c)(13) is amended by inserting "At least 5,000 but less than 10,000 units of Ketamine;" after the line referenced to "Hashish Oil"; and by inserting "(except Ketamine)" after "Schedule III substances".

Section 2D1.1(c)(14) is amended by inserting "At least 2,500 but less than 5,000 units of Ketamine;" after the line referenced to "Hashish Oil"; and by inserting "(except Ketamine)" after "Schedule III substances".

Section 2D1.1(c)(15) is amended by inserting "At least 1,000 but less than 2,500 units of Ketamine; " after the line referenced to "Hashish Oil"; and by inserting "(except Ketamine)"

after "Schedule III substances".

Section 2D1.1(c)(16) is amended by inserting "At least 250 but less than 1,000 units of Ketamine;" after the line referenced to "Hashish Oil"; and by inserting "(except Ketamine)" after "Schedule III substances".

Section 2D1.1(c)(17) is amended by inserting "Less than 250 units of Ketamine;" after the line referenced to "Hashish Oil"; and by inserting "(except Ketamine)" after "Schedule III substances".

The Commentary to §2D1.1 captioned "Statutory Provisions" is amended by inserting "(g), 860a, 865," after "(3), (7),".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the section captioned "Drug Equivalency Tables" in the subdivision captioned "Schedule III Substances" by inserting in the heading "(except ketamine)" after "Substances";

by adding after the subdivision captioned "Schedule III Substances" the following new subdivision:

"Ketamine

1 unit of ketamine = 1 gm of marihuana";

and by adding after the subdivision captioned "List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)" the following new subdivision:

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

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

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 19 by striking "(b)(8)" each place it appears and inserting "(b)(10)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 20 in subdivision (A) by striking "(b)(8)(B) or (C)" and inserting "(b)(10)(C)(ii) or (D)"; and in subdivision (B) by striking "(b)(8)(C)" and inserting (b)(10)(D)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 21 by striking "(9)" each place it appears and inserting "(11)".

The Commentary to §2D1.1 captioned "Application Notes" is amended by redesignating Notes 22 through 25 as Notes 23 through 26, respectively; and by inserting after Note 21 the following:

"22. Imposition of Consecutive Sentence for 21 U.S.C. § 860a or § 865.—Sections 860a and 865 of title 21, United States Code, require the imposition of a mandatory consecutive term of imprisonment of not more

than 20 years and 15 years, respectively. In order to comply with the relevant statute, the court should determine the appropriate 'total punishment' and divide the sentence on the judgment form between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 860a or § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 860a or § 865. For example, if the applicable adjusted guideline range is 151-188 months and the court determines a 'total punishment' of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 860a or § 865 would achieve the 'total punishment' in a manner that satisfies the statutory requirement of a consecutive sentence.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 23, as redesignated by this amendment, by striking "(5)" each place it appears and inserting "(6)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 25, as redesignated by this amendment, by striking "(6)" each place it appears and inserting "(7)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 26, as redesignated by this amendment, by striking "(7)" each place it appears and inserting "(8)".

The Commentary to §2D1.1 captioned "Background" is amended in the ninth paragraph by striking "(b)(8)" and inserting "(b)(10)"; and in the last paragraph by striking "(b)(8)(B) and (C)" and inserting "(b)(10)(C)(ii) and (D)".

Section 2D1.11(b) is amended by adding at the end the following subdivision:

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

The Commentary to §2D1.11 captioned "Statutory Provisions" is amended by inserting "865," after "(f)(1),".

The Commentary to §2D1.11 captioned "Application Notes" is amended by adding at the end the following:

"8. Imposition of Consecutive Sentence for 21 U.S.C. § 865.—Section 865 of title 21, United States Code, requires the imposition of a mandatory consecutive term of imprisonment of not more than 15 years. In order to comply with the relevant statute, the court should determine the appropriate 'total punishment' and, on the judgment form, divide the sentence between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 865. For example, if the applicable adjusted guideline range is 151-188 months and the court determines a 'total punishment' of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 865 would achieve the 'total punishment' in a manner that satisfies the statutory requirement of a consecutive

sentence.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 21 U.S.C. § 841(f)(1) the following:

"21 U.S.C. § 841(g) 2D1.1";

by inserting after the line referenced to 21 U.S.C. § 860 the following:

"21 U.S.C. § 860a 2D1.1";

and by inserting after the line referenced to 21 U.S.C. § 864 the following:

"21 U.S.C. § 865 2D1.1, 2D1.11".

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

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

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

commission of criminal sexual conduct.

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

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

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

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

The Commission determined that distributing, or possessing with the intent to distribute,

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

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

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

Effective Date: The effective date of this amendment is November 1, 2007.

706. **Amendment:** Section 2D1.1(c)(1) is amended by striking "1.5 KG or more of Cocaine Base" and inserting "4.5 KG or more of Cocaine Base".

Section 2D1.1(c)(2) is amended by striking "At least 500 G but less than 1.5 KG of Cocaine Base" and inserting "At least 1.5 KG but less than 4.5 KG of Cocaine Base".

Section 2D1.1(c)(3) is amended by striking "At least 150 G but less than 500 G of Cocaine Base" and inserting "At least 500 G but less than 1.5 KG of Cocaine Base".

Section 2D1.1(c)(4) is amended by striking "At least 50 G but less than 150 G of Cocaine Base" and inserting "At least 150 G but less than 500 G of Cocaine Base".

Section 2D1.1(c)(5) is amended by striking "At least 35 G but less than 50 G of Cocaine Base" and inserting "At least 50 G but less than 150 G of Cocaine Base".

Section 2D1.1(c)(6) is amended by striking "At least 20 G but less than 35 G of Cocaine Base" and inserting "At least 35 G but less than 50 G of Cocaine Base".

Section 2D1.1(c)(7) is amended by striking "At least 5 G but less than 20 G of Cocaine Base" and inserting "At least 20 G but less than 35 G of Cocaine Base".

Section 2D1.1(c)(8) is amended by striking "At least 4 G but less than 5 G of Cocaine Base" and inserting "At least 5 G but less than 20 G of Cocaine Base".

Section 2D1.1(c)(9) is amended by striking "At least 3 G but less than 4 G of Cocaine Base" and inserting "At least 4 G but less than 5 G of Cocaine Base".

Section 2D1.1(c)(10) is amended by striking "At least 2 G but less than 3 G of Cocaine Base" and inserting "At least 3 G but less than 4 G of Cocaine Base".

Section 2D1.1(c)(11) is amended by striking "At least 1 G but less than 2 G of Cocaine Base" and inserting "At least 2 G but less than 3 G of Cocaine Base".

Section 2D1.1(c)(12) is amended by striking "At least 500 MG but less than 1 G of Cocaine Base" and inserting "At least 1 G but less than 2 G of Cocaine Base".

Section 2D1.1(c)(13) is amended by striking "At least 250 MG but less than 500 MG of Cocaine Base" and inserting "At least 500 MG but less than 1 G of Cocaine Base".

Section 2D1.1(c)(14) is amended by striking "Less than 250 MG of Cocaine Base" and inserting "Less than 500 MG of Cocaine Base".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the first paragraph by inserting before "The Commission has used the sentences" the following:

"Use of Drug Equivalency Tables.—

(A) Controlled Substances Not Referenced in Drug Quantity Table.—";

by striking "(A)" before "Use" and inserting "(i)"; by striking "(B)" before "Find" and inserting "(ii)"; and by striking "(C)" before "Use" and inserting "(iii)";

in the second paragraph by striking "The Drug Equivalency Tables also provide" and inserting the following:

"(B) Combining Differing Controlled Substances (Except Cocaine Base).—The Drug Equivalency Tables also provide";

and by adding at the end the following:

"To determine a single offense level in a case involving cocaine base and other controlled substances, see subdivision (D) of this note.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision captioned "Examples:" by striking "Examples:" and inserting the following:

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

and by redesignating examples "a." through "d." as examples (i) through (iv), respectively.

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 by inserting after example (iv), as redesignated by this amendment, the following:

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

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

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

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

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

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

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

(ii) Example.—The case involves 1.5 kg of cocaine, 10 kg of marihuana, and 20 g of cocaine base. Pursuant to subdivision (B), the equivalent quantity of marihuana for the cocaine and the marihuana is 310 kg. (The cocaine converts to an equivalent of 300 kg of marihuana (1.5 kg x 200 g = 300 kg), which when added to the quantity of marihuana involved in the offense, results in an equivalent quantity of 310 kg of marihuana.) This corresponds to a base offense level 26. Pursuant to the table in subdivision (II), the base offense level of 26 results in a marihuana equivalency of

5 kg for the cocaine base. Using this marihuana equivalency for the cocaine base results in a marihuana equivalency of 100 kg (20 g x 5 kg = 100 kg). Adding the quantities of marihuana of all three controlled substances results in a combined quantity of 410 kg of marihuana, which corresponds to a combined base offense level of 28 in the Drug Quantity Table.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 by striking "DRUG EQUIVALENCY TABLES" and inserting the following:

"(E) Drug Equivalency Tables.—";

and in the subdivision captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)" by striking "1 gm of Cocaine Base ('Crack') = 20 kg of marihuana".

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

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

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

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

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

When Congress passed the 1986 Act, the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. The drug quantity thresholds in the Drug Quantity Table are set so as to provide base offense levels corresponding to guideline ranges that are <u>above</u> the statutory mandatory minimum penalties. Accordingly, offenses involving 5 grams or more of crack cocaine were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the five-year statutory minimum for such offenses by at least three months). Similarly, offenses involving 50 grams or more of crack cocaine were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeds the ten-year statutory minimum for such offenses by at least one month). Crack cocaine offenses for quantities above and below the mandatory minimum threshold quantities were set accordingly using the 100-to-1 drug quantity ratio.

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

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

Having concluded once again that the 100-to-1 drug quantity ratio should be modified, the Commission recognizes that establishing federal cocaine sentencing policy ultimately is Congress's prerogative. Accordingly, the Commission tailored the amendment to fit within the existing statutory penalty scheme by assigning base offense levels that provide guideline

ranges that include the statutory mandatory minimum penalties for crack cocaine offenses. The Commission, however, views the amendment only as an interim solution to some of the problems associated with the 100-to-1 drug quantity ratio. It is neither a permanent nor a complete solution to those problems. Any comprehensive solution to the 100-to-1 drug quantity ratio requires appropriate legislative action by Congress.

Effective Date: The effective date of this amendment is November 1, 2007.

707. **Amendment:** Section 2D1.11(a) is amended by striking "(e)" after "under subsection" and inserting "(d)".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 14 in subdivision (B) by striking "(b)(1)" and inserting "(b)(6)".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 930 the following:

"18 U.S.C. § 931 2K2.6";

and by striking the following:

"18 U.S.C. § 3147 2J1.7".

Chapter Three, Part D is amended in the Introductory Commentary in the first paragraph by inserting after the first sentence the following:

> "These rules apply to multiple counts of conviction (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.".

The Commentary to §3D1.1 captioned "Application Note" is amended by striking "Note" and inserting "Notes"; by redesignating Note 1 as Note 2; and by inserting the following as new Note 1:

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

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

First, the amendment corrects typographical errors in subsection (a) of §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) and Application Note 14 of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). Second, the amendment addresses application of the grouping rules when a defendant is sentenced on multiple counts contained in different indictments as, for example, when a case

is transferred to another district for purposes of sentencing, pursuant to Fed. R. Crim. P. 20(a).

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

Effective Date: The effective date of this amendment is November 1, 2007.

708. **Amendment:** The amendments to §2H3.1 and Appendix A, effective May 1, 2007 (see Appendix C, Amendment 697), are repromulgated with the following changes:

Section 2H3.1 is amended in the heading by striking "Tax Return Information" and inserting "Certain Private or Protected Information".

Section 2H3.1(a) is amended by striking subdivision (2) as follows:

"(2) 6, if the defendant was convicted of 26 U.S.C. § 7213A or 26 U.S.C. § 7216.",

and inserting the following:

"(2) 6, if the offense of conviction has a statutory maximum term of imprisonment of one year or less but more than six months.".

Section 2H3.1(b)(1) is amended by inserting "(A) the defendant is convicted under 18 U.S.C. § 1039(d) or (e); or (B)" after "If".

The Commentary to §2H3.1 captioned "Statutory Provisions" is amended by inserting "8 U.S.C. § 1375a(d)(3)(C), (d)(5)(B);" before "18 U.S.C."; by inserting "§ 1039, 1905," after "18 U.S.C. §"; and by inserting "42 U.S.C. §§ 16962, 16984;" after "7216;".

The Commentary to §2H3.1 captioned "Application Notes" is amended by striking Note 1 as follows:

"1. Definitions.—For purposes of this guideline, ‘tax return’ and ‘tax return information’ have the meaning given the terms ‘return’ and ‘return information’ in 26 U.S.C. § 6103(b)(1) and (2), respectively.";

by redesignating Note 2 as Note 1; and by adding at the end the following:

"2. Imposition of Sentence for 18 U.S.C. § 1039(d) and (e).—Subsections 1039(d) and (e) of title 18, United States Code, require a term of imprisonment of not more than 5 years to be imposed in addition to any sentence imposed for a conviction under 18 U.S.C. § 1039(a), (b), or (c).

In order to comply with the statute, the court should determine the appropriate 'total punishment' and divide the sentence on the judgment form between the sentence attributable to the conviction under 18 U.S.C. § 1039(d) or (e) and the sentence attributable to the conviction under 18 U.S.C. § 1039(a), (b), or (c), specifying the number of months to be served for the conviction under 18 U.S.C. § 1039(d) or (e). For example, if the applicable adjusted guideline range is 15-21 months and the court determines a 'total punishment' of 21 months is appropriate, a sentence of 9 months for conduct under 18 U.S.C. § 1039(a) plus 12 months for 18 U.S.C. § 1039(d) conduct would achieve the 'total punishment' in a manner that satisfies the statutory requirement.

3. Upward Departure.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. The following are examples of cases in which an upward departure may be warranted:

(i) The offense involved confidential phone records information or tax return information of a substantial number of individuals.

(ii) The offense caused or risked substantial non-monetary harm (e.g. physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.".

Section 2H3.1 is amended by striking the Commentary captioned "Background" as follows:

"Background: This section refers to conduct proscribed by 47 U.S.C. § 605 and the Electronic Communications Privacy Act of 1986, which amends 18 U.S.C. § 2511 and other sections of Title 18 dealing with unlawful interception and disclosure of communications. These statutes proscribe the interception and divulging of wire, oral, radio, and electronic communications. The Electronic Communications Privacy Act of 1986 provides for a maximum term of imprisonment of five years for violations involving most types of communication.

This section also refers to conduct relating to the disclosure and inspection of tax returns and tax return information, which is proscribed by 26 U.S.C. §§ 7213(a)(1)-(3), (5), (d), 7213A, and 7216. These statutes provide for a maximum term of imprisonment of five years for most types of disclosure of tax return information, but provide a maximum term of imprisonment of one year for violations of 26 U.S.C. §§ 7213A and 7216.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 8 U.S.C. § 1328 the following:

"8 U.S.C. § 1375a(d)(3)(C), (d)(5)(B) 2H3.1";

by inserting after the line referenced to 18 U.S.C. § 1038 the following:

"18 U.S.C. § 1039 2H3.1"; and

by inserting after the line referenced to 42 U.S.C. § 14905 the following:

"42 U.S.C. § 16962 2H3.1
42 U.S.C. § 16984 2H3.1".

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

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

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

Finally, this amendment implements the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162 ("VAWA"). VAWA included the International Marriage Broker Regulation Act of 2005 ("IMBRA"), which requires marriage brokers to keep private information gathered in the course of their business confidential.

New offenses at 8 U.S.C. §§ 1375a(d)(3)(C) and 1375a(d)(5)(B) involve invasions of protected privacy interests and, as such, are referenced to §2H3.1.

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

Effective Date: The effective date of this amendment is November 1, 2007.

709. **Amendment:** Section 4A1.1(f) is amended by striking "was considered related to another sentence resulting from a conviction of a crime of violence" and inserting "was counted as a single sentence"; and by striking the last sentence as follows:

> "Provided, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.".

The Commentary to §4A1.1 captioned "Application Notes" is amended in Note 6 by striking the first paragraph as follows:

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

and inserting the following:

> "§4A1.1(f). In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are counted as a single sentence (see §4A1.2(a)(2)), one point is added under §4A1.1(f) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(f). For purposes of this guideline, 'crime of violence' has the meaning given that term in §4B1.2(a). See §4A1.2(p).";

and in the second paragraph by striking "that were consolidated for sentencing and therefore are treated as related." and inserting ". The sentences for these offenses were imposed on the same day and are counted as a single prior sentence. See §4A1.2(a)(2).".

Section 4A1.2(a) is amended in the heading by striking "Defined"; and by striking subdivision (2) as follows:

> "(2) Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of §4A1.1(a), (b), and (c). Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.",

and inserting the following:

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

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

Section 4A1.2(c)(1) is amended by striking "at least one" and inserting "more than one"; by striking "Fish and game violations"; and by striking "Local ordinance violations (excluding local ordinance violations that are also criminal offenses under state law)".

Section 4A1.2(c)(2) is amended by inserting "Fish and game violations" as a new line before the line referenced to "Hitchhiking"; and by inserting "Local ordinance violations (except those violations that are also violations under state criminal law)" as a new line before the line referenced to "Loitering".

The Commentary to §4A1.2 captioned "Application Notes" is amended by striking Note 3 as follows:

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

and inserting the following:

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

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 12 by striking "Local Ordinance Violations." and inserting the following:

"Application of Subsection (c).—

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

(B) Local Ordinance Violations.—";

by striking "§4A1.2(c)(1)" after "violations in" and inserting "§4A1.2(c)(2)"; and by inserting at the end the following:

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

The Commentary to §4A1.2 captioned "Application Notes" is amended by striking Note 13 as follows:

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

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "A violation of 18 U.S.C. § 924(c)" by inserting "sentences for the" before "two prior"; and by striking "treated as related cases" and inserting "counted as a single sentence".

The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 4(B) by striking "considered 'related cases', as that term is defined in Application Note 3" and inserting "counted as a single sentence pursuant to subsection (a)(2)".

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

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

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

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

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

The amendment further provides that in the case of a single sentence that comprises multiple concurrent sentences of varying lengths, the longest sentence is to be used for purposes of

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

Instances may arise in which a single sentence comprises multiple prior sentences for crimes of violence. In such a case, §4A1.1(f) will apply. Consistent with §4A1.1(f) and Application Note 6 to §4A1.1, additional criminal history points will be awarded for certain sentences that otherwise do not receive points because they have been determined to be part of a single sentence. For example, if a defendant's criminal history contains two robbery convictions for which the defendant received concurrent five-year sentences of imprisonment and the sentences are considered a single sentence because the offenses were not separated by an intervening arrest and were imposed on the same day, a total of 3 points would be added under §4A1.1(a). An additional point would be added under §4A1.1(f) because the second sentence was for a crime of violence that did not receive any points under §4A1.1(a), (b), or (c).

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

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

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

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

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

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

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

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

Application Note 12(A), adopts the Hardeman "common sense approach" as a means of ensuring that courts are guided by a number of relevant factors that may help them determine whether a non-listed offense is similar to a listed one.

Effective Date: The effective date of this amendment is November 1, 2007.

710. **Amendment:** Section 1B1.10(c) is amended by striking "and" and by inserting ", and 702" before the period.

Reason for Amendment: Amendment 702 corrects typographical errors in subsection (b)(13)(C) of §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) and subsection (b)(1) of §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). As stated in the reason for amendment accompanying Amendment 702, this amendment adds Amendment 702 to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) as an amendment that the court may consider for retroactive application.

Effective Date: The effective date of this amendment is November 1, 2007.

711. **Amendment:** The Commentary to §2A3.4 captioned "Statutory Provisions" is amended by striking "Provisions" and inserting "Provision".

Section 2A3.5(b)(1)(A), as added by Amendment 701, is amended by inserting a comma after "minor".

Chapter Two, Part D is amended in the heading by inserting "AND NARCO-TERRORISM" after "DRUGS".

The Commentary to §2D1.1 captioned "Application Notes", as amended by Amendment 706, is further amended by striking subdivision (D) as follows:

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

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

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

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

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

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

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

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

and inserting the following:

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

(i) In General.—If the offense involves cocaine base (‘crack’) and one

or more other controlled substance, determine the base offense level as follows:

(I) Determine the base offense level for the quantity of cocaine base involved in the offense.

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

Base Offense Level	Marihuana Equivalency
38	6.7 kg of marihuana per g of cocaine base
36	6.7 kg of marihuana per g of cocaine base
34	6 kg of marihuana per g of cocaine base
32	6.7 kg of marihuana per g of cocaine base
30	14 kg of marihuana per g of cocaine base
28	11.4 kg of marihuana per g of cocaine base
26	5 kg of marihuana per g of cocaine base
24	16 kg of marihuana per g of cocaine base
22	15 kg of marihuana per g of cocaine base
20	13.3 kg of marihuana per g of cocaine base
18	10 kg of marihuana per g of cocaine base
16	10 kg of marihuana per g of cocaine base
14	10 kg of marihuana per g of cocaine base
12	10 kg of marihuana per g of cocaine base

(III) Determine the combined marihuana equivalency for the other controlled substance or controlled substances involved in the offense as provided in subdivision (B) of this note.

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

(ii) Example.—The case involves 1.5 kg of cocaine, 10 kg of marihuana, and 20 g of cocaine base. Under the Drug Quantity Table, 20 g of cocaine base corresponds to a base offense level of 26. Pursuant to the table in subdivision (II), the base offense level of 26 corresponds to a marihuana equivalency of 5 kg per gram of cocaine base. Therefore, the equivalent quantity of marihuana for the cocaine base is 100 kg (20 g x 5 kg = 100 kg). Pursuant to subdivision (B), the equivalent quantity of marihuana for the cocaine and marihuana is 310 kg. (The cocaine converts to an equivalent of 300 kg of marihuana (1.5 kg x 200 g = 300 kg), which, when added to the 10 kg of marihuana, results in an equivalent quantity of 310 kg of marihuana.) Adding the equivalent quantities of marihuana of all three drug types results in a combined quantity of 410 kg of marihuana (100 kg

+ 310 kg = 410 kg), which corresponds to a combined base offense level of 28 in the Drug Quantity Table.".

The Commentary to §2N2.1 captioned "Application Notes" is amended in Note 4 by inserting "and Narco-Terrorism" after "Drugs".

The Commentary to §5B1.3 captioned "Application Note", as added by Amendment 701, is amended by striking "(b)" each place it appears and inserting "(a)".

The Commentary to §5D1.3 captioned "Application Note", as added by Amendment 701, is amended by striking "(b)" each place it appears and inserting "(a)".

Appendix A (Statutory Index) is amended by striking the lines referenced to "50 U.S.C. § 421" and "50 U.S.C. § 783(b)" the first place they appear.

Reason for Amendment: This amendment makes various technical and conforming amendments in order to execute properly amendments submitted to Congress on May 1, 2007, and that will become effective on November 1, 2007. Specifically, the amendment corrects grammatical errors in the commentary to §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact); amends the commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy); changes the heading in Chapter Two, Part D and makes the conforming change to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product); corrects typographical errors in §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release); and amends Appendix A to remove duplicate listings.

Effective Date: The effective date of this amendment is November 1, 2007.

712. **Amendment:** Chapter One, Part B, Subpart One, is amended by striking §1B1.10 and its accompanying commentary as follows:

"§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.

(b) In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2),

the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, and 702.

Commentary

Application Notes:

1. Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range.

2. In determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

3. Under subsection (b), the amended guideline range and the term of imprisonment already served by the defendant limit the extent to which an eligible defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2). When the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate; however, in no case shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

5. If the limitation in subsection (b) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range, the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range shall

not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range.

Background: Section 3582(c)(2) of Title 18, United States Code, provides: '[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.'

This policy statement provides guidance for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: 'If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.'

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: 'It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines* or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases.' S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

*So in original. Probably should be 'to fall above the amended guidelines'.",

and inserting the following:

"§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Authority.—

(1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (c) is applicable to the defendant; or

(B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.—

(1) In General.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the

amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) Limitations and Prohibition on Extent of Reduction.—

(A) In General.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) Exception.—If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

(C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, and 702.

Commentary

Application Notes:

1. Application of Subsection (a).—

(A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range. Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (c) is applicable to the defendant; or (ii) an amendment listed in subsection (c) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

(i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. Application of Subsection (b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

3. Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. §

3582(c)(2) and this policy statement. Specifically, if the original term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 41 to 51 months; (B) the original term of imprisonment imposed was 41 months; and (C) the amended guideline range determined under subsection (b)(1) is 30 to 37 months, the court shall not reduce the defendant's term of imprisonment to a term less than 30 months.

If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subsection (b)(1) may be appropriate. For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (C) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate.
In no case, however, shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Supervised Release.—

(A) Exclusion Relating to Revocation.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the

fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: '[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.'

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: 'If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.'

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: 'It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines* or when there is only a minor

downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases.' S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

*So in original. Probably should be 'to fall above the amended guidelines'.".

Reason for Amendment: This amendment makes a number of modifications to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) to clarify when, and to what extent, a reduction in the defendant's term of imprisonment is consistent with the policy statement and is therefore authorized under 18 U.S.C. § 3582(c)(2).

The amendment modifies subsection (a) to state the statutory requirement under 18 U.S.C. § 3582(c)(2) that a reduction in the defendant's term of imprisonment be consistent with the policy statement. The amendment also modifies subsection (a) to state that, consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) do not constitute a full resentencing of the defendant.

In addition, the amendment amends subsection (a) to clarify circumstances in which a reduction in the defendant's term of imprisonment is not consistent with the policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2). Specifically, the amendment provides that a reduction in the defendant's term of imprisonment is not consistent with §1B1.10 and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if (1) none of the amendments listed in subsection (c) is applicable to the defendant; or (2) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range. Application Note 1 provides further explanation that an amendment may be listed in subsection (c) but not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment). In such a case, a reduction in the defendant's term of imprisonment is not consistent with §1B1.10 and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

The amendment modifies subsection (b) to clarify the limitations on the extent to which a court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and §1B1.10. Specifically, in subsection (b)(1) the amendment provides that, in determining whether, and to what extent, a reduction in the defendant's term of imprisonment is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced, substituting only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and leaving all other guideline application decisions unaffected.

In subsection (b)(2) the amendment provides further clarification that the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum of the amended guideline range, except if the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S.

220 (2005), a further reduction generally would not be appropriate. The amendment clarifies that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served. The amendment adds in Application Note 3 examples illustrating the limitations on the extent to which a court may reduce a defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and §1B1.10.

The amendment also modifies Application Note 1 to delineate more clearly factors for consideration by the court in determining whether, and to what extent, a reduction in the defendant's term of imprisonment is warranted under 18 U.S.C. § 3582(c)(2). Specifically, the amendment provides that the court shall consider the factors set forth in 18 U.S.C. § 3553(a), as required by 18 U.S.C. § 3582(c)(2), and the nature and seriousness of the danger to any person or the community that may be posed by such a reduction, but only within the limits described in subsection (b). In addition, the amendment provides that the court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment, but only within the limits described in subsection (b).

The amendment makes conforming changes and adds headings to the application notes, and makes conforming changes to the background commentary.

Effective Date: The effective date of this amendment is March 3, 2008.

713. **Amendment:** Section 1B1.10, as amended by Amendment 712, is further amended in subsection (c) by inserting "Covered Amendments.—" before "Amendments"; by striking "and 702"; and by inserting "702, and 706 as amended by 711" before the period.

Reason for Amendment: This amendment expands the listing in §1B1.10(c) to implement the directive in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application. The Commission has determined that Amendment 706, as amended by Amendment 711, should be applied retroactively because the applicable standards set forth in the background commentary to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) appear to be met. Specifically: (1) as stated in the reason for amendment accompanying Amendment 706, the purpose of that amendment was to alleviate some of the urgent and compelling problems associated with the penalty structure for crack cocaine offenses; (2) the Commission's analysis of cases potentially eligible for retroactive application of Amendment 706 (available on the Commission's website at www.ussc.gov) indicates that the number of cases potentially involved is substantial, and the magnitude of the change in the guideline range, i.e., two levels, is not difficult to apply in individual cases; and (3) the Commission received persuasive written comment and testimony at its November 13, 2007 public hearing on retroactivity that the administrative burdens of applying Amendment 706 retroactively are manageable. In addition, public safety will be considered in every case because §1B1.10, as amended by Amendment 712, requires the court, in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction.

Effective Date: The effective date of this amendment is March 3, 2008.

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

"(16) If the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency, increase by 2 levels.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3 by inserting after the paragraph that begins "(III) Offenses Under 18 U.S.C. § 1030.—" the following:

"(IV) Disaster Fraud Cases.—In a case in which subsection (b)(16) applies, reasonably foreseeable pecuniary harm includes the administrative costs to any federal, state, or local government entity or any commercial or not-for-profit entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit that were reasonably foreseeable.".

The Commentary to §2B1.1 captioned "Application Notes" is amended by redesignating Notes 15 through 19 as Notes 16 through 20, respectively; and by inserting after Note 14 the following:

"15. Application of Subsection (b)(16).—

Definitions.—For purposes of this subsection:

'Emergency' has the meaning given that term in 42 U.S.C. § 5122.

'Major disaster' has the meaning given that term in 42 U.S.C. § 5122.".

The Commentary to §2B1.1 captioned "Background" is amended by adding at the end the following:

"Subsection (b)(16) implements the directive in section 5 of Public Law 110–179.".

Appendix A (Statutory Index) is amended by inserting after the line reference to 18 U.S.C. § 1039 the following:

"18 U.S.C. § 1040 2B1.1".

Reason for Amendment: This amendment implements the emergency directive in section 5 of the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. 110–179. The directive, which requires the Commission to promulgate an amendment under emergency amendment authority by February 6, 2008, directs that the Commission forthwith shall—

> promulgate sentencing guidelines or amend existing sentencing guidelines to provide for increased penalties for persons convicted of fraud or theft offenses in connection with a major disaster declaration under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) or an emergency declaration under section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42

U.S.C. 5191) . . ..

Section 5(b) of the Act further requires the Commission to—

(1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses described in subsection (a) and the need for aggressive and appropriate law enforcement action to prevent such offenses;

(2) assure reasonable consistency with other relevant directives and with other guidelines;

(3) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements;

(4) make any necessary conforming changes to the sentencing guidelines; and

(5) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

The amendment addresses the directive by creating a two-level enhancement that applies if the offense involved fraud or theft in connection with a declaration of a major disaster or emergency, as those terms are defined in 42 U.S.C. § 5122. In addition, the amendment modifies Application Note 3 to provide that for purposes of determining loss under subsection (b)(1), reasonably foreseeable pecuniary harm includes certain administrative costs in such cases.

Effective Date: The effective date of this amendment is February 6, 2008.

715. Amendment: The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 by striking subdivision (D) as follows:

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

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

(I) Determine the base offense level for the quantity of cocaine base involved in the offense.

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

Base Offense Level	Marihuana Equivalency
38	6.7 kg of marihuana per g of cocaine base
36	6.7 kg of marihuana per g of cocaine base
34	6 kg of marihuana per g of cocaine base
32	6.7 kg of marihuana per g of cocaine base

30	14 kg of marihuana per g of cocaine base
28	11.4 kg of marihuana per g of cocaine base
26	5 kg of marihuana per g of cocaine base
24	16 kg of marihuana per g of cocaine base
22	15 kg of marihuana per g of cocaine base
20	13.3 kg of marihuana per g of cocaine base
18	10 kg of marihuana per g of cocaine base
16	10 kg of marihuana per g of cocaine base
14	10 kg of marihuana per g of cocaine base
12	10 kg of marihuana per g of cocaine base

(III) Determine the combined marihuana equivalency for the other controlled substance or controlled substances involved in the offense as provided in subdivision (B) of this note.

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

(ii) Example.—The case involves 1.5 kg of cocaine, 10 kg of marihuana, and 20 g of cocaine base. Under the Drug Quantity Table, 20 g of cocaine base corresponds to a base offense level of 26. Pursuant to the table in subdivision (II), the base offense level of 26 corresponds to a marihuana equivalency of 5 kg per gram of cocaine base. Therefore, the equivalent quantity of marihuana for the cocaine base is 100 kg (20 g x 5 kg = 100 kg). Pursuant to subdivision (B), the equivalent quantity of marihuana for the cocaine and marihuana is 310 kg. (The cocaine converts to an equivalent of 300 kg of marihuana (1.5 kg x 200 g = 300 kg), which, when added to the 10 kg of marihuana, results in an equivalent quantity of 310 kg of marihuana.) Adding the equivalent quantities of marihuana of all three drug types results in a combined quantity of 410 kg of marihuana (100 kg + 310 kg = 410 kg), which corresponds to a combined base offense level of 28 in the Drug Quantity Table.",

and inserting the following:

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

(i) In General.—Except as provided in subdivision (ii), if the offense involves cocaine base (‘crack’) and one or more other controlled substance, determine the combined offense level as provided by subdivision (B) of this note, and reduce the combined offense level by 2 levels.

(ii) Exceptions to 2-level Reduction.—The 2-level reduction provided in subdivision (i) shall not apply in a case in which:

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

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

(iii) Examples.—

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

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

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10, in subdivision (E), by inserting under the heading "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*" the following as the fifteenth entry:

"1 gm Cocaine Base (‘Crack’) = 20 kg of marihuana".

Reason for Amendment: This amendment modifies the commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to revise the manner in which combined offense levels are determined in cases involving cocaine base ("crack cocaine") and one or more other controlled substance. Specifically, Application Note 10(D) has resulted in a certain sentencing anomaly in which some offenders have not received the benefit of the two-level reduction provided by Amendment 706 because of the conversion of cocaine base to its marihuana equivalent, and some offenders have received a reduction greater than intended (see Amendment 706).

In order to remedy this anomaly, this amendment modifies the Drug Equivalency Tables to provide that 1 gram of cocaine base equals 20 kilograms of marihuana, as it did prior to Amendment 706, and amends Application Note 10(D) to provide that the combined offense level for an offense involving cocaine base and one or more other controlled substance is determined initially in the same manner as for other polydrug cases under Application Note 10(B). In order to effectuate the two-level reduction intended by Amendment 706, this amendment further provides that the resulting combined offense level is reduced by two levels. However, the amendment provides three exclusions to application of the two-level reduction. First, the two-level reduction does not apply if the offense involved 4.5 kilograms or more of cocaine base because the offense levels for such offenses were unaffected by Amendment 706. Second, the two-level reduction does not apply if the offense involved less than 250 milligrams of cocaine base in order to ensure that the offense level does not reduce below level 12, the minimum offense level in the Drug Quantity Table for offenses involving cocaine base. Third, the two-level reduction does not apply if it would result in a combined offense level that is less than the combined offense level that would apply if the offense involved only the other controlled substance(s) (i.e., the controlled substance(s) other than cocaine base). This third exclusion ensures that offenses involving controlled substances other than cocaine base do not receive a lower offense level than they otherwise would receive merely because cocaine base also is involved in the offense.

Effective Date: The effective date of this amendment is May 1, 2008.

716. **Amendment:** Section 1B1.10 is amended in subsection (c) by striking "and"; and by inserting ", and 715" before the period.

Reason for Amendment: This amendment expands the listing in §1B1.10(c) (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) to include Amendment 715 as an amendment that may be applied retroactively pursuant to 28 U.S.C. § 994(u). The Commission determined for the same reasons accompanying

Amendment 713 that Amendment 715 also should be applied retroactively (see Amendment 713).

Effective Date: The effective date of this amendment is May 1, 2008.

717. **Amendment:** Chapter One is amended in the heading by inserting "Introduction," before "Authority and General"; and by striking Part A, including the Editorial Note as follows:

" PART A - AUTHORITY

§1A1.1. Authority

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.

Commentary

Application Note:

1. Historical Review of Original Introduction.—Part A of Chapter One originally was an introduction to the Guidelines Manual that explained a number of policy decisions made by the Commission when it promulgated the initial set of guidelines. This introduction was amended occasionally between 1987 and 2003. In 2003, as part of the Commission's implementation of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the "PROTECT Act", Public Law 108–21), the original introduction was transferred to the Editorial Note at the end of this guideline. The Commission encourages the review of this material for context and historical purposes.

Background: The Sentencing Reform Act of 1984 changed the course of federal sentencing. Among other things, the Act created the United States Sentencing Commission as an independent agency in the Judicial Branch, and directed it to develop guidelines and policy statements for sentencing courts to use when sentencing offenders convicted of federal crimes. Moreover, it empowered the Commission with ongoing responsibilities to monitor the guidelines, submit to Congress appropriate modifications of the guidelines and recommended changes in criminal statutes, and establish education and research programs. The mandate rested on Congressional awareness that sentencing was a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.

Editorial Note: Chapter One, Part A, as in effect on November 1, 1987, read as follows:

"

CHAPTER ONE - INTRODUCTION
AND GENERAL APPLICATION PRINCIPLES

PART A - INTRODUCTION

1. Authority

The United States Sentencing Commission ('Commission') is an independent agency in the judicial branch composed of seven voting and two non-voting, ex officio members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.

2. The Statutory Mission

The Comprehensive Crime Control Act of 1984 foresees guidelines that will further the basic purposes of criminal punishment, i.e., deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender. It delegates to the Commission broad authority to review and rationalize the federal sentencing process.

The statute contains many detailed instructions as to how this determination should be made, but the most important of them instructs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of 'bank robbery/committed with a gun/$2500 taken.' An offender characteristic category might be 'offender with one prior conviction who was not sentenced to imprisonment.' The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons, to be determined by coordinating the offense behavior categories with the offender characteristic categories. The statute contemplates the guidelines will establish a range of sentences for every coordination of categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum imprisonment cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

The sentencing judge must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the judge to depart from the guidelines and sentence outside the range. In that case, the judge must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to see if the guideline was correctly applied. If the judge departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act requires the offender to serve virtually all of any prison sentence imposed, for it abolishes parole and substantially restructures good behavior adjustments.

The law requires the Commission to send its initial guidelines to Congress by April 13, 1987, and under the present statute they take effect automatically on November 1, 1987. Pub. L. No. 98-473, § 235, reprinted at 18 U.S.C. § 3551. The Commission may submit guideline amendments each year to Congress between the beginning of a regular session and May 1. The amendments will take effect automatically 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The Commission, with the aid of its legal and research staff, considerable public testimony, and written commentary, has developed an initial set of guidelines which it now transmits to Congress. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines by submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts throughout the nation.

3. The Basic Approach (Policy Statement)

To understand these guidelines and the rationale that underlies them, one must begin with the three objectives that Congress, in enacting the new sentencing law, sought to achieve. Its basic objective was to enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system. To achieve this objective, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by 'good time' credits. In addition, the parole commission is permitted to determine how much of the remainder of any prison sentence an offender actually will serve. This usually results in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence handed down by the court.

Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.

Honesty is easy to achieve: The abolition of parole makes the sentence imposed by the court the sentence the offender will serve. There is a tension, however, between the mandate of uniformity (treat similar cases alike) and the mandate of proportionality (treat different cases differently) which, like the historical tension between law and equity, makes it difficult to achieve both goals simultaneously. Perfect uniformity -- sentencing every offender to five years -- destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that lumps together armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, is far too broad.

At the same time, a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect. A bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected (and therefore may already be counted, to a different degree, in the punishment for the underlying offense); and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies, depending on how much other harm has occurred. (Thus, one cannot easily assign points for each kind of harm and simply add them up, irrespective of context and total amounts.)

The larger the number of subcategories, the greater the complexity that is created and the less workable the system. Moreover, the subcategories themselves, sometimes too broad and sometimes too narrow, will apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system of subcategories, would have to make a host of decisions about whether the underlying facts are sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different judges will apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to eliminate.

In view of the arguments, it is tempting to retreat to the simple, broad-category approach and to grant judges the discretion to select the proper point along a broad sentencing range. Obviously, however, granting such broad discretion risks correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. That is to say, such an approach risks a return to the wide disparity that Congress established the Commission to limit.

In the end, there is no completely satisfying solution to this practical stalemate. The Commission has had to simply balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any ultimate system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the moral principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Thus, if a defendant is less culpable, the defendant deserves less punishment. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. Defendants sentenced under this scheme should receive the punishment that most effectively lessens the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of these points of view have urged the Commission to choose between them, to accord one primacy over the other. Such a choice would be profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor. A clear-cut Commission decision in favor of one

of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation. As a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result.

For now, the Commission has sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that uses data estimating the existing sentencing system as a starting point. It has analyzed data drawn from 10,000 presentence investigations, crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and resulting statistics, and data from other relevant sources, in order to determine which distinctions are important in present practice. After examination, the Commission has accepted, modified, or rationalized the more important of these distinctions.

This empirical approach has helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, is short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit many distinctions that some may believe important, yet they include most of the major distinctions that statutes and presentence data suggest make a significant difference in sentencing decisions. Important distinctions that are ignored in existing practice probably occur rarely. A sentencing judge may take this unusual case into account by departing from the guidelines.

The Commission's empirical approach has also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of moral consensus might make it difficult to say exactly what punishment is deserved for a particular crime, specified in minute detail. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient, readily available data might make it difficult to say exactly what punishment will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a moral or crime-control perspective.

The Commission has not simply copied estimates of existing practice as revealed by the data (even though establishing offense values on this basis would help eliminate disparity, for the data represent averages). Rather, it has departed from the data at different points for various important reasons. Congressional statutes, for example, may suggest or require departure, as in the case of the new drug law that imposes increased and mandatory minimum sentences. In addition, the data may reveal inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from present practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these initial guidelines are but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission has developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, and therefore effective, sentencing system.

4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-writing process has required the Commission to resolve a host of important policy questions, typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction will briefly discuss several of those issues. Commentary in the guidelines explains others.

(a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense with which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a real offense system. After all, the present sentencing system is, in a sense, a real offense system. The sentencing court (and the parole commission) take account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive mostly for practical reasons. To make such a system work,

even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process, given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable, and, in the Commission's view, risked return to wide disparity in practice.

The Commission therefore abandoned the effort to devise a 'pure' real offense system and instead experimented with a 'modified real offense system,' which it published for public comment in a September 1986 preliminary draft.

This version also foundered in several major respects on the rock of practicality. It was highly complex and its mechanical rules for adding harms (e.g., bodily injury added the same punishment irrespective of context) threatened to work considerable unfairness. Ultimately, the Commission decided that it could not find a practical or fair and efficient way to implement either a pure or modified real offense system of the sort it originally wanted, and it abandoned that approach.

The Commission, in its January 1987 Revised Draft and the present guidelines, has moved closer to a 'charge offense' system. The system is not, however, pure; it has a number of real elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law have forced the Commission to write guidelines that are descriptive of generic conduct rather than tracking purely statutory language. For another, the guidelines, both through specific offense characteristics and adjustments, take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken.

Finally, it is important not to overstate the difference in practice between a real and a charge offense system. The federal criminal system, in practice, deals mostly with drug offenses, bank robberies and white collar crimes (such as fraud, embezzlement, and bribery). For the most part, the conduct that an indictment charges approximates the real and relevant conduct in which the offender actually engaged.

The Commission recognizes its system will not completely cure the problems of a real offense system. It may still be necessary, for example, for a court to determine some particular real facts that will make a difference to the sentence. Yet, the Commission believes that the instances of controversial facts will be far fewer; indeed, there will be few enough so that the court system will be able to devise fair procedures for their determination. See United States v. Fatico, 579 F.2d 707 (2d Cir. 1978) (permitting introduction of hearsay evidence at sentencing hearing under certain conditions), on remand, 458 F. Supp. 388 (E.D.N.Y. 1978), aff'd, 603 F.2d 1053 (2d Cir. 1979) (holding that the government need not prove facts at sentencing hearing beyond a reasonable doubt), cert. denied, 444 U.S. 1073 (1980).

The Commission also recognizes that a charge offense system has drawbacks of its own. One of the most important is its potential to turn over to the prosecutor the power to determine the sentence by increasing or decreasing the number (or content) of the counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin, or theft of $10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of $30,000. Further, a sentencing court may control any inappropriate manipulation of the indictment through use of its power to depart from the specific guideline sentence. Finally, the Commission will closely monitor problems arising out of count manipulation and will make appropriate adjustments should they become necessary.

(b) Departures.

The new sentencing statute permits a court to depart from a guideline-specified sentence only when it finds 'an aggravating or mitigating circumstance ...that was not adequately taken into consideration by the Sentencing Commission . . .'. 18 U.S.C. § 3553(b). Thus, in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of §5H1.4, and the last sentence of §5K2.12, list a few factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to

limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two basic reasons. First is the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that in the initial set of guidelines it need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's sentencing data indicate make a significant difference in sentencing at the present time. Thus, for example, where the presence of actual physical injury currently makes an important difference in final sentences, as in the case of robbery, assault, or arson, the guidelines specifically instruct the judge to use this factor to augment the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data do not permit the Commission, at this time, to conclude that the factor is empirically important in relation to the particular offense. Of course, a factor (say physical injury) may nonetheless sometimes occur in connection with a crime (such as fraud) where it does not often occur. If, however, as the data indicate, such occurrences are rare, they are precisely the type of events that the court's departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed. Of course, the Commission recognizes that even its collection and analysis of 10,000 presentence reports are an imperfect source of data sentencing estimates. Rather than rely heavily at this time upon impressionistic accounts, however, the Commission believes it wiser to wait and collect additional data from our continuing monitoring process that may demonstrate how the guidelines work in practice before further modification.

It is important to note that the guidelines refer to three different kinds of departure. The first kind, which will most frequently be used, is in effect an interpolation between two adjacent, numerically oriented guideline rules. A specific offense characteristic, for example, might require an increase of four levels for serious bodily injury but two levels for bodily injury. Rather than requiring a court to force middle instances into either the 'serious' or the 'simple' category, the guideline commentary suggests that the court may interpolate and select a midpoint increase of three levels. The Commission has decided to call such an interpolation a 'departure' in light of the legal views that a guideline providing for a range of increases in offense levels may violate the statute's 25 percent rule (though others have presented contrary legal arguments). Since interpolations are technically departures, the courts will have to provide reasons for their selection, and it will be subject to review for 'reasonableness' on appeal. The Commission believes, however, that a simple reference by the court to the 'mid-category' nature of the facts will typically provide sufficient reason. It does not foresee serious practical problems arising out of the application of the appeal provisions to this form of departure.

The second kind involves instances in which the guidelines provide specific guidance for departure, by analogy or by other numerical or non-numerical suggestions. For example, the commentary to §2G1.1 (Transportation for Prostitution), recommends a downward adjustment of eight levels where commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions, and that the courts of appeals may prove more likely to find departures 'unreasonable' where they fall outside suggested levels.

A third kind of departure will remain unguided. It may rest upon grounds referred to in Chapter 5, Part H, or on grounds not mentioned in the guidelines. While Chapter 5, Part H lists factors that the Commission believes may constitute grounds for departure, those suggested grounds are not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly unusual.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas, and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts have urged the Commission not to attempt any major reforms of the agreement process, on the grounds that any set of guidelines that threatens to radically change present practice also threatens to make the federal system unmanageable. Others, starting with the same facts, have argued that guidelines which fail to control and limit plea agreements would leave untouched a 'loophole' large enough to undo the good that sentencing guidelines may bring. Still other commentators make both sets of arguments.

The Commission has decided that these initial guidelines will not, in general, make significant changes in current plea agreement practices. The court will accept or reject any such agreements primarily in accordance with the rules set forth in Fed.R.Crim.P. 11(e). The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements. In light of

this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate.

The Commission nonetheless expects the initial set of guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. Insofar as a prosecutor and defense attorney seek to agree about a likely sentence or range of sentences, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which judges will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation. Since they will have before them the norm, the relevant factors (as disclosed in the plea agreement), and the reason for the agreement, they will find it easier than at present to determine whether there is sufficient reason to accept a plea agreement that departs from the norm.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to 'reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .' 28 U.S.C. § 994(j). Under present sentencing practice, courts sentence to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are 'serious.' If the guidelines were to permit courts to impose probation instead of prison in many or all such cases, the present sentences would continue to be ineffective.

The Commission's solution to this problem has been to write guidelines that classify as 'serious' (and therefore subject to mandatory prison sentences) many offenses for which probation is now frequently given. At the same time, the guidelines will permit the sentencing court to impose short prison terms in many such cases. The Commission's view is that the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement or intermittent confinement). For offense levels eleven and twelve, the court must impose at least one half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

(e) Multi-Count Convictions.

The Commission, like other sentencing commissions, has found it particularly difficult to develop rules for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The reason it is difficult is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to life sentences of imprisonment--sentences that neither 'just deserts' nor 'crime control' theories of punishment would find justified.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment when multiple offenses that are the subjects of separate counts take place.

These rules are set out in Chapter Three, Part D. They essentially provide: (1) When the conduct involves fungible items, e.g., separate drug transactions or thefts of money, the amounts are added and the guidelines apply to the total amount. (2) When nonfungible harms are involved, the offense level for the most serious count is increased (according to a somewhat diminishing scale) to reflect the existence of other counts of conviction.

The rules have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures where necessary to produce a mitigated sentence.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These criminal statutes pose two problems. First, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it cannot comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission has sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses are particularly important in light of the need for enforcement of the general regulatory scheme. The Commission has sought to treat these offenses in these initial guidelines. It will address the less common regulatory offenses in the future.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses, dividing them into four categories.

First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper treatment of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense is as follows:

(1) The guideline provides a low base offense level (6) aimed at the first type of recordkeeping or reporting offense. It gives the court the legal authority to impose a punishment ranging from probation up to six months of imprisonment.

(2) Specific offense characteristics designed to reflect substantive offenses that do occur (in respect to some regulatory offenses), or that are likely to occur, increase the offense level.

(3) A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will be treated like the substantive offense.

The Commission views this structure as an initial effort. It may revise its approach in light of further experience and analysis of regulatory crimes.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission began by estimating the average sentences now being served within each category. It also examined the sentence specified in congressional statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's forthcoming detailed report will contain a comparison between estimates of existing sentencing practices and sentences under the guidelines.

While the Commission has not considered itself bound by existing sentencing practice, it has not tried to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences in many instances will approximate existing practice, but adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons now receive probation, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who now receive probation from those who receive more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a current sentencing practice of very wide variability in which some defendants receive probation while others receive several years in prison for the same offense. Moreover, inasmuch as those who currently plead guilty often receive lesser sentences, the guidelines also permit the court to impose lesser sentences on those defendants who accept responsibility and those who cooperate with the government.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the new drug law and the career offender provisions of the sentencing law, require the Commission to promulgate rules that will lead to substantial prison population increases. These increases will occur irrespective of any guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum, or career offender, sentences), will

lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons, estimate at approximately 10 percent, over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table. For technical and practical reasons it has 43 levels. Each row in the table contains levels that overlap with the levels in the preceding and succeeding rows. By overlapping the levels, the table should discourage unnecessary litigation. Both prosecutor and defendant will realize that the difference between one level and another will not necessarily make a difference in the sentence that the judge imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud. At the same time, the rows work to increase a sentence proportionately. A change of 6 levels roughly doubles the sentence irrespective of the level at which one starts. The Commission, aware of the legal requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months, also wishes to permit courts the greatest possible range for exercising discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the judge within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many, rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation as to which category an offender fell within would become more likely. Where a table has many smaller monetary distinctions, it minimizes the likelihood of litigation, for the importance of the precise amount of money involved is considerably less.

5. A Concluding Note

The Commission emphasizes that its approach in this initial set of guidelines is one of caution. It has examined the many hundreds of criminal statutes in the United States Code. It has begun with those that are the basis for a significant number of prosecutions. It has sought to place them in a rational order. It has developed additional distinctions relevant to the application of these provisions, and it has applied sentencing ranges to each resulting category. In doing so, it has relied upon estimates of existing sentencing practices as revealed by its own statistical analyses, based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from existing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with these guidelines will lead to additional information and provide a firm empirical basis for revision.

Finally, the guidelines will apply to approximately 90 percent of all cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in this initial set of guidelines. They will, however, be addressed in the near future. Their exclusion from this initial submission does not reflect any judgment about their seriousness. The Commission has also deferred promulgation of guidelines pertaining to fines, probation and other sanctions for organizational defendants, with the exception of antitrust violations. The Commission also expects to address this area in the near future.".

Amendments

1989 Amendments

Amendment 67 amended Subpart 4(b) in the first sentence of the first paragraph by striking "...that was" and inserting "of a kind, or to a degree,"; in the second sentence of the last paragraph by striking "Part H" and inserting "Part K (Departures)"; and in the third sentence of the last paragraph by striking "Part H" and inserting "Part K".

Amendment 68 amended Subpart 4(b) in the first sentence of the fourth paragraph by striking "three" and inserting "two"; in the fourth paragraph by striking the second through eighth sentences as follows:

> "The first kind, which will most frequently be used, is in effect an interpolation between two adjacent, numerically oriented guideline rules. A specific offense characteristic, for example, might require an increase of four levels for serious bodily injury but two levels for bodily injury. Rather than requiring a court to force middle instances into either the 'serious' or the 'simple' category, the guideline commentary suggests that the court may interpolate and select a midpoint increase of three levels. The Commission has decided to call such an interpolation a 'departure' in light of the legal views that a guideline providing for a range of increases in offense levels may violate the statute's 25 percent rule (though other have presented contrary legal arguments). Since interpolations are technically departures, the courts will have to provide reasons for their selection, and it will be subject to review for 'reasonableness' on appeal. The Commission believes, however, that a simple reference by the court to the 'mid-category' nature of the facts will typically provide sufficient reason. It does not foresee

serious practical problems arising out of the application of the appeal provisions to this form of departure.";

in the first sentence of the fifth paragraph by striking "second" and inserting "first"; and in the first sentence of the sixth paragraph by striking "third" and inserting "second".

1990 Amendment
Amendment 307 amended Subparts 2 through 5 to read as follows:

"2. The Statutory Mission

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of 'bank robbery/committed with a gun/$2500 taken.' An offender characteristic category might be 'offender with one prior conviction not resulting in imprisonment.' The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

3. The Basic Approach (Policy Statement)

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court

the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity -- sentencing every offender to five years -- destroys proportionality.

Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.

The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

In view of the arguments, it would have been tempting to retreat to the simple, broad category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.

In the end, there was no completely satisfying solution to this problem. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

(a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a

presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. This system, however, does contain a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of $10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of $30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.

(b) Departures.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds '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.' 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), and the last sentence of §5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify

an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (e.g., physical injury) may infrequently occur in connection with a particular crime (e.g., fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. For example, the Commentary to §2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures 'unreasonable' where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the plea agreement process on the grounds that any set of guidelines that threatened to change pre-guidelines practice radically also threatened to make the federal system unmanageable. Others argued that guidelines that failed to control and limit plea agreements would leave untouched a 'loophole' large enough to undo the good that sentencing guidelines would bring.

The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance or rejection of such agreements. The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea agreement practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate. Importantly, if the policy statements relating to plea agreements are followed, circumvention of the Sentencing Reform Act and the guidelines should not occur.

The Commission expects the guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. In the event a prosecutor and defense attorney explore the possibility of a negotiated plea, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to 'reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . .' 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are 'serious.'

The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

(e) Multi-Count Convictions.

The Commission, like several state sentencing commissions, has found it particularly difficult to develop guidelines for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to sentences of life imprisonment -- sentences that neither just deserts nor crime control theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts). They essentially provide: (1) when the conduct involves fungible items (e.g., separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it could not comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses were particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense provides a low base offense level

(e.g., 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will have the same offense level as the substantive offense.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practice and sentences under the guidelines.

While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct. For defendants who provide substantial assistance to the government in the investigation or prosecution of others, a downward departure may be warranted.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. § 994(h)), required the Commission to promulgate guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons in 1987, estimated at approximately 10 percent over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. § 994(b)(2)), permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many small monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably less importance.

5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution.

It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

Finally, the guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines. Their exclusion does not reflect any judgment regarding their seriousness and they will be addressed as the Commission refines the guidelines over time.".

1992 Amendment
Amendment 466 amended Subpart 4(b) in the first paragraph by inserting "§5H1.12 (Lack of Guidance as a Youth and Similar Circumstances)" after "§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status)".

1995 Amendment
Amendment 534 amended Subpart 4(d) in the second sentence of the third paragraph by striking "six" and inserting "eight"; and in the third sentence of the third paragraph by striking "seven through" and inserting "nine and".

1996 Amendment
Amendment 538 amended Subpart 4(b) in the fourth paragraph by striking the third sentence as follows:

"For example, the Commentary to §2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved.".

2000 Amendments
Amendment 602 amended Subpart 4(b) in the fifth sentence of the first paragraph by striking "and" before "the last"; and by inserting ", and §5K2.19 (Post-Sentencing Rehabilitative Efforts)" after "(Coercion and Duress)".

Amendment 603 amended Subpart 4(d) by adding an asterisk at the end of the last paragraph after the period; and by adding at the end the following footnote:

"*Note: Although the Commission had not addressed 'single acts of aberrant behavior' at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See Supplement to Appendix C, Amendment 603.)".",

and inserting:

" PART A - INTRODUCTION AND AUTHORITY

Introductory Commentary

Subparts 1 and 2 of this Part provide an introduction to the Guidelines Manual describing the historical development and evolution of the federal sentencing guidelines. Subpart 1 sets forth the original introduction to the Guidelines Manual as it first appeared in 1987, with the inclusion of amendments made occasionally thereto between 1987 and 2000. The original introduction, as so amended, explained a number of policy decisions made by the United States

Sentencing Commission ('Commission') when it promulgated the initial set of guidelines and therefore provides a useful reference for contextual and historical purposes. Subpart 2 further describes the evolution of the federal sentencing guidelines after the initial guidelines were promulgated.

Subpart 3 of this Part states the authority of the Commission to promulgate federal sentencing guidelines, policy statements, and commentary.

1. ORIGINAL INTRODUCTION TO THE GUIDELINES MANUAL

The following provisions of this Subpart set forth the original introduction to this manual, effective November 1, 1987, and as amended through November 1, 2000:

1. Authority

The United States Sentencing Commission ('Commission') is an independent agency in the judicial branch composed of seven voting and two non-voting, ex officio members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.

2. The Statutory Mission

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of 'bank robbery/committed with a gun/$2500 taken.' An offender characteristic category might be 'offender with one prior conviction not resulting in imprisonment.' The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months.

28 U.S.C. § 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

3. The Basic Approach (Policy Statement)

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity -- sentencing every offender to five years -- destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.

The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation

officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

In view of the arguments, it would have been tempting to retreat to the simple, broad category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.

In the end, there was no completely satisfying solution to this problem. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting

point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an

evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

(a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. This system, however, does contain a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of $10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of $30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.

(b) Departures.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds '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.' 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of §5K2.12 (Coercion and Duress), and §5K2.19 (Post-Sentencing Rehabilitative Efforts) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors,

whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (e.g., physical injury) may infrequently occur in connection with a particular crime (e.g., fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures 'unreasonable' where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the plea agreement process on the grounds that any set of guidelines that threatened to change pre-guidelines practice radically also threatened to make the federal system unmanageable. Others argued that guidelines that failed to control and limit plea agreements would leave untouched a 'loophole' large enough to undo the good that sentencing guidelines would bring.

The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance or rejection of such agreements. The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea agreement practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate. Importantly, if the policy statements relating to plea agreements are followed, circumvention of the Sentencing Reform Act and the guidelines should not occur.

The Commission expects the guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. In the event a prosecutor and defense attorney explore the possibility of a negotiated plea, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to 'reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . .' 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are 'serious.'

The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation

previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.*

*Note: Although the Commission had not addressed 'single acts of aberrant behavior' at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See Supplement to Appendix C, amendment 603.)

(e) Multi-Count Convictions.

The Commission, like several state sentencing commissions, has found it particularly difficult to develop guidelines for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to sentences of life imprisonment -- sentences that neither just deserts nor crime control theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts).

They essentially provide: (1) when the conduct involves fungible items (e.g., separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it could not comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses were particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense provides a low base offense level (e.g., 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some

regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will have the same offense level as the substantive offense.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practice and sentences under the guidelines.

While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct. For defendants who provide substantial assistance to the government in the investigation or prosecution of others, a downward departure may be warranted.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. § 994(h)), required the Commission to promulgate guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons in 1987, estimated at approximately 10 percent over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. § 994(b)(2)), permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many small monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably less importance.

5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the

guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

Finally, the guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines. Their exclusion does not reflect any judgment regarding their seriousness and they will be addressed as the Commission refines the guidelines over time.

2. CONTINUING EVOLUTION AND ROLE OF THE GUIDELINES

The Sentencing Reform Act of 1984 changed the course of federal sentencing. Among other things, the Act created the United States Sentencing Commission as an independent agency in the Judicial Branch, and directed it to develop guidelines and policy statements for sentencing courts to use when sentencing offenders convicted of federal crimes. Moreover, it empowered the Commission with ongoing responsibilities to monitor the guidelines, submit to Congress appropriate modifications of the guidelines and recommended changes in criminal statutes, and establish education and research programs. The mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.

This statement finds resonance in a line of Supreme Court cases that, taken together, echo two themes. The first theme is that the guidelines are the product of a deliberative process that seeks to embody the purposes of sentencing set forth in the Sentencing Reform Act, and as such they continue to play an important role in the sentencing court's determination of an appropriate sentence in a particular case. The Supreme Court alluded to this in Mistretta v. United States, 488 U.S. 361 (1989), which upheld the constitutionality of both the federal sentencing guidelines and the Commission against nondelegation and separation of powers challenges. Therein the Court stated:

> Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate. Although Congress has delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice and alternative sentencing models, . . . [w]e have no doubt that in the hands of the Commission 'the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose' of the Act.

Id. at 379 (internal quotation marks and citations omitted).

The continuing importance of the guidelines in federal sentencing was

further acknowledged by the Court in United States v. Booker, 543 U.S. 220 (2005), even as that case rendered the guidelines advisory in nature. In Booker, the Court held that the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant violated the Sixth Amendment. The Court reasoned that an advisory guideline system, while lacking the mandatory features that Congress enacted, retains other features that help to further congressional objectives, including providing certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities, and maintaining sufficient flexibility to permit individualized sentences when warranted. The Court concluded that an advisory guideline system would 'continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.' Id. at 264-65. An advisory guideline system continues to assure transparency by requiring that sentences be based on articulated reasons stated in open court that are subject to appellate review. An advisory guideline system also continues to promote certainty and predictability in sentencing, thereby enabling the parties to better anticipate the likely sentence based on the individualized facts of the case.

The continuing importance of the guidelines in the sentencing determination is predicated in large part on the Sentencing Reform Act's intent that, in promulgating guidelines, the Commission must take into account the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). See 28 U.S.C. §§ 994(f), 991(b)(1). The Supreme Court reinforced this view in Rita v. United States, 127 S. Ct. 2456 (2007), which held that a court of appeals may apply a presumption of reasonableness to a sentence imposed by a district court within a properly calculated guideline range without violating the Sixth Amendment. In Rita, the Court relied heavily on the complementary roles of the Commission and the sentencing court in federal sentencing, stating:

> [T]he presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task. In instructing both the sentencing judge and the Commission what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. § 3553(a) . . . . The provision also tells the sentencing judge to 'impose a sentence sufficient, but not greater than necessary, to comply with' the basic aims of sentencing as set out above. Congressional statutes then tell the Commission to write Guidelines that will carry out these same § 3553(a) objectives.

Id. at 2463 (emphasis in original). The Court concluded that '[t]he upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale,' id., and that the Commission's process for promulgating guidelines results in 'a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice.' Id. at 2464.

Consequently, district courts are required to properly calculate and consider the guidelines when sentencing, even in an advisory guideline system. See 18 U.S.C. § 3553(a)(4), (a)(5); Booker, 543 U.S. at 264 ('The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.'); Rita, 127 S. Ct. at 2465 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); Gall v. United States, 128 S. Ct. 586, 596 (2007) ('As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.'). The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). See Rita, 127 S. Ct. at 2465. The appellate court engages in a two-step process upon review. The appellate court 'first ensure[s] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . [and] then consider[s] the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard[,] . . . tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range.' Gall, 128 S. Ct. at 597.

The second and related theme resonant in this line of Supreme Court cases is that, as contemplated by the Sentencing Reform Act, the guidelines are evolutionary in nature. They are the product of the Commission's fulfillment of its statutory duties to monitor federal sentencing law and practices, to seek public input on the operation of the guidelines, and to revise the guidelines accordingly. As the Court acknowledged in Rita:

> The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since Booker, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

Id. at 2464; see also Booker, 543 U.S. at 264 ('[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.'); Gall, 128 S. Ct. at 594 ('[E]ven though the Guidelines are advisory rather than mandatory, they are, as we pointed out in Rita, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.').

Provisions of the Sentencing Reform Act promote and facilitate this evolutionary process. For example, pursuant to 28 U.S.C. § 994(x), the

Commission publishes guideline amendment proposals in the Federal Register and conducts hearings to solicit input on those proposals from experts and other members of the public. Pursuant to 28 U.S.C. § 994(o), the Commission periodically reviews and revises the guidelines in consideration of comments it receives from members of the federal criminal justice system, including the courts, probation officers, the Department of Justice, the Bureau of Prisons, defense attorneys and the federal public defenders, and in consideration of data it receives from sentencing courts and other sources. Statutory mechanisms such as these bolster the Commission's ability to take into account fully the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) in its promulgation of the guidelines.

Congress retains authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines. As the Supreme Court noted in Kimbrough v. United States, 128 S. Ct. 558 (2007), 'Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guideline sentences for serious recidivist offenders 'at or near' the statutory maximum.' Id. at 571; 28 U.S.C. § 994(h).

As envisioned by Congress, implemented by the Commission, and reaffirmed by the Supreme Court, the guidelines are the product of a deliberative and dynamic process that seeks to embody within federal sentencing policy the purposes of sentencing set forth in the Sentencing Reform Act. As such, the guidelines continue to be a key component of federal sentencing and to play an important role in the sentencing court's determination of an appropriate sentence in any particular case.

3. AUTHORITY

§1A3.1. Authority

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.".

Reason for Amendment: This amendment sets forth the introduction to the Guidelines Manual as it first appeared in 1987, with the inclusion of amendments occasionally made thereto between 1987 and 2000, in Subpart 1 of Chapter One. In 2003, the introduction was moved to an editorial note. (See Appendix C to the Guidelines Manual, Amendment 651.) This amendment removes the introduction from the editorial note to Subpart 1 of Chapter One, representing the original introduction as it first appeared in 1987, as amended by Amendments 67, 68, 307, 466, 534, 538, 602, and 603.

The amendment also supplements the original introduction with an updated discussion of the role of the guidelines, their evolution, and Supreme Court case law, and redesignates §1A1.1 (Authority) as §1A3.1.

Effective Date: The effective date of this amendment is November 1, 2008.

718. Amendment: Section 2A6.1 is amended in the heading by adding at the end "; False Liens".

Section 2A6.1(b) is amended by striking subdivision (2) as follows:

"(2) If the offense involved more than two threats, increase by 2 levels.",

and inserting the following:

"(2) If (A) the offense involved more than two threats; or (B) the defendant is convicted under 18 U.S.C. § 1521 and the offense involved more than two false liens or encumbrances, increase by 2 levels.".

The Commentary to §2A6.1 captioned "Statutory Provisions" is amended by inserting "1521," after "1038,".

The Commentary to §2A6.1 captioned "Application Notes" is amended by redesignating Notes 2 and 3 as Notes 3 and 4, respectively; and by inserting after Note 1 the following:

"2. Applicability of Chapter Three Adjustments.—If the defendant is convicted under 18 U.S.C. § 1521, apply §3A1.2 (Official Victim).".

The Commentary to §2A6.1 captioned "Application Notes" is amended in Note 4, as redesignated by this amendment, by striking subdivision (B) as follows:

"(B) Multiple Threats or Victims.—If the offense involved substantially more than two threatening communications to the same victim or a prolonged period of making harassing communications to the same victim, or if the offense involved multiple victims, an upward departure may be warranted.",

and inserting the following:

"(B) Multiple Threats, False Liens or Encumbrances, or Victims; Pecuniary Harm.—If the offense involved (i) substantially more than two threatening communications to the same victim, (ii) a prolonged period of making harassing communications to the same victim, (iii) substantially more than two false liens or encumbrances against the real or personal property of the same victim, (iv) multiple victims, or (v) substantial pecuniary harm to a victim, an upward departure may be warranted.".

Section 2H3.1(b) is amended by striking "Characteristic" and inserting "Characteristics"; and by adding at the end the following:

"(2) (Apply the greater) If—

(A) the defendant is convicted under 18 U.S.C. § 119, increase by 8 levels; or

(B) the defendant is convicted under 18 U.S.C. § 119, and the offense involved the use of a computer or an interactive computer service to make restricted personal information about a covered person publicly available, increase by 10 levels.".

The Commentary to §2H3.1 captioned "Statutory Provisions" is amended by inserting "119," before "1039,".

The Commentary to §2H3.1 captioned "Application Notes" is amended by redesignating Note 3 as Note 5 and inserting after Note 2 the following:

"3. Inapplicability of Chapter Three (Adjustments).—If the enhancement under subsection (b)(2) applies, do not apply §3A1.2 (Official Victim).

4. Definitions.—For purposes of subsection (b)(2)(B):

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

'Covered person' has the meaning given that term in 18 U.S.C. § 119(b).

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

'Restricted personal information' has the meaning given that term in 18 U.S.C. § 119(b).".

Appendix A (Statutory Index) is amended by inserting after the line reference to 18 U.S.C. § 115(b)(4) the following:

"18 U.S.C. § 119 2H3.1"; and

by inserting after the line reference to 18 U.S.C. § 1520 the following:

"18 U.S.C. § 1521 2A6.1".

Reason for Amendment: This amendment responds to two new offenses created by the Court Security Improvement Act of 2007 (the "Act"), Pub. L. 110–177.

First, the amendment addresses section 201 of the Act, which created a new offense at 18 U.S.C. § 1521 prohibiting the filing of, attempts, or conspiracies to file any false lien or encumbrance against the real or personal property of officers or employees of the United States Government, on account of that individual's performance of official duties. The offense is punishable by a statutory maximum term of imprisonment of ten years. The amendment references the new offense to §2A6.1 (Threatening or Harassing

Communications; Hoaxes), and expands the heading of §2A6.1 accordingly. The Commission determined that referencing offenses under 18 U.S.C. § 1521 to §2A6.1 is appropriate because the harassment and threatening of an official by the filing of fraudulent encumbrances is analogous to conduct covered by other statutes referenced to this guideline.

The amendment also makes a number of modifications to §2A6.1 to address specific harms associated with violations of 18 U.S.C. § 1521. Specifically, the amendment expands the scope of the two-level enhancement at subsection (b)(2) to apply if the defendant is convicted under 18 U.S.C. § 1521 and the offense involved more than two false liens or encumbrances, and also provides an upward departure provision that may apply if the offense involved substantially more than two false liens or encumbrances against the real or personal property of the same victim. These modifications reflect the additional time and resources required to remove multiple false liens or encumbrances and provide proportionality between such offenses and other offenses referenced to this guideline that involve more than two threats.

The amendment also provides an upward departure provision that may apply if the offense involved substantial pecuniary harm to a victim. The upward departure provision reflects the increased seriousness of those offenses that result in substantial costs.

In addition, the amendment adds a new application note specifying that if the defendant is convicted under 18 U.S.C. § 1521, the adjustment under §3A1.2 (Official Victim) shall apply. The addition of this note clarifies that the official status of the victim is not taken into account in the base offense level.

Second, the amendment addresses section 202 of the Act, which created a new offense at 18 U.S.C. § 119 prohibiting the public disclosure of restricted personal information about a federal officer or employee, witness, juror, or immediate family member of such a person, with the intent to threaten or facilitate a crime of violence against such a person. The offense is punishable by a statutory maximum term of imprisonment of five years. The amendment references the new offense to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). The Commission determined that referencing offenses under 18 U.S.C. § 119 to §2H3.1 is appropriate because the prohibited conduct is analogous to conduct covered by other statutes referenced to this guideline.

The amendment also creates a two-pronged enhancement at subsection (b)(2), the greater of which applies. The first prong, at subsection (b)(2)(A), is an eight-level enhancement applicable if the defendant is convicted under 18 U.S.C. § 119. A corresponding application note provides that §3A1.2 shall not apply in such cases. Thus, the enhancement at subsection (b)(2)(A) accounts for the official victim adjustment under §3A1.2 that would otherwise apply in many offenses under 18 U.S.C. § 119. Incorporating the official victim adjustment into subsection (b)(2)(A) was appropriate because the adjustment in §3A1.2 does not apply to some individuals, such as witnesses and jurors, who are covered by 18 U.S.C. § 119. The enhancement at subsection (b)(2)(A) also reflects the intent to threaten or facilitate a crime of violence, which is an element of an offense under 18 U.S.C. § 119. The cross reference at subsection (c)(1) will apply, however, if the purpose of the offense was to facilitate another offense and the guideline applicable to an attempt to commit that other offense results in a greater offense level.

The second prong, at subsection (b)(2)(B), is a ten-level enhancement applicable if the defendant is convicted under 18 U.S.C. § 119 and the offense involved the use of a computer or an interactive computer service to make restricted personal information about a covered person publicly available. This greater enhancement accounts for the more substantial risk of harm posed by widely disseminating such protected information via the Internet.

Effective Date: The effective date of this amendment is November 1, 2008.

719. **Amendment:** Section 2B1.1, effective February 6, 2008 (see Amendment 714), is repromulgated with the following changes:

Section 2B1.1(b) is amended by striking subdivision (16) as follows:

"(16) If the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency, increase by 2 levels.";

by redesignating subdivisions (11) through (15) as subdivisions (12) through (16), respectively; by inserting after subdivision (10) the following:

"(11) If the offense involved conduct described in 18 U.S.C. § 1040, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.";

in subdivision (12), as redesignated by this amendment, by inserting "resulting" before "offense level"; and

in subdivision (14), as redesignated by this amendment, by striking "(b)(13)(B)" and inserting "(b)(14)(B)".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "1040," before "1341-1344,".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3 by striking subdivision (A)(v)(IV) as follows:

"(IV) Disaster Fraud Cases.—In a case in which subsection (b)(16) applies, reasonably foreseeable pecuniary harm includes the administrative costs to any federal, state, or local government entity or any commercial or not-for-profit entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit that were reasonably foreseeable.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 10 by striking "(b)(11)" and inserting "(b)(12)" each place it appears.

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 11 by striking "(b)(13)(A)" and inserting "(b)(14)(A)" each place it appears.

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 12 by striking "(b)(13)(B)" and inserting "(b)(14)(B)"; by striking "(b)(13)(B)(i)" and inserting "(b)(14)(B)(i)"; and by striking "(b)(13)(B)(ii)" and inserting "(b)(14)(B)(ii)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 13 by striking "(b)(14)" and inserting "(b)(15)" each place it appears; by striking "(b)(14)(iii)" and inserting "(b)(15)(iii)" each place it appears; and by striking "(b)(13)(B)" and inserting "(b)(14)(B)" each place it appears.

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 14 by striking "(b)(15)" and inserting "(b)(16)" each place it appears.

The Commentary to §2B1.1 captioned "Application Notes" is amended by striking Note 15 as follows:

"15. Application of Subsection (b)(16).—

Definitions.—For purposes of this subsection:

'Emergency' has the meaning given that term in 42 U.S.C. § 5122.

'Major disaster' has the meaning given that term in 42 U.S.C. § 5122.",

and by redesignating Notes 16 through 20 as Notes 15 through 19, respectively.

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 19, as redesignated by this amendment, by striking "(b)(14)(iii)" and inserting "(b)(15)(iii)"; and by adding at the end the following:

"(D) Downward Departure for Major Disaster or Emergency Victims.—If (i) the minimum offense level of level 12 in subsection (b)(11) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.".

The Commentary to §2B1.1 captioned "Background" is amended by inserting after the paragraph that begins "Subsection (b)(10)(C)" the following:

"Subsection (b)(11) implements the directive in section 5 of Public Law 110–179.".

The Commentary to §2B1.1 captioned "Background" is amended in the paragraph that begins "Subsection (b)(12)(B)" by striking "(b)(12)(B)" and inserting "(b)(13)(B)";

in the paragraph that begins "Subsection (b)(13)(A)" by striking "(b)(13)(A)" and inserting "(b)(14)(A)";

in the paragraph that begins "Subsection (b)(13)(B)(i)" by striking "(b)(13)(B)(i)" and

inserting "(b)(14)(B)(i)";

in the paragraph that begins "Subsection (b)(14)" by striking "(b)(14)" and inserting "(b)(15)"; and by striking "(b)(14)(B)" and inserting "(b)(15)(B)"; and

by striking the paragraph that begins "Subsection (b)(16) implements" as follows:

> "Subsection (b)(16) implements the directive in section 5 of Public Law 110–179.".

Reason for Amendment: This amendment re-promulgates as permanent the temporary, emergency amendment (effective Feb. 6, 2008) that implemented the emergency directive in section 5 of the "Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007," Pub. L. 110–179 (the "Act"). The directive, which required the Commission to promulgate an amendment under emergency amendment authority by February 6, 2008, directed that the Commission forthwith shall –

> promulgate sentencing guidelines or amend existing sentencing guidelines to provide for increased penalties for persons convicted of fraud or theft offenses in connection with a major disaster declaration under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) or an emergency declaration under section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5191) . . ..

Section 5(b) of the Act further required the Commission to –

> (1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses described in subsection (a) and the need for aggressive and appropriate law enforcement action to prevent such offenses;
> (2) assure reasonable consistency with other relevant directives and with other guidelines;
> (3) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements;
> (4) make any necessary conforming changes to the sentencing guidelines; and
> (5) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

The emergency amendment addressed concerns that disaster fraud involves harms not adequately addressed by §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) by (1) adding a two-level enhancement if the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency; (2) modifying the commentary to the guideline as it relates to the calculation of loss; and (3) providing a reference to §2B1.1 in Appendix A (Statutory Index) for the

offense at 18 U.S.C. § 1040 (Fraud in connection with major disaster or emergency benefits) created by the Act.

This amendment repromulgates the temporary, emergency amendment as permanent, with the following changes. First, the amendment expands the scope of the two-level enhancement to include all conduct described in 18 U.S.C. § 1040. Thus, the amendment expands the scope of the enhancement to include fraud or theft involving procurement of property or services as a contractor, subcontractor or supplier, rather than limiting it to the conduct described in the emergency directive. The limited emergency amendment authority did not permit the Commission to include such conduct in the enhancement promulgated in the emergency amendment. However, the directive in section 5 of the Act covers all "fraud or theft offenses in connection with a major disaster declaration" and, therefore, expansion of the scope of the enhancement to apply to all conduct described in 18 U.S.C. § 1040 is appropriate.

Second, the amendment modifies the enhancement to include a minimum offense level of 12. The Commission frequently adopts a minimum offense level in circumstances in which, as in these cases, loss as calculated by the guidelines is difficult to compute or does not adequately account for the harm caused by the offense. The Commission studied a sample of disaster fraud cases and compared those cases to other cases of defrauding government programs. This analysis supported claims made in testimony to the Commission that the majority of the disaster fraud cases resulted in probationary sentences because the amount of loss calculated under subsection (b)(1) of §2B1.1 had little impact on the sentences. The Commission also received testimony and public comment identifying various harms unique to disaster fraud cases. For example, charitable institutions may have a more difficult time soliciting contributions because fraud in connection with disasters may erode public trust in these institutions. Moreover, the pool of funds available to aid legitimate disaster victims is adversely affected when fraud occurs. Further, the inherent tension between the imposition of fraud controls and the need to provide aid to disaster victims quickly makes it difficult for relief agencies and charitable institutions to prevent disaster fraud. All of these factors provide support for a minimum offense level.

Third, the amendment adds a downward departure provision that may apply in a case in which the minimum offense level applies, the defendant is a victim of a major disaster or emergency, and the benefits received illegally were only an extension or overpayment of benefits received legitimately. This provision recognizes that a defendant's legitimate status as a disaster victim may be a mitigating factor warranting a downward departure in certain cases involving relatively small amounts of loss.

Fourth, the amendment deletes certain commentary relating to the definition of loss that was promulgated in the emergency amendment. Specifically, the emergency amendment added subdivision (IV) to Application Note 3(A)(v) of §2B1.1 providing that in disaster fraud cases, "reasonably foreseeable pecuniary harm includes the administrative costs to any federal, state, or local government entity or any commercial or not-for-profit entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit that were reasonably foreseeable." The amendment deletes this provision because of concerns that administrative costs might be difficult to determine or in some instances could over-represent the harm caused by the offense.

Finally, the amendment makes conforming changes to the guideline and the commentary.

Effective Date: The effective date of this amendment is November 1, 2008.

720. **Amendment:** The Commentary to §2C1.1 captioned "Statutory Provisions" is amended by inserting "227," after "226,".

Appendix A (Statutory Index) is amended by inserting after the line reference to 18 U.S.C. § 226 the following:

"18 U.S.C. § 227 2C1.1".

Reason for Amendment: This amendment responds to the Honest Leadership and Open Government Act of 2007, Pub. L. 110–81 ("the Act"). The Act created a criminal offense at 18 U.S.C. § 227 prohibiting a member or employee of Congress from influencing or attempting to influence, on the basis of political affiliation, employment decisions or practices of a private entity. The offense is punishable by a 15-year statutory maximum term of imprisonment.

The amendment modifies Appendix A (Statutory Index) to reference offenses under 18 U.S.C. § 227 to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions) because this guideline covers similar offenses.

Effective Date: The effective date of this amendment is November 1, 2008.

721. **Amendment:** Section 2E3.1 is amended in the heading by adding at the end "; Animal Fighting Offenses".

Section 2E3.1(a) is amended by inserting "(Apply the greatest)" after "Level:"; by redesignating subdivision (2) as subdivision (3); and by inserting after subdivision (1) the following:

"(2) 10, if the offense involved an animal fighting venture; or".

The Commentary to §2E3.1 captioned "Statutory Provisions" is amended by inserting "7 U.S.C. § 2156;" before "15 U.S.C. §§".

The Commentary to §2E3.1 is amended by adding at the end the following:

"Application Notes:

1. Definition.—For purposes of this guideline: ‘Animal fighting venture’ has the meaning given that term in 7 U.S.C. § 2156(g).

2. Upward Departure Provision.—If the offense involved extraordinary cruelty to an animal that resulted in, for example, maiming or death to an animal, an upward departure may be warranted.".

The Commentary to §2X5.2 captioned "Statutory Provisions" is amended by striking "7 U.S.C. § 2156;".

Appendix A (Statutory Index) is amended in the line reference to 7 U.S.C. § 2156 by striking "2X5.2" and inserting "2E3.1".

Reason for Amendment: This amendment implements the Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. 110–22 (the "Act"). The Act amended the Animal Welfare Act, 7 U.S.C. § 2156, to increase penalties for existing offenses and to create a new offense. Specifically, the Act increased penalties for criminal violations of 7 U.S.C. § 2156 from a one-year statutory maximum term of imprisonment to a three-year statutory maximum term of imprisonment. The penalties are set forth in section 49 of title 18, United States Code. In addition, the Act created an offense at 7 U.S.C. § 2156(e) making it unlawful to "sell, buy, transport, or deliver in interstate or foreign commerce a knife, a gaff, or any other sharp instrument attached, or designed or intended to be attached, to the leg of a bird for use in an animal fighting venture." This new offense also carries a three-year statutory maximum term of imprisonment.

Because 7 U.S.C. § 2156 is now a felony offense, the amendment deletes the reference of 7 U.S.C. § 2156 to §2X5.2 (Class A Misdemeanors) in Appendix A (Statutory Index), and deletes the listing of 7 U.S.C. § 2156 from the statutory provisions listed in the commentary to §2X5.2. The amendment references offenses under 7 U.S.C. § 2156 to §2E3.1 (Gambling Offenses) as the legislative history and public comment indicate that such offenses often involve gambling. Accordingly, the amendment expands the title of §2E3.1 to include animal fighting offenses.

The amendment also creates a new alternative base offense level at §2E3.1(a)(2) that provides a base offense level of level 10 if the offense involved an "animal fighting venture," which is defined in Application Note 1 as having the meaning given that term in 7 U.S.C. § 2156(g), i.e., "any event which involves a fight between at least two animals and is conducted for purposes of sport, wagering, or entertainment." The alternative base offense level reflects the increased harm, i.e., cruelty to animals, resulting from offenses under 7 U.S.C. § 2156(g) that is not associated with offenses that typically receive a base offense level of level 6 under the guideline. Additionally, the amendment adds an instruction to apply the greatest applicable base offense level at §2E3.1(a) because an offense involving an animal fighting venture may also involve conduct covered by subsection (a)(1) and, therefore, should receive the higher base offense level provided by that subsection.

The amendment also provides an upward departure provision that may apply if an offense involves extraordinary cruelty to an animal that resulted in, for example, maiming or death to an animal.

Effective Date: The effective date of this amendment is November 1, 2008.

722. **Amendment:** The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 1 by striking subdivision (B)(iii) as follows:

"(iii) ‘Crime of violence’ means any of the following: murder, manslaughter,

kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.",

and inserting the following:

"(iii) 'Crime of violence' means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.";

and in subdivision (B)(iv) by inserting ", or offer to sell" after "dispensing of".

The Commentary to §2L1.2 captioned "Application Notes" is amended by adding at the end the following:

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

Reason for Amendment: This amendment addresses certain discrete issues that have arisen in the application of §2L1.2 (Unlawfully Entering or Remaining in the United States). The amendment reflects input the Commission has received from federal judges, prosecutors, defense attorneys, and probation officers at several roundtable discussions and public hearings on the operation of §2L1.2.

First, the amendment clarifies the scope of the term "forcible sex offense" as that term is used in the definition of "crime of violence" in §2L1.2, Application Note 1(B)(iii). The amendment provides that the term "forcible sex offense" includes crimes "where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced." The amendment makes clear that forcible sex offenses, like all offenses enumerated in Application Note 1(B)(iii), "are always classified as 'crimes of violence,' regardless of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another," USSC, Guideline Manual, Supplement to Appendix C, Amendment 658. Application of the

amendment, therefore, would result in an outcome that is contrary to cases excluding crimes in which "there may be assent in fact but no legally valid consent" from the scope of "forcible sex offenses." See, e.g., United States v. Gomez-Gomez, 493 F.3d 562, 567 (5th Cir. 2007) (holding that a rape conviction was not a forcible sex offense because it could have been based on assent given in response to a threat "to reveal embarrassing secrets" or after "an employer threatened to fire a subordinate"); United States v. Luciano-Rodriguez, 442 F.3d 320, 322–23 (5th Cir. 2006) (holding that a conviction for a sexual assault was not a forcible sex offense because it could have been based on assent when "the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it," when "the actor is a public servant who coerces the other person to submit or participate," or when "the actor is a member of the clergy or is a mental health service provider who exploits the emotional dependency engendered by their position"); United States v. Sarmiento-Funes, 374 F.3d 336, 341 (5th Cir. 2004) (holding that a conviction for sexual assault was not a forcible sex offense because it could have been based on assent that is "the product of deception or a judgment impaired by intoxication").

Second, the amendment clarifies that an "offer to sell" a controlled substance is a "drug trafficking offense" for purposes of subsection (b)(1) of §2L1.2 by adding "offer to sell" to the conduct listed in Application Note 1(B)(iv).

Finally, the amendment addresses the concern that in some cases the categorical enhancements in subsection (b) may not adequately reflect the seriousness of a prior offense. The amendment adds a departure provision that may apply in a case "in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction." The amendment provides two examples of cases that may warrant such a departure. The first example suggests that an upward departure may be warranted in a case in which "subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use." The second example suggests that a downward departure may be warranted in a case in which "subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43)."

Effective Date: The effective date of this amendment is November 1, 2008.

723. **Amendment:** Section 2N2.1 is amended by redesignating subsection (b) as subsection (c) and inserting after subsection (a) the following:

"(b) Specific Offense Characteristic

(1) If the defendant was convicted under 21 U.S.C. § 331 after sustaining a prior conviction under 21 U.S.C. § 331, increase by 4 levels.".

The Commentary to §2N2.1 captioned "Application Notes" is amended in Note 2 by striking "(b)(1)" and inserting "(c)(1)"; and by striking "(b)(2)" and inserting "(c)(2)".

The Commentary to §2N2.1 captioned "Application Notes" is amended in Note 3 by striking "Death" and inserting "The offense created a substantial risk of bodily injury or death;"; by

inserting "death," before "extreme"; and by inserting "from the offense" after "resulted".

Reason for Amendment: This amendment makes two changes to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) to address offenses under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 et seq. (the "FDCA") and the Prescription Drug Marketing Act of 1987, Pub L. 100–293 (the "PDMA"). First, the amendment adds a specific offense characteristic at subsection (b)(1) of §2N2.1 that provides a four-level enhancement for repeat violations of the FDCA. First time violations of the FDCA, absent fraud, carry a maximum term of imprisonment of one year. 21 U.S.C. § 333(a)(1). In contrast, second or subsequent violations of the FDCA carry a maximum term of imprisonment of three years. 21 U.S.C. § 333(a)(2). The Commission determined based on public comment and testimony that an enhancement is appropriate to account for the increased statutory maximum penalties provided for second or subsequent FDCA violations.

Second, the amendment expands the upward departure provision at Application Note 3(A) of §2N2.1 to include an offense that created a substantial risk of bodily injury or death. Public comment and testimony indicated that §2N2.1 may not adequately account for the substantial risk of bodily injury or death created by certain offenses. The PDMA, for example, includes certain offenses that may create such risks, such as the re-importation into the United States of any previously exported prescription drug, except by the drug's manufacturer; the sale or purchase of any prescription drug sample or coupon; and the wholesale distribution of prescription drugs without the necessary state or federal licenses. 21 U.S.C. § 353(c), (d), (e). Thus, the amendment expanded the scope of the upward departure provision to address such risks.

Effective Date: The effective date of this amendment is November 1, 2008.

724. **Amendment:** The Commentary to §2E4.1 captioned "Application Note" is amended in Note 1 by inserting "and local" before "excise"; and by striking "tax" and inserting "taxes".

The Commentary to §2E4.1 captioned "Background" is amended by inserting "and local" before "excise".

Section 2X7.1 is amended in subsection (a) by striking "554" and inserting "555" each place it appears.

The Commentary to §2X7.1 captioned "Statutory Provision" is amended by striking "554" and inserting "555".

Section 3C1.4 is amended by striking "3559(f)(1)" and inserting "3559(g)(1)".

Appendix A (Statutory Index) is amended by striking both line references to 18 U.S.C. § 554 as follows:

"18 U.S.C. § 554	2X7.1
(Border tunnels and passages)	
18 U.S.C. § 554	
(Smuggling goods from	2B1.5, 2M5.2, 2Q2.1",

the United States)

and inserting the following:

"18 U.S.C. § 554	2B1.5, 2M5.2, 2Q2.1
18 U.S.C. § 555	2X7.1";

in the line reference to 18 U.S.C. § 1091 by striking "2H1.3" and inserting "2H1.1";

in the line reference to 18 U.S.C. § 1512(a) by inserting ", 2A2.2, 2A2.3, 2J1.2" after "2A2.1"; and

in the line reference to 18 U.S.C. § 1512(b) by striking "2A1.2, 2A2.2,".

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

First, the amendment addresses section 121 of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177, which expanded the definition of "contraband cigarette" in subsection (2) of 18 U.S.C. § 2341 to include the failure to pay local cigarette taxes. The amendment reflects this statutory change by expanding the scope of Application Note 1 of §2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes and Smokeless Tobacco) to include local excise taxes within the meaning of "taxes evaded." The amendment also amends the background commentary to §2E4.1 to include local excise taxes.

Second, the amendment implements technical corrections made by section 553 of Pub. L. 110–161 by changing the statutory references in §2X7.1 (Border Tunnels and Subterranean Passages) from "18 U.S.C. § 554" to "18 U.S.C. § 555," and by amending Appendix A (Statutory Index) to refer violations of 18 U.S.C. § 555 to §2X7.1.

Third, the amendment addresses a statutory redesignation made by section 202 of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109–248, by changing statutory references in §3C1.4 (False Registration of Domain Name) from "18 U.S.C. § 3559(f)(1)" to "18 U.S.C. § 3559(g)(1)."

Fourth, the amendment addresses statutory changes to 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant) made by the 21st Century Department of Justice Appropriations Act, Pub. L. 107–273, by deleting in Appendix A the references to §§2A1.2 (Second Degree Murder) and 2A2.2 (Aggravated Assault) for violations of 18 U.S.C. § 1512(b), and adding those guidelines as references for violations of 18 U.S.C. § 1512(a). The amendment also adds a reference to §2J1.2 (Obstruction of Justice) for a violation of 18 U.S.C. § 1512(a) to reflect the broad range of obstructive conduct, including the use of physical force against a witness, covered by that subsection.

Fifth, the amendment changes the reference in Appendix A for offenses under 18 U.S.C. § 1091 (Genocide) from §2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property), which no longer exists as a result of a guideline consolidation (see Appendix C to the Guidelines Manual,

Amendment 521), to §2H1.1 (Offenses Involving Individual Rights).

Effective Date: The effective date of this amendment is November 1, 2008.

725. **Amendment:** Chapter One, as amended by Amendment 717, is amended in the heading by inserting a comma after "AUTHORITY".

The Commentary to §2A3.1 captioned "Application Notes" is amended in Note 5 by striking "(c)(1)" each place it appears and inserting "(c)(2)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3(F)(i) by striking "7(A)" and inserting "9(A)".

The Commentary to §5K2.0 captioned "Background" is amended in the second paragraph by striking "Historical Note to §1A1.1 (Authority)" and inserting "Chapter One, Part A".

Appendix A (Statutory Index) is amended by inserting after the line reference to 18 U.S.C. § 1039 the following:

"18 U.S.C. § 1040 2B1.1".

Reason for Amendment: This amendment makes various technical and conforming changes. Specifically, the amendment makes a clerical change to the chapter heading of Chapter One; corrects inaccurate references in the Commentary to §2A3.1 Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), §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 §5K2.0 (Grounds for Departure), and amends Appendix A (Statutory Index) to repromulgate the line reference to 18 U.S.C. § 1040, which had been added by Amendment 714.

Effective Date: The effective date of this amendment is November 1, 2008.

726. **Amendment:** Section 2B1.1(b) is amended by redesignating subdivisions (15) and (16) as subdivisions (16) and (17); and by inserting after subdivision (14) the following:

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

Section 2B1.1(b) is amended in subdivision (16), as redesignated by this amendment, by striking "(I)" after "involved"; by striking "; or (II) an intent to obtain personal information" after "security"; and by striking "(i)" after "(5)(A)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "'Foreign instrumentality'" the following:

"'Means of identification' has the meaning given that term in 18 U.S.C. §

1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).";

and by inserting after the paragraph that begins "'National cemetery'" the following:

"'Personal information' means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (i) medical records; (ii) wills; (iii) diaries; (iv) private correspondence, including e-mail; (v) financial records; (vi) photographs of a sensitive or private nature; or (vii) similar information.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3(C) in subdivision (i) by inserting ", copied," after "taken"; by redesignating subdivisions (ii) through (v) as subdivisions (iii) through (vi); and by inserting after subdivision (i) the following:

"(ii) In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 4 by adding at the end the following:

"(E) Cases Involving Means of Identification.—For purposes of subsection (b)(2), in a case involving means of identification 'victim' means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 9(A) by striking the paragraph that begins "'Means of identification'" as follows:

"'Means of identification' has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 13 by striking "(15)" and inserting "(16)" each place it appears; by striking the paragraph that begins "'Personal information'" as follows:

"'Personal information' means sensitive or private information (including such information in the possession of a third party), including (i) medical records; (ii) wills; (iii) diaries; (iv) private correspondence, including e-mail; (v) financial records; (vi) photographs of a sensitive or private nature; or (vii) similar information.";

and by inserting "(A)" before "(iii)" each place it appears.

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 14 by striking "(b)(16)" and inserting "(b)(17)" each place it appears.

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 19(B) by striking "(15)" and inserting "(16)(A)".

The Commentary to §2B1.1 captioned "Background" is amended by inserting after the paragraph that begins "Subsection (b)(14)(B)(i)" the following:

> " Subsection (b)(15) implements the directive in section 209 of Public Law 110–326.";

and in the paragraph that begins "Subsection (b)(15)" by striking "(15)" and inserting "(16)" each place it appears.

The Commentary to §2H3.1 captioned "Application Notes" is amended in Note 4 by striking "Definitions.—For purposes of subsection (b)(2)(B):" and inserting "Definitions.—For purposes of this guideline:"; and by inserting after the paragraph that begins "'Interactive computer service'" the following:

> "'Means of identification' has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).
>
> 'Personal information' means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (i) medical records; (ii) wills; (iii) diaries; (iv) private correspondence, including e-mail; (v) financial records; (vi) photographs of a sensitive or private nature; or (vii) similar information.".

The Commentary to §2H3.1 captioned "Application Notes" is amended in Note 5(i) by inserting "personal information, means of identification," after "offense involved"; and by inserting a comma before "or tax".

The Commentary to §3B1.3 captioned "Application Notes" is amended in Note 2(B) by inserting ", transfer, or issue" after "in order to obtain".

Reason for Amendment: This multi-part amendment responds to the directive in section 209 of the Identity Theft Enforcement and Restitution Act of 2008, Title II of Pub. L. 110–326 (the "Act"), and addresses other related issues arising from case law. Section 209(a) of the Act directed the Commission to—

> review its guidelines and policy statements applicable to persons convicted of offenses under sections 1028, 1028A, 1030, 2511, and 2701 of title 18, United States Code, and any other relevant provisions of law, in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by such guidelines and policy statements.

The Act further required the Commission, in determining the appropriate sentence for the above referenced offenses, to consider the extent to which the guidelines and policy statements adequately account for 13 factors listed in section 209(b) of the Act.

In response to the congressional directive, the amendment increases penalties provided by the applicable guidelines and policy statements by adding a new enhancement and a new upward departure provision. In addition, the amendment expands both the definition of "victim" and the factors to be considered in the calculation of loss; each of these expansions may, in an appropriate case, increase penalties in comparison to those provided prior to the amendment.

First, the amendment adds a new two-level enhancement in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The new enhancement, which addresses offenses involving personal information, is at subsection (b)(15). An existing enhancement, which addresses offenses under 18 U.S.C. § 1030 (i.e., computer crimes), was at subsection (b)(15) but has been redesignated as subsection (b)(16).

The new enhancement for offenses involving personal information applies if (A) the defendant was convicted of an offense under 18 U.S.C. § 1030 and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information. The "(A)" prong of the new personal information enhancement had been a prong of the existing computer crime enhancement, but the tiered structure of that enhancement was such that if a computer crime involved both an intent to obtain personal information and another harm (such as an intrusion into a government computer, an intent to cause damage, or a disruption of a critical infrastructure), only the greatest applicable increase would apply. The amendment responds to concerns that a case involving those other harms is different in kind from a case involving an intent to obtain personal information. Moving the intent to obtain personal information prong out of the computer crime enhancement and into the new enhancement ensures that a defendant convicted under section 1030 receives an incremental increase in punishment if the offense involved both an intent to obtain personal information and another harm addressed by the computer crime enhancement. The "(B)" prong of the new personal information enhancement ensures that any defendant, regardless of the statute of conviction, receives an additional incremental increase in punishment if the offense involved the unauthorized public dissemination of personal information. This prong accounts for the greater harm to privacy caused by such an offense.

Second, the amendment amends the Commentary to §2B1.1 to provide that, for purposes of the victims table in subsection (b)(2), an individual whose means of identification was used unlawfully or without authority is considered a "victim." The Commentary to §2B1.1 in Application Note 1 defines "victim" in pertinent part to mean "any person who sustained any part of the actual loss determined under subsection (b)(1)". An identity theft case may involve an individual whose means of identification was taken and used but who was fully reimbursed by a third party (e.g., a bank or credit card company). Some courts have held that such an individual is not counted as a "victim" for purposes of the victims table at §2B1.1(b)(2). See United States v. Kennedy, 554 F.3d 415 (3d Cir. 2009) (discussing

various cases addressing this issue, including United States v. Armstead, 552 F.3d 769 (9th Cir. 2008); United States v. Abiodun, 536 F.3d 162 (2d Cir. 2008); United States v. Connor, 537 F.3d 480 (5th Cir. 2008); United States v. Icaza, 492 F.3d 967 (8th Cir. 2007); United States v. Lee, 427 F.3d 881 (11th Cir. 2005); and United States v. Yagar, 404 F.3d 967 (6th Cir. 2005)). The Commission determined that such an individual should be considered a "victim" for purposes of subsection (b)(2) because such an individual, even if fully reimbursed, must often spend significant time resolving credit problems and related issues, and such lost time may not be adequately accounted for in the loss calculations under the guidelines. The Commission received testimony that the incidence of data breach cases, in which large numbers of means of identification are compromised, is increasing. This new category of "victim" for purposes of subsection (b)(2) is appropriately limited, however, to cover only those individuals whose means of identification are actually used.

Third, the amendment makes two changes to Application Note 3(C) regarding the calculation of loss. The first change specifies that the estimate of loss may be based upon the fair market value of property that is copied. This change responds to concerns that the calculation of loss does not adequately account for a case in which an owner of proprietary information retains possession of such information, but the proprietary information is unlawfully copied. The amendment recognizes, for example, that a computer crime that does not deprive the owner of the information in the computer nonetheless may cause loss inasmuch as it reduces the value of the information. The amendment makes clear that in such a case the court may use the fair market value of the copied property to estimate loss. The second change adds a new provision to Application Note 3(C) specifying that, in a case involving proprietary information (e.g., trade secrets), the court may estimate loss using the cost of developing that information or the reduction in the value of that information that resulted from the offense. The new provision responds to concerns that the guidelines did not adequately explain how to estimate loss in a case involving proprietary information such as trade secrets.

Fourth, the amendment moves the definitions of "means of identification" and "personal information" to Application Note 1, and clarifies that for information to be considered "personal information," it must involve information of an identifiable individual.

Fifth, the amendment amends §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) to provide that an upward departure may be warranted in a case in which the offense involved personal information or means of identification of a substantial number of individuals. As a conforming change, in Application Note 4 the amendment adds definitions of "means of identification" and "personal information" that are identical to the definitions of those terms in §2B1.1. The departure provision responds to concerns that the guideline may not adequately account for the rare wiretapping offense that involves a substantial number of victims.

Sixth, the amendment clarifies Application Note 2(B) of §3B1.3 (Abuse of Position of Trust or Use of Special Skill). The first sentence of Application Note 2(B) specifies that an adjustment under §3B1.3 shall apply to a defendant who exceeds or abuses his or her authority to "obtain" or "use" a means of identification. The second sentence then provides, as an example of such a defendant, an employee of a state motor vehicle department who exceeds or abuses his or her authority by "issuing" a means of identification. To make the two sentences consistent, the amendment clarifies the first sentence so that it expressly

applies not only to obtaining or using a means of identification, but also to issuing or transferring a means of identification.

Finally, the amendment makes several technical changes. In particular, it corrects several places in the Guidelines Manual that erroneously refer to subsection "(b)(15)(iii)" of §2B1.1; the reference should be to subsection (b)(15)(A)(iii) (redesignated by the amendment as (b)(16)(A)(iii)). Also, it conforms a statutory reference in §2B1.1(b)(15)(A)(ii) (redesignated by the amendment as (b)(16)(A)(ii)), which refers to 18 U.S.C. § 1030(a)(5)(A)(i); the Act redesignated this statute as 18 U.S.C. § 1030(a)(5)(A).

The Commission determined that certain factors listed in the directive are adequately accounted for by existing provisions in the Guidelines Manual. See, e.g., §§2B1.1(b)(1), (b)(9)(C), (b)(13), (b)(16) (as redesignated by the amendment); 2B2.3(b)(1), (b)(3); 2B3.2(b)(3)(B); 2H3.1(b)(1)(B); and 3B1.4 (Using a Minor To Commit a Crime)).

Effective Date: The effective date of this amendment is November 1, 2009.

727. **Amendment:** Section 2D1.1(a) is amended by redesignating subdivision (3) as subdivision (5); and by inserting after subdivision (2) the following:

"(3) 30, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(4) 26, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or".

Section 2D1.1(c)(5) is amended by inserting "700,000 or more units of Schedule III Hydrocodone;" after the line referenced to "Schedule I or II Depressants".

Section 2D1.1(c)(6) is amended by inserting "At least 400,000 but less than 700,000 units of Schedule III Hydrocodone;" after the line referenced to "Schedule I or II Depressants".

Section 2D1.1(c)(7) is amended by inserting "At least 100,000 but less than 400,000 units of Schedule III Hydrocodone;" after the line referenced to "Schedule I or II Depressants".

Section 2D1.1(c)(8) is amended by inserting "At least 80,000 but less than 100,000 units of Schedule III Hydrocodone;" after the line referenced to "Schedule I or II Depressants".

Section 2D1.1(c)(9) is amended by inserting "At least 60,000 but less than 80,000 units of Schedule III Hydrocodone;" after the line referenced to "Schedule I or II Depressants".

Section 2D1.1(c)(10) is amended by inserting "At least 40,000 but less than 60,000 units of Schedule III Hydrocodone;" after the line referenced to "Schedule I or II Depressants"; and by inserting "or Hydrocodone" after "(except Ketamine".

Section 2D1.1(c)(11) is amended by inserting "At least 20,000 but less than 40,000 units of Schedule III Hydrocodone;" after the line referenced to "Schedule I or II Depressants"; and by inserting "or Hydrocodone" after "(except Ketamine".

Section 2D1.1(c)(12) is amended by inserting "At least 10,000 but less than 20,000 units of Schedule III Hydrocodone;" after the line referenced to "Schedule I or II Depressants"; and by inserting "or Hydrocodone" after "(except Ketamine".

Section 2D1.1(c)(13) is amended by inserting "At least 5,000 but less than 10,000 units of Schedule III Hydrocodone;" after the line referenced to "Schedule I or II Depressants"; and by inserting "or Hydrocodone" after "(except Ketamine".

Section 2D1.1(c)(14) is amended by inserting "At least 2,500 but less than 5,000 units of Schedule III Hydrocodone;" after the line referenced to "Schedule I or II Depressants"; and by inserting "or Hydrocodone" after "(except Ketamine".

Section 2D1.1(c)(15) is amended by inserting "At least 1,000 but less than 2,500 units of Schedule III Hydrocodone;" after the line referenced to "Schedule I or II Depressants"; and by inserting "or Hydrocodone" after "(except Ketamine".

Section 2D1.1(c)(16) is amended by inserting "At least 250 but less than 1,000 units of Schedule III Hydrocodone;" after the line referenced to "Schedule I or II Depressants"; and by inserting "or Hydrocodone" after "(except Ketamine".

Section 2D1.1(c)(17) is amended by inserting "Less than 250 units of Schedule III Hydrocodone;" after the line referenced to "Schedule I or II Depressants"; and by inserting "or Hydrocodone" after "(except Ketamine".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10(E) in the subdivision captioned "Schedule III Substances (except ketamine)" by inserting in the heading "and hydrocodone" after "(except ketamine"; and in the sentence that begins "***Provided" by inserting "(except ketamine and hydrocodone)" after "Schedule III substances".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10(E) by inserting after the subdivision captioned "Schedule III Substances (except ketamine)" the following subdivision:

"<u>Schedule III Hydrocodone</u>****

1 unit of Schedule III hydrocodone = 1 gm of marihuana

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

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10(E) in the subdivision captioned "Schedule IV Substances (except flunitrazepam)" by inserting an additional asterisk after "****" each place it appears.

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10(E) in the subdivision captioned "Schedule V Substances" by inserting an additional asterisk after "*****" each place it appears.

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10(E) in the subdivision captioned "List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)" by inserting an additional asterisk after "******" each place it appears.

Section 2D3.1 is amended in the heading by striking "Schedule I" and inserting "Scheduled".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 21 U.S.C. § 841(g) the following:

"21 U.S.C. § 841(h) 2D1.1".

Reason for Amendment: This amendment responds to the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub. L. 110–425 (the "Act").

The Act amended the Controlled Substances Act (21 U.S.C. § 801 et seq.) to create two new offenses involving controlled substances, increased the statutory maximum terms of imprisonment for all Schedule III and IV controlled substance offenses and for second and subsequent Schedule V controlled substance offenses, and added a sentencing enhancement for Schedule III controlled substance offenses in a case in which "death or serious bodily injury results from the use of such substance". The Act also included a directive to the Commission that states:

> The United States Sentencing Commission, in determining whether to amend, or establish new, guidelines or policy statements, to conform the Federal sentencing guidelines and policy statements to this Act and the amendments made by this Act, should not construe any change in the maximum penalty for a violation involving a controlled substance in a particular schedule as being the sole reason to amend, or establish a new, guideline or policy statement.

First, the amendment addresses the sentencing enhancement added by the Act, which applies when the offense involved a Schedule III controlled substance and death or serious bodily injury resulted from the use of such substance. The statutory enhancement provides a maximum term of imprisonment of 15 years, or 30 years if the violation is committed after a prior conviction for a felony drug offense. See 21 U.S.C. §§ 841(b)(1)(E), 960(b)(5). The amendment addresses the statutory enhancement by amending §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide two new alternative base offense levels at subsections (a)(3) and (a)(4) for offenses involving Schedule III controlled substances in which death or injury results that are comparable to the alternative base offense levels at subsections (a)(1) and (a)(2) for offenses involving Schedule I and II controlled substances in which death or injury results. To reflect the harms involved in these offenses and the criminal histories of repeat drug offenders, the alternative base offense levels are set at level 30 if the defendant committed the offense after one or more prior convictions for a similar offense and level 26 otherwise.

Second, the amendment modifies the Drug Quantity Table in §2D1.1 to increase the maximum base offense level for offenses involving Schedule III hydrocodone from level 20 to level 30, without modifying any other offense level. The amendment extends the Drug Quantity Table for Schedule III hydrocodone offenses to level 30 using the existing marihuana equivalency (i.e., 1 pill of Schedule III hydrocodone = 1 gram of marihuana). The Commission determined that a maximum base offense level of 30 is appropriate for Schedule III hydrocodone offenses because of data and testimony indicating a relatively high prevalence of misuse (when compared to other, non-marihuana drugs of abuse), an increasing number of emergency room visits involving this drug, and the very large volume of hydrocodone pills illicitly distributed, either over the Internet or in specialized pain clinics.

Finally, the amendment addresses the two new offenses created by the Act. The first new offense, at 21 U.S.C. § 841(h), prohibits the delivery, distribution, or dispensing of controlled substances over the Internet without a valid prescription. The applicable statutory maximum term of imprisonment depends on the controlled substance involved. The amendment amends Appendix A (Statutory Index) to reference 21 U.S.C. § 841(h) to §2D1.1 because distribution of a controlled substance is an element of the offense. That guideline also is appropriate because it includes an enhancement at subsection (b)(6) that provides a two-level increase in a case in which "a person distributes a controlled substance through mass-marketing by means of an interactive computer service" (e.g., sale of a controlled substance by means of the Internet).

The second new offense, at 21 U.S.C. § 843(c)(2)(A), prohibits the use of the Internet to advertise for sale a controlled substance and has a statutory maximum term of imprisonment of four years. Offenses under 21 U.S.C. § 843(c) already are referenced in Appendix A (Statutory Index) to §2D3.1 (Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy). The amendment modifies the title of that guideline to indicate that it covers any scheduled controlled substance.

Effective Date: The effective date of this amendment is November 1, 2009.

728. **Amendment:** Section 2D1.1(b)(2) is amended by striking "or" before "(B)"; and by inserting "a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C)" after "(B)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 8 in the paragraph that begins "Note, however" by striking "(B)" and inserting "(C)".

Chapter Two, Part X, Subpart 7 is amended in the heading by adding at the end "AND SUBMERSIBLE AND SEMI-SUBMERSIBLE VESSELS".

Chapter Two, Part X, Subpart 7 is amended by adding at the end the following guideline and accompanying commentary:

"§2X7.2. Submersible and Semi-Submersible Vessels

(a) Base Offense Level: 26

(b) Specific Offense Characteristic

(1) (Apply the greatest) If the offense involved—

(A) a failure to heave to when directed by law enforcement officers, increase by 2 levels;

(B) an attempt to sink the vessel, increase by 4 levels; or

(C) the sinking of the vessel, increase by 8 levels.

Commentary

Statutory Provision: 18 U.S.C. § 2285.

Application Note:

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

(A) The defendant engaged in a pattern of activity involving use of a submersible vessel or semi-submersible vessel described in 18 U.S.C. § 2285 to facilitate other felonies.

(B) The offense involved use of the vessel as part of an ongoing criminal organization or enterprise.

Background: This guideline implements the directive to the Commission in section 103 of Public Law 110–407.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 2284 the following:

"18 U.S.C. § 2285 2X7.2".

Reason for Amendment: This amendment responds to the Drug Trafficking Vessel Interdiction Act of 2008, Pub. L. 110–407 (the "Act"). The Act created a new offense at 18 U.S.C. § 2285 making it unlawful to operate, attempt or conspire to operate, or embark in an unflagged submersible or semi-submersible vessel in international waters with the intent to evade detection. Section 103 of the Act directed the Commission to amend the guidelines, or promulgate new guidelines, to provide adequate penalties for persons convicted of offenses under 18 U.S.C. § 2285 and included a list of circumstances for the Commission to consider.

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

Conspiracy) by expanding the scope of the specific offense characteristic at subsection (b)(2) to apply if a submersible or semi-submersible vessel was used in a drug importation offense. The Commission determined that a drug importation offense involving the use of a submersible or semi-submersible vessel poses similar risks and harms as a drug importation offense involving an unscheduled aircraft (which subsection (b)(2) already covers). The amendment also makes a conforming change to a reference in Application Note 8.

Second, the amendment creates a new guideline at §2X7.2 (Submersible and Semi-Submersible Vessels) for the new offense at 18 U.S.C. § 2285. The new guideline provides a base offense level of 26 and includes a tiered specific offense characteristic and upward departure provisions to address certain aggravating circumstances listed in the directive. Public testimony indicates that submersible and semi-submersible vessels to date have been used for the purpose of transporting drugs. Such conduct receives a minimum offense level of 26 under §2D1.1(b)(2), discussed above, regardless of the type or quantity of drug involved in the offense. The Commission determined that a base offense level of 26 in §2X7.2 for an offense under section 2285 would be appropriate to promote proportionality.

The specific offense characteristic in §2X7.2 provides a two-level enhancement for failing to heave to, a four-level enhancement for attempting to sink the vessel, and an eight-level enhancement for sinking the vessel; the greatest applicable enhancement applies. Offenses involving such conduct are more serious because they create greater risk of harm to the crew of the illegal vessel and the interdicting law enforcement personnel, particularly in a case in which the illegal vessel is sunk and its crew must be rescued. In addition, sinking the vessel destroys evidence of illegal activity. The upward departure provisions provide that an upward departure may be warranted if the defendant engaged in a pattern of activity involving the use of a submersible or semi-submersible vessel, or if the offense involved the use of the vessel as a part of an ongoing criminal organization or criminal enterprise.

Third, the amendment amends Appendix A (Statutory Index) to reference 18 U.S.C. § 2285 to §2X7.2.

Effective Date: The effective date of this amendment is November 1, 2009.

729. **Amendment:** Section 2A6.1(b) is amended by redesignating subdivision (5) as subdivision (6); by inserting after subdivision (4) the following:

> "(5) If the defendant (A) is convicted under 18 U.S.C. § 115, (B) made a public threatening communication, and (C) knew or should have known that the public threatening communication created a substantial risk of inciting others to violate 18 U.S.C. § 115, increase by 2 levels.";

and in subdivision (6), as redesignated by this amendment, by striking "and (4)" and inserting "(4), and (5)".

The Commentary to §2A6.1 captioned "Background" is amended by adding at the end the following:

" Subsection (b)(5) implements, in a broader form, the directive to the Commission in section 209 of the Court Security Improvement Act of 2007, Public Law 110–177.".

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 1513 by inserting "2A1.1, 2A1.2, 2A1.3, 2A2.1, 2A2.2, 2A2.3, 2B1.1," before "2J1.2".

Reason for Amendment: This amendment responds to the Court Security Improvement Act of 2007, Pub. L. 110–177 (the "Act"), and other related issues.

First, the amendment responds to the directive in section 209 of the Act, which required the Commission to review the guidelines applicable to threats punishable under 18 U.S.C. § 115 (Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member) that occur over the Internet, and determine "whether and by how much that circumstance should aggravate the punishment pursuant to section 994 of title 28, United States Code." The directive further required the Commission to consider the number of such threats made, the intended number of recipients of such threats, and whether the initial senders of such threats were acting in an individual capacity or as part of a larger group.

The amendment implements the directive by amending §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens) to provide a new two-level enhancement for a case in which the defendant is convicted under 18 U.S.C. § 115, made a public threatening communication, and knew or should have known that the public threatening communication created a substantial risk of inciting others to violate 18 U.S.C. § 115. The Commission determined that the policy concerns underlying the directive regarding threats occurring over the Internet apply equally to threats made public by other means (e.g., radio, television broadcast) and that the response to the directive therefore should be technology neutral. The threat guideline, §2A6.1, adequately accounts for offenses involving multiple threats and multiple victims through the existing specific offense characteristic at subsection (b)(2) and the upward departure provision in Application Note 4.

Second, the amendment amends Appendix A (Statutory Index) to add references for 18 U.S.C. § 1513 (Retaliating against a witness, victim, or an informant) to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), and 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), in addition to §2J1.2 (Obstruction of Justice). The additional references more adequately reflect the range of conduct covered by 18 U.S.C. § 1513, including killing or attempting to kill a witness, causing bodily injury to a witness, and damaging the tangible property of a witness. In addition, 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant), which covers a similar range of conduct, including killing or attempting to kill a witness and using physical force against a witness, is referenced to the same Chapter Two, Part A guidelines.

Effective Date: The effective date of this amendment is November 1, 2009.

730. Amendment: Section 2H4.1(a) is amended by striking "(Apply the greater)" after "Offense Level"; and by striking subdivision (2) as follows:

"(2) 18, if the defendant was convicted of an offense under 18 U.S.C. § 1592.",

and inserting the following:

"(2) 18, if (A) the defendant was convicted of an offense under 18 U.S.C. § 1592, or (B) the defendant was convicted of an offense under 18 U.S.C. § 1593A based on an act in violation of 18 U.S.C. § 1592.".

The Commentary to §2H4.1 captioned "Statutory Provisions" is amended by inserting ", 1593A" after "1592".

The Commentary to §2H4.1 captioned "Application Notes" is amended by adding at the end the following:

"4. In a case in which the defendant was convicted under 18 U.S.C. §§ 1589(b) or 1593A, a downward departure may be warranted if the defendant benefitted from participating in a venture described in those sections without knowing that (i.e., in reckless disregard of the fact that) the venture had engaged in the criminal activity described in those sections.".

Section 2L1.1(b) is amended by striking subdivision (8) as follows:

"(8) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (A) after the alien was smuggled into the United States; or (B) while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18.",

and inserting the following:

"(8) (Apply the greater):

(A) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18.

(B) If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by 2 levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by 6 levels.".

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 6 by inserting "(A)" after "(b)(8)".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1350 the following:

"18 U.S.C. § 1351 2B1.1";

and by inserting after the line referenced to 18 U.S.C. § 1592 the following:

"18 U.S.C. § 1593A 2H4.1".

Reason for Amendment: This amendment responds to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110–457 (the "Act"), which included a directive to the Commission and created two new offenses.

First, the amendment responds to the directive in section 222(g) of the Act. It directed the Commission to—

> review and, if appropriate, amend the sentencing guidelines and policy statements applicable to persons convicted of alien harboring to ensure conformity with the sentencing guidelines applicable to persons convicted of promoting a commercial sex act if–
>
> (1) the harboring was committed in furtherance of prostitution; and
>
> (2) the defendant to be sentenced is an organizer, leader, manager, or supervisor of the criminal activity.

The amendment amends §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) to provide an alternative prong to the enhancement at subsection (b)(8), which covers cases in which an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment. The new alternative prong, at subsection (b)(8)(B), applies in a case in which the defendant was convicted of alien harboring, the alien harboring was for the purpose of prostitution, and the defendant receives an adjustment under §3B1.1 (Aggravating Role). In such a case, a two-level increase applies, but if the alien engaging in the prostitution had not attained the age of 18 years, a six-level increase applies. Because this is an alternative enhancement, it does not apply if the enhancement for coercion at §2L1.1(b)(8)(A) is greater.

The amendment also amends Application Note 6 to provide that, while an adjustment under §3A1.3 (Restraint of Victim) does not apply in a case that receives an enhancement under §2L1.1(b)(8)(A), such an adjustment may apply in a case that receives an enhancement under §2L1.1(b)(8)(B).

Second, the amendment responds to a new offense created by the Act, 18 U.S.C. § 1351 (Fraud in foreign labor contracting). The new offense has a statutory maximum term of imprisonment of five years. Because this new offense has fraud as an element, the amendment references this new offense in Appendix A (Statutory Index) to §2B1.1

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

Third, the amendment responds to another new offense created by the Act, 18 U.S.C. § 1593A (Benefitting financially from peonage, slavery, and trafficking in persons). This new offense applies when a person has knowingly benefitted financially from participating in a venture that has engaged in a violation of 18 U.S.C. §§ 1581(a), 1592, or 1595(a), knowing or in reckless disregard of the fact that the venture has engaged in such violation. The amendment amends Appendix A (Statutory Index) to reference 18 U.S.C. § 1593A to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) because that guideline covers the relevant underlying statutes, 18 U.S.C. §§ 1581(a) and 1592. The amendment also amends §2H4.1 to provide that a defendant convicted of 18 U.S.C. § 1593A receives the same base offense level as if the defendant were convicted of committing the underlying violation. Accordingly, if the defendant was convicted under section 1593A under circumstances in which the defendant benefitted from participation in a venture that engaged in a violation of 18 U.S.C. § 1592, the defendant would receive the same base offense level, 18, as if the defendant had been convicted of 18 U.S.C. § 1592. If the defendant was convicted under section 1593A under circumstances in which the defendant benefitted from participation in a venture that engaged in a violation of 18 U.S.C. § 1581(a), the defendant would receive the same base offense level, 22, as if the defendant had been convicted of 18 U.S.C. § 1581(a).

The amendment also amends the Commentary to §2H4.1 to provide that a downward departure may be warranted in a case in which the defendant is convicted under 18 U.S.C. §§ 1589(b) or 1593A if the defendant benefitted from participating in a venture described in those sections in reckless disregard of the fact that the venture had engaged in the criminal activities described in those sections. This downward departure provision recognizes that a defendant who commits such an offense in reckless disregard of the fact that the venture engaged in such criminal activities may be less culpable than a defendant who acts with knowledge of that fact.

Finally, the amendment makes a technical change to §2H4.1(a) by striking the phrase "(Apply the greater)".

Effective Date: The effective date of this amendment is November 1, 2009.

731. **Amendment:** Section 2B5.1(b)(2)(B) is amended by inserting "(ii) genuine United States currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed;" after "paper;"; and by striking "or (ii)" and inserting "or (iii)".

The Commentary to §2B5.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "Definitions.—" the following:

> "'Counterfeit' refers to an instrument that has been falsely made, manufactured, or altered. For example, an instrument that has been falsely made or manufactured in its entirety is 'counterfeit', as is a genuine instrument that has been falsely altered

(such as a genuine $5 bill that has been altered to appear to be a genuine $100 bill).".

The Commentary to §2B5.1 captioned "Application Notes" is amended by striking Note 3 as follows:

"3. Inapplicability to Genuine but Fraudulently Altered Instruments.—'Counterfeit,' as used in this section, means an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety. Offenses involving genuine instruments that have been altered are covered under §2B1.1 (Theft, Property Destruction, and Fraud).";

and by redesignating Note 4 as Note 3.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 474A by striking "2B1.1,"; and in the line referenced to 18 U.S.C. § 476 by striking "2B1.1,".

Reason for Amendment: This amendment amends §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) to clarify guideline application issues regarding the sentencing of counterfeiting offenses involving "bleached notes." A bleached note is genuine United States currency stripped of its original image through the use of solvents or other chemicals and then reprinted to appear to be a note of higher denomination. The amendment responds to concerns expressed by federal judges and members of Congress regarding which guideline should apply to offenses involving bleached notes.

Courts in different circuits have resolved differently the question of whether an offense involving bleached notes should be sentenced under §2B5.1 or §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). Compare United States v. Schreckengost, 384 F.3d 922 (7th Cir. 2004) (holding that bleached notes should be sentenced under §2B1.1), and United States v. Inclema, 363 F.3d 1177 (11th Cir. 2004) (same), with United States v. Dison, 2008 WL 351935 (W.D. La. Feb. 8, 2008) (applying §2B5.1 in a case involving bleached notes), and United States v. Vice, 2008 WL 113970 (W.D. La. Jan. 3, 2008) (same).

The amendment resolves this issue by providing that an offense involving bleached notes is sentenced under §2B5.1. The amendment does so by deleting Application Note 3 and revising the definition of "counterfeit" to more closely parallel relevant counterfeiting statutes, including 18 U.S.C. §§ 471 (Obligations or securities of the United States) and 472 (Uttering counterfeit obligations or securities). It establishes a new definition at Application Note 1 providing that counterfeit "refers to an instrument that has been falsely made, manufactured, or altered." Under the new definition, altered instruments are treated as counterfeit and sentenced under §2B5.1. Technological advances in counterfeiting, such as bleaching notes, have rendered obsolete the previous distinction in the guidelines between an instrument falsely made or manufactured in its entirety and a genuine instrument that is altered.

The amendment also adds a prong to the enhancement at subsection (b)(2)(B) to cover a case in which the defendant controlled or possessed genuine United States currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed. Blank or partially blank bleached notes are similar to counterfeiting paper in how they are involved in counterfeiting offenses. Accordingly, this new prong ensures that an offender who controlled or possessed blank or partially blank bleached notes is subject to the same two-level enhancement as an offender who controlled or possessed "counterfeiting paper similar to a distinctive paper", as subsection (b)(2)(B)(i) already provides.

Finally, the amendment amends Appendix A (Statutory Index) by striking the reference to §2B1.1 for two offenses that do not involve elements of fraud. Specifically, the amendment deletes the reference to §2B1.1 for offenses under 18 U.S.C. §§ 474A (Deterrents to counterfeiting of obligations and securities) and 476 (Taking impressions of tools used for obligations or securities).

Effective Date: The effective date of this amendment is November 1, 2009.

732. **Amendment:** The Commentary to §2A3.2 captioned "Application Notes" is amended in Note 3(B) in the paragraph that begins "Undue Influence" by adding at the end "The voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring."; by inserting after the paragraph that begins "Undue Influence" the following:

> "However, subsection (b)(2)(B)(ii) does not apply in a case in which the only 'minor' (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.";

and in the paragraph that begins "In a case" by striking ", for purposes of subsection (b)(2)(B), that such participant unduly influenced the minor to engage in prohibited sexual conduct" and inserting "that subsection (b)(2)(B)(ii) applies".

The Commentary to §2A3.2 captioned "Background" is amended by striking "two-level" and inserting "four-level" each place it appears.

The Commentary to §2G1.3 captioned "Application Notes" is amended in Note 3(B) in the paragraph that begins "Undue Influence" by adding at the end "The voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring."; by inserting after the paragraph that begins "Undue Influence" the following:

> "However, subsection (b)(2)(B) does not apply in a case in which the only 'minor' (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.";

and in the paragraph that begins "In a case" by striking ", for purposes of subsection (b)(2)(B), that such participant unduly influenced the minor to engage in prohibited sexual conduct" and inserting "that subsection (b)(2)(B) applies".

Reason for Amendment: This amendment addresses a circuit conflict regarding application of the undue influence enhancement at subsection (b)(2)(B)(ii) of §2A3.2

(Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) and at subsection (b)(2)(B) of §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). The undue influence enhancement applies if "a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct." The Commentary to both guidelines states that in determining whether the undue influence enhancement applies, "the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior." The Commentary also provides for a rebuttable presumption of undue influence "[i]n a case in which a participant is at least 10 years older than the minor."

In both guidelines, the term "minor" is defined to include "an individual, whether fictitious or not, who a law enforcement officer represented to a participant . . . could be provided for the purposes of engaging in sexually explicit conduct" or "an undercover law enforcement officer who represented to a participant that the officer had not attained" the age of majority.

Three circuits have expressed different views on two issues: first, whether the undue influence enhancement can apply in a case involving attempted sexual conduct; and second, whether the undue influence enhancement can apply in a case in which the only minor involved is a law enforcement officer. Compare United States v. Root, 296 F.3d 1222, 1234 (11th Cir. 2002) (holding that the undue influence enhancement in §2A3.2 can apply in instances of attempted sexual conduct, including a case in which the only "victim" involved in the case is an undercover law enforcement officer), and United States v. Vance, 494 F.3d 985, 996 (11th Cir. 2007) (holding that the undue influence enhancement in §2G1.3 can apply in a case in which the minor is fictitious), with United States v. Mitchell, 353 F.3d 552, 554, 557 (7th Cir. 2003) (holding that the undue influence enhancement in §2A3.2 "cannot apply in the case of an attempt where the victim is an undercover police officer", and suggesting that it cannot apply in any case in which "the offender and victim have not engaged in illicit sexual conduct"), and United States v. Chriswell, 401 F.3d 459, 469 (6th Cir. 2005) (holding that the undue influence enhancement in §2A3.2 "is not applicable in cases where the victim is an undercover agent representing himself to be a child under the age of sixteen" but leaving open the possibility that it can apply in other instances of attempted sexual conduct).

The amendment resolves the first issue by providing that the undue influence enhancement can apply in a case involving attempted sexual conduct. Specifically, the amendment amends the Commentary in §§2A3.2 and 2G1.3 to provide that "[t]he voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring."

The amendment resolves the second issue by providing in the Commentary to §§2A3.2 and 2G1.3 that the undue influence enhancement does not apply in a case in which the only "minor" involved in the offense is an undercover law enforcement officer. The Commission determined that the undue influence enhancement should not apply in a case involving only an undercover law enforcement officer because, unlike other enhancements in the sex offense guidelines, the undue influence enhancement is properly focused on the effect of the defendant's actions on the minor's behavior.

The amendment also makes a stylistic change to the language in the Commentary of both §§2A3.2 and 2G1.3, and makes a technical change to the Background of §2A3.2.

Effective Date: The effective date of this amendment is November 1, 2009.

733. **Amendment:** Section 2B1.1(b)(6) is amended by striking "or" after "damage to,"; and by inserting "or trafficking in," after "destruction of,".

The Commentary to §2B1.1 captioned "Background" is amended in the paragraph that begins "Subsection (b)(6)" by inserting "and the directive to the Commission in section 3 of Public Law 110–384" after "105–101".

Section 2G2.1(b)(6) is amended by inserting "or for the purpose of transmitting such material live" after "explicit material".

The Commentary to §2G2.1 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "'Distribution' means" by inserting "transmission," after "production,"; and by inserting after the paragraph that begins "'Interactive computer service'" the following:

"'Material' includes a visual depiction, as defined in 18 U.S.C. § 2256.".

The Commentary to §2G2.1 captioned "Application Notes" is amended in Note 4 by inserting "or for the purpose of transmitting such material live" after "explicit material" each place it appears; and in subdivision (B) by striking "purpose" after "for such" and inserting "purposes".

Section 2G2.2(a)(1) is amended by striking "or" after "2252(a)(4),"; and by inserting ", or § 2252A(a)(7)" after "2252A(a)(5)".

Section 2G2.2(b)(6) is amended by inserting "or for accessing with intent to view the material," after "material,".

Section 2G2.2(c)(1) is amended by inserting "or for the purpose of transmitting a live visual depiction of such conduct" after "such conduct".

The Commentary to §2G2.2 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "'Distribution' means" by inserting "transmission," after "production,"; by inserting after the paragraph that begins "'Interactive computer service'" the following:

"'Material' includes a visual depiction, as defined in 18 U.S.C. § 2256."; and

in the paragraph that begins "'Sexual abuse or exploitation'" by inserting "accessing with intent to view," after "possession,".

The Commentary to §2G2.2 captioned "Application Notes" is amended in Note 2 by inserting "access with intent to view," after "possess,".

The Commentary to §2G2.2 captioned "Application Notes" is amended in Note 4(B)(ii) by striking "recording" and inserting "visual depiction" each place it appears.

The Commentary to §2G2.2 captioned "Application Notes" is amended in Note 5(A) by inserting "or for the purpose of transmitting live any visual depiction of such conduct" after "such conduct".

The Commentary to §2G2.2 captioned "Application Notes" is amended by redesignating Note 6 as Note 7; and by inserting after Note 5 the following:

> "6. Cases Involving Adapted or Modified Depictions.—If the offense involved material that is an adapted or modified depiction of an identifiable minor (e.g., a case in which the defendant is convicted under 18 U.S.C. § 2252A(a)(7)), the term 'material involving the sexual exploitation of a minor' includes such material.".

Chapter Two, Part H, Subpart 4 is amended in the heading by striking "AND" after "SERVITUDE,"; and by adding at the end ", AND CHILD SOLDIERS".

Section 2H4.1 is amended in the heading by striking "and" after "Servitude,"; and by adding at the end ", and Child Soldiers".

The Commentary to §2H4.1 captioned "Statutory Provisions" is amended by inserting ", 2442" before the period at the end.

The Commentary to §2H4.1 captioned "Application Notes" is amended in Note 1 by adding at the end the following:

> "'Peonage or involuntary servitude' includes forced labor, slavery, and recruitment or use of a child soldier.".

Chapter Two, Part N is amended in the heading by inserting "CONSUMER PRODUCTS," after "PRODUCTS,".

Chapter Two, Part N, Subpart 2 is amended in the heading by striking "AND" after "DRUGS,"; and by adding at the end ", AND CONSUMER PRODUCTS".

Section 2N2.1 is amended in the heading by striking "or" after "Cosmetic,"; and by adding at the end ", or Consumer Product".

Section 5B1.3(a) is amended in subdivision (2) by striking "(B) give notice to victims of the offense pursuant to 18 U.S.C. § 3555, or (C) reside, or refrain from residing, in a specified place or area," and inserting "(B) work in community service, or (C) both, unless the court has imposed a fine, or"; and by striking the paragraph that begins "Note: Section 3563(a)(2)" as follows:

> "Note: Section 3563(a)(2) of Title 18, United States Code, provides that, absent unusual circumstances, a defendant convicted of a felony shall abide by at least one of the conditions set forth in 18 U.S.C. § 3563(b)(2), (b)(3), and (b)(13). Before the

enactment of the Antiterrorism and Effective Death Penalty Act of 1996, those conditions were a fine ((b)(2)), an order of restitution ((b)(3)), and community service ((b)(13)). Whether or not the change was intended, the Act deleted the fine condition and renumbered the restitution and community service conditions in 18 U.S.C. § 3563(b), but failed to make a corresponding change in the referenced paragraphs under 18 U.S.C. § 3563(a)(2). Accordingly, the conditions now referenced are restitution ((b)(2)), notice to victims pursuant to 18 U.S.C. § 3555 ((b)(3)), and an order that the defendant reside, or refrain from residing, in a specified place or area ((b)(13)).".

. Section 5B1.3(e)(1) is amended by adding at the end "See §5F1.1 (Community Confinement).".

Section 5B1.3(e)(6) is amended by adding at the end "See §5F1.8 (Intermittent Confinement).".

Section 5C1.1(c)(2) is amended by striking the asterisk after "confinement".

Section 5C1.1(d)(2) is amended by striking the asterisk after "confinement".

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 3(C) in the first sentence by striking the asterisk after "confinement".

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 4(B) in the first sentence by striking the asterisk after "confinement".

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 6 by striking the asterisk after "confinement".

The Commentary to §5C1.1 captioned "Application Notes" is amended by striking the paragraph that begins "*Note:" and the paragraph that begins "However," as follows:

"*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result.

Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.".

Section 5D1.3(e)(1) is amended by striking the asterisk after "Confinement"; and by striking the paragraph that begins "*Note: Section 3583(d)" and the paragraph that begins "However," as follows:

"*Note: Section 3583(d) of title 18, United States Code, provides that '[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate.' Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.".

Section 5D1.3(e) is amended by adding at the end the following:

"(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See §5F1.8 (Intermittent Confinement).".

Section 5F1.1 is amended by striking the asterisk after "release."; and by striking the paragraph that begins "*Note: Section 3583(d)" and the paragraph that begins "However," as follows:

"*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate."

Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.".

Chapter Five, Part F is amended by adding at the end the following guideline and accompanying commentary:

"§5F1.8. Intermittent Confinement

Intermittent confinement may be imposed as a condition of probation during the first year of probation. See 18 U.S.C. § 3563(b)(10). It may be imposed as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See 18 U.S.C. § 3583(d).

Commentary

Application Note:

1. 'Intermittent confinement' means remaining in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release. See 18 U.S.C. § 3563(b)(10).".

Chapter Seven, Part A, Subpart 2(b) is amended in the paragraph that begins "With the exception" by striking the first sentence as follows:

"With the exception of residency in, or participation in the program of, a community corrections facility,* which is available only for a sentence of probation, the conditions of supervised release authorized by statute are the same as those for a sentence of probation.",

and inserting the following:

> "The conditions of supervised release authorized by statute are the same as those for a sentence of probation, except for intermittent confinement. (Intermittent confinement is available for a sentence of probation, but is available as a condition of supervised release only for a violation of a condition of supervised release.)";

and by striking the paragraph that begins "*Note: Section 3583(d)" and the paragraph that begins "However," as follows:

> "*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.
>
> However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.".

The Commentary to §7B1.3 captioned "Application Notes" is amended by striking Note 5 as follows:

> "5. Intermittent confinement is authorized only as a condition of probation during the first year of the term of probation. 18 U.S.C. § 3563(b)(10).*
>
> *Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C.

§ 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.",

and inserting the following:

"5. Intermittent confinement is authorized as a condition of probation during the first year of the term of probation. 18 U.S.C. § 3563(b)(10). Intermittent confinement is authorized as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See §5F1.8 (Intermittent Confinement).".

Section 8D1.3(b) is amended by striking ", (2) notice to victims of the offense pursuant to 18 U.S.C. § 3555, or (3) an order requiring the organization to reside, or refrain from residing, in a specified place or area," and inserting "or (2) community service, unless the court has imposed a fine, or";

and by striking the paragraph that begins "Note:" as follows:

"Note: Section 3563(a)(2) of Title 18, United States Code, provides that, absent unusual circumstances, a defendant convicted of a felony shall abide by at least one of the conditions set forth in 18 U.S.C. § 3563(b)(2), (b)(3), and (b)(13). Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, those conditions were a fine ((b)(2)), an order of restitution ((b)(3)), and community service ((b)(13)). Whether or not the change was intended, the Act deleted the fine condition and renumbered the restitution and community service conditions in 18 U.S.C. § 3563(b), but failed to make a corresponding change in the referenced paragraphs under 18 U.S.C. § 3563(a)(2). Accordingly, the conditions now referenced are restitution ((b)(2)), notice to victims pursuant to 18 U.S.C. § 3555 ((b)(3)), and an order that the defendant reside, or refrain from residing, in a specified place or area ((b)(13)).".

Appendix A (Statutory Index) is amended by inserting before the line referenced to 2 U.S.C. § 437g(d) the following:

"2 U.S.C. § 192	2J1.1, 2J1.5
2 U.S.C. § 390	2J1.1, 2J1.5";

by inserting after the line referenced to 7 U.S.C. § 87b the following:

"7 U.S.C. § 87f(e)	2J1.1, 2J1.5";

by inserting after the line referenced to 8 U.S.C. § 1375a(d)(3)(C),(d)(5)(B) the following:

"10 U.S.C. § 987(f)	2X5.2";

by inserting after the line referenced to 12 U.S.C. § 631 the following:

"12 U.S.C. § 1818(j)	2B1.1
12 U.S.C. § 1844(f)	2J1.1, 2J1.5
12 U.S.C. § 2273	2J1.1, 2J1.5
12 U.S.C. § 3108(b)(6)	2J1.1, 2J1.5
12 U.S.C. § 4636b	2B1.1
12 U.S.C. § 4641	2J1.1, 2J1.5";

by inserting after the line referenced to 15 U.S.C. § 78ff the following:

"15 U.S.C. § 78u(c)	2J1.1, 2J1.5
15 U.S.C. § 80a-41(c)	2J1.1, 2J1.5";

by inserting after the line referenced to 15 U.S.C. § 80b-6 the following:

"15 U.S.C. § 80b-9(c)	2J1.1, 2J1.5";

by inserting after the line referenced to 15 U.S.C. § 714m(c) the following:

"15 U.S.C. § 717m(d)	2J1.1, 2J1.5";

by inserting after the line referenced to 15 U.S.C. § 1176 the following:

"15 U.S.C. § 1192	2N2.1
15 U.S.C. § 1197(b)	2N2.1
15 U.S.C. § 1202(c)	2N2.1
15 U.S.C. § 1263	2N2.1";

by inserting after the line referenced to 15 U.S.C. § 1990c the following:

"15 U.S.C. § 2068	2N2.1";

by inserting after the line referenced to 16 U.S.C. § 773g the following:

"16 U.S.C. § 825f(c)	2J1.1, 2J1.5";

by inserting after the line referenced to 18 U.S.C. § 115(b)(4) the following:

"18 U.S.C. § 117	2A6.2";

in the line referenced to 18 U.S.C. § 2280 by inserting "2A6.1," after "2A4.1,";

in the line referenced to 18 U.S.C. § 2332a by inserting "2A6.1," before "2K1.4";

by inserting after the line referenced to 18 U.S.C. § 2425 the following:

"18 U.S.C. § 2442 2H4.1";

in the line referenced to 26 U.S.C. § 7210 by inserting ", 2J1.5" after "2J1.1";

by striking the line referenced to 33 U.S.C. § 506 as follows:

"33 U.S.C. § 506 2J1.1";

in the line referenced to 33 U.S.C. § 1227(b) by inserting ", 2J1.5" after "2J1.1";

in the line referenced to 42 U.S.C. § 3611(f) by inserting ", 2J1.5" after "2J1.1";

by inserting after the line referenced to 47 U.S.C. § 223(b)(1)(A) the following:

"47 U.S.C. § 409(m) 2J1.1, 2J1.5";

in the line referenced to 49 U.S.C. § 14909 by inserting ", 2J1.5" after "2J1.1";

in the line referenced to 49 U.S.C. § 16104 by inserting ", 2J1.5" after "2J1.1";

and by inserting after the line referenced to 50 U.S.C. § 783(c) the following:

"50 U.S.C. App. § 527(e) 2X5.2".

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

First, the amendment amends Appendix A (Statutory Index) to include offenses created by the Housing and Economic Recovery Act of 2008, Pub. L. 110–289, and other offenses similar to those offenses, as follows:

(1) The new offense at 12 U.S.C. § 4636b is referenced 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). The similar existing offense at 12 U.S.C. § 1818(j) is also referenced to §2B1.1. These offenses are similar to economic crimes and are best accounted for by §2B1.1.

(2) The new offense at 12 U.S.C. § 4641 is referenced to §2J1.1 (Contempt) and §2J1.5 (Failure to Appear by Material Witness); similar existing offenses (2 U.S.C. §§ 192, 390; 7 U.S.C. § 87f(e); 12 U.S.C. §§ 1844(f), 2273, 3108(b)(6); 15 U.S.C. §§

78u(c), 80a-41(c), 80b-9(c), 717m(d); 16 U.S.C. § 825f(c); 26 U.S.C. § 7210; 33 U.S.C. § 1227(b); 42 U.S.C. § 3611; 47 U.S.C. § 409(m); 49 U.S.C. §§ 14909, 16104) are also referenced to §2J1.1 and §2J1.5. Contempt offenses can involve a range of conduct. The Commission determined that referencing these offenses to both §2J1.1 and §2J1.5 will best account for the range of conduct involved. Another similar offense, 33 U.S.C. § 506, is deleted from Appendix A (Statutory Index) because it has been repealed.

Second, the amendment amends Appendix A (Statutory Index) to include offenses upgraded from misdemeanors to felonies by the Consumer Product Safety Improvement Act of 2008, Pub. L. 110–314. These offenses (15 U.S.C. §§ 1192, 1197(b), 1202(c), 1263, 2068) are referenced to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product). These offenses cover a range of conduct (from paperwork violations to making or selling a nonconforming product) and a range of mental states (from strict liability to knowing, willful, or intentional misconduct). The Commission determined that these offenses are similar to offenses referenced to §2N2.1, which has provisions to account for aggravating and mitigating circumstances that may be involved in such offenses. Technical and conforming changes are also made to indicate that §2N2.1 covers consumer product safety offenses.

Third, the amendment amends Appendix A (Statutory Index) to include an offense created by the Veterans' Benefits Improvement Act of 2008, Pub. L. 110–389. The new offense, 50 U.S.C. App. § 527(e), is a Class A misdemeanor and, accordingly, is referenced to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). The amendment also references 10 U.S.C. § 987(f), a similar Class A misdemeanor, to §2X5.2.

Fourth, the amendment amends Appendix A (Statutory Index) to include an offense created by the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162. The offense, 18 U.S.C. § 117, covers domestic assault by a person with two or more prior convictions for domestic assault offenses. It is similar to the offenses referenced to §2A6.2 (Stalking or Domestic Violence) and, therefore, is referenced to that guideline.

Fifth, the amendment amends Appendix A (Statutory Index) to include an offense created by the Child Soldiers Accountability Act of 2008, Pub. L. 110–340. The offense, 18 U.S.C. § 2442, is referenced to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade). The offenses currently indexed to §2H4.1 include five offenses that relate to illegal use of an individual's labor and have the same statutory maximum term of imprisonment as the new child soldiers offense (20 years imprisonment or, if death results, life). Likewise, §2H4.1 has provisions to account for aggravating and mitigating circumstances that may be involved in a child soldiers offense. Technical and conforming changes are also made to indicate that §2H4.1 applies to the new offense.

Sixth, the amendment makes changes throughout the Guidelines Manual to reflect the amendments made by the Judicial Administration and Technical Amendments Act of 2008, Pub. L. 110–406, to the probation and supervised release statutes (18 U.S.C. §§ 3563, 3583). The changes include a new guideline for intermittent confinement at §5F1.8 (Intermittent Confinement) that parallels the statutory language, as well as technical and conforming

changes. These changes conform the Guidelines Manual to reflect what Congress has provided.

Seventh, the amendment responds to the Let Our Veterans Rest in Peace Act of 2008, Pub. L. 110–384, which directed the Commission to review and, if appropriate, amend the guidelines to "provide adequate sentencing enhancements" for any offense involving "desecration, theft, or trafficking" in a veteran's grave marker. There is a specific offense characteristic at subsection (b)(6) of §2B1.1 for damage, destruction, or theft of a veteran's grave marker. The amendment amends this specific offense characteristic so that it also covers trafficking in a veteran's grave marker.

Eighth, the amendment makes changes in the child pornography guidelines, §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) and §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor), so that they reflect the amendments made to the child pornography statutes (18 U.S.C. §§ 2251 et seq.) by the Effective Child Pornography Prosecution Act of 2007, Pub. L. 110–358, and the PROTECT Our Children Act of 2008, Pub. L. 110–401. The changes relate primarily to cases in which child pornography is transmitted over the Internet. Under the amendment, where the guidelines refer to the purpose of producing a visual depiction, they will also refer to the purpose of transmitting a live visual depiction; where the guidelines refer to possessing material, they will also refer to accessing with intent to view the material. The amendment also amends the child pornography guidelines so that the term "distribution" includes "transmission", and the term "material" includes any visual depiction, as now defined by 18 U.S.C. § 2256 (i.e., to include data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format). These changes conform the child pornography guidelines to reflect what Congress has provided.

Ninth, the amendment amends Appendix A (Statutory Index) so that the threat guideline, §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), is included on the list of guidelines to which 18 U.S.C. § 2280 and § 2332a are referenced. A person may be charged and convicted of committing such an offense by threat. In such a case, §2A6.1 may be the most appropriate guideline.

Tenth, the amendment addresses subsection (a)(7) of 18 U.S.C. § 2252A, a new child pornography offense created by the PROTECT Our Children Act of 2008, Pub. L. 110–401. The offense makes it unlawful to knowingly produce with intent to distribute, or to knowingly distribute, "child pornography that is an adapted or modified depiction of an identifiable minor." A violator is subject to a maximum term of imprisonment of 15 years. This offense is already referenced in Appendix A (Statutory Index) to the child pornography distribution guideline, §2G2.2, by virtue of the fact that all offenses under section 2252A(a) are referenced to that guideline. The Commission determined that the distribution guideline is the appropriate guideline for this offense because distribution is a required element of this offense, in that the offender must either distribute the material or produce it with intent to distribute. The distribution guideline also has provisions to account for aggravating and

mitigating circumstances that may be involved in these offenses. The amendment provides a base offense level of 18 for this offense, which is four levels lower than the base offense level for other child pornography distribution offenses referenced to §2G2.2. The Commission determined that the lower base offense level was appropriate for this offense because, unlike for other child pornography distribution offenses, the process of creating the image does not involve the sexual exploitation of a child, and Congress provided a lower penalty structure for this offense (a maximum term of imprisonment of 15 years, and no mandatory minimum term of imprisonment) than for other child pornography distribution offenses (typically, a maximum term of imprisonment of 20 years and a mandatory minimum of 5 years). The lower base offense level also accounts for the fact that the enhancements at subsections (b)(3) (for distribution) and (b)(6) (for use of a computer) will likely apply in these cases. Finally, to ensure that §2G2.2 treats material involving an adapted or modified image in the same manner as it treats material involving any other form of child pornography, the amendment provides a new Application Note to §2G2.2 to clarify that, if the offense involved material that is an adapted or modified depiction of an identifiable minor, the term "material involving the sexual exploitation of a minor" includes such material.

Effective Date: The effective date of this amendment is November 1, 2009.

734. **Amendment:** The Commentary to §3C1.3 captioned "Application Note" is amended in Note 1 by striking "as adjusted" and inserting "including, as in any other case in which a Chapter Three adjustment applies (see §1B1.1 (Application Instructions)), the adjustment provided"; and by adding at the end "Similarly, if the applicable adjusted guideline range is 30-37 months and the court determines a 'total punishment' of 30 months is appropriate, a sentence of 24 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.".

Reason for Amendment: This amendment clarifies Application Note 1 in §3C1.3 (Commission of Offense While on Release). Section 3C1.3 (formerly §2J1.7, see Appendix C to the Guidelines Manual, Amendment 684) provides a three-level adjustment if the defendant is subject to the statutory enhancement at 18 U.S.C. § 3147—that is, if the defendant has committed the underlying offense while on release. Application Note 1 to §3C1.3 states that, in order to comply with the statute's requirement that a consecutive sentence be imposed, the sentencing court must "divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement."

The Second and Seventh Circuits have held that, according to the terms of Application Note 2 to §2J1.7 (now Application Note 1 to §3C1.3), a sentencing court cannot apportion to the underlying offense more than the maximum of the guideline range absent the three-level adjustment. See United States v. Confredo, 528 F.3d 143 (2d Cir. 2008); United States v. Stevens, 66 F.3d 431 (2d Cir. 1995); United States v. Wilson, 966 F.2d 243 (7th Cir. 1992).

The amendment clarifies that the court determines the applicable guideline range for a defendant who committed an offense while on release and is subject to the enhancement at 18 U.S.C. § 3147 as in any other case. Therefore, under ordinary guideline application principles, only one guideline range applies to such a defendant. See §1B1.1 (Application Instructions) (instructing the sentencing court to, in this order: (1) determine the offense

guideline applicable to the offense of conviction (the underlying offense); (2) determine the base offense level and specific offense characteristics, and follow other instructions in Chapter Two; (3) apply adjustments from Chapter Three; and, ultimately, (4) "[d]etermine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above"). At that point, the court determines an appropriate "total punishment" using that applicable guideline range, and then divides the total sentence between the underlying offense and the section 3147 enhancement as the court considers appropriate.

Effective Date: The effective date of this amendment is November 1, 2009.

735. **Amendment:** Section 2B5.3(b)(5) is amended by inserting "death or" after "risk of"; and by striking "13" and inserting "14" each place it appears.

Reason for Amendment: This amendment responds to the Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. 110–403, which added two sentencing enhancements to violations of 18 U.S.C. § 2320 (Trafficking in counterfeit goods or services). Under those sentencing enhancements, if the offender causes or attempts to cause serious bodily injury, the statutory maximum term of imprisonment is increased from 10 years to 20 years; if the offender causes or attempts to cause death, the statutory maximum is increased to any term of years (or to life).

The amendment amends §2B5.3 (Criminal Infringement of Copyright or Trademark) at subsection (b)(5) to clarify that the enhancement in that subsection, which applies when the offense involved the risk of serious bodily injury, also applies when the offense involved the risk of death. This brings the language of that enhancement back into parallel with the corresponding enhancement in subsection (b)(13) of §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The Commission envisioned, when it added the enhancement to §2B5.3, that paralleling the fraud guideline would promote proportionality. See Appendix C to the Guidelines Manual, Amendment 590 ("The Commission determined that this kind of aggravating conduct in connection with infringement cases should be treated under the guidelines in the same way it is treated in connection with fraud cases; therefore, this enhancement is consistent with an identical provision in the fraud guideline."). Accordingly, the amendment also increases the minimum offense level in §2B5.3(b)(5) from level 13 to level 14, bringing it back into parallel with the minimum offense level in §2B1.1(b)(13).

Effective Date: The effective date of this amendment is November 1, 2009.

736. **Amendment:** The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 3 by striking "(e)(6) (Inadmissibility of Pleas," and inserting "(f) (Admissibility or Inadmissibility of a Plea,".

The Commentary to §2G2.1 captioned "Statutory Provisions" is amended by inserting "(a)-(c), 2251(d)(1)(B)" after "2251".

The Commentary to §2G2.2 captioned "Statutory Provisions" is amended by inserting "(a)-

(b)" after "2252A".

The Commentary to §2G2.2 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "'Sexual abuse" by inserting "(a)-(c), § 2251(d)(1)(B)" after "2251".

The Commentary to §2G2.3 captioned "Background" is amended by striking "twenty" and inserting "thirty".

Section 2G3.1(c)(1) is amended by inserting "Soliciting," after "Shipping,"; and by striking "Traffic) or §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), as appropriate." and inserting "Traffic; Possessing Material Involving the Sexual Exploitation of a Minor).".

The Commentary to §2J1.1 captioned "Application Notes" is amended in Note 3 by striking "(7)" and inserting "(8)".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "Unlawfully possessing a listed" by striking "(d)" and inserting "(c)".

The Commentary to §5C1.2 captioned "Application Notes" is amended in Note 8 by striking "(c)(1), (3)" and inserting "(f), (i)".

The Commentary to §5D1.2 captioned "Background" is amended by striking "(b)" and inserting "(c)".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 2251(a),(b) the following:

"18 U.S.C. § 2251(c) 2G2.1";

in the line referenced to 18 U.S.C. § 2251(c)(1)(A) by striking "(c)" and inserting "(d)";

in the line referenced to 18 U.S.C. § 2251(c)(1)(B) by striking "(c)" and inserting "(d)";

in the line referenced to 18 U.S.C. § 2252A by inserting "(a), (b)" after "2252A";

by inserting before the line referenced to 18 U.S.C. § 2252B the following:

"18 U.S.C. § 2252A(g) 2G2.6";

and in the line referenced to 42 U.S.C. § 3611(f) by striking "(f)" and inserting "(c)".

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

The amendment addresses several cases in which the Guidelines Manual refers to a guideline, or to a statute or rule, but the reference has become incorrect or obsolete. First, it makes technical changes in §1B1.8 (Use of Certain Information) to address the fact that provisions that had been contained in subsection (e)(6) of Rule 11 of the Federal Rules of

Criminal Procedure are now contained in subsection (f) of that rule. Second, it makes a technical change in §2J1.1 (Contempt), Application Note 3, to address the fact that the provision that had been contained in subsection (b)(7)(C) of §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States)) is now contained in subsection (b)(8)(C) of that guideline. Third, it makes a technical change in §4B1.2 (Definitions of Terms Used in Section 4B1.1), Application Note 1, to address the fact that the offense that had been contained in subsection (d)(1) of 21 U.S.C. § 841 is now contained in subsection (c)(1) of that section. Fourth, it makes technical changes in §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), Application Note 8, to address the fact that subsections (c)(1) and (c)(3) of Rule 32 of the Federal Rules of Criminal Procedure are now contained in subsections (f) and (i) of that rule. Fifth, it makes a technical change to the Commentary in §5D1.2 (Term of Supervised Release) to address the fact that the provision that had been contained in subsection (b) of §5D1.2 is now contained in subsection (c) of that guideline. Sixth, it makes a technical change in Appendix A (Statutory Index) to address the fact that the offense that had been contained in subsection (f) of 42 U.S.C. § 3611 is now contained in subsection (c) of that section.

The amendment also resolves certain technical issues that have arisen in the Guidelines Manual with respect to child pornography offenses. First, it makes technical changes to the Commentary in §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) to more accurately indicate which offenses under 18 U.S.C. § 2251 are referenced to §2G2.1. Second, it makes technical changes to the Commentary in §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor) to address the fact that offenses under 18 U.S.C. § 2252A(g) are now covered by §2G2.6 (Child Exploitation Enterprises)(see Appendix C to the Guidelines Manual, Amendment 701), while offenses under section 2252A(a) and (b) continue to be covered by §2G2.2. Third, it makes a technical change to the Commentary in §2G2.3 (Selling or Buying of Children for Use in the Production of Pornography) to address the fact that the statutory minimum sentence for a defendant convicted under 18 U.S.C. § 2251A is now 30 years imprisonment. Fourth, it makes technical changes in subsection (c)(1) of §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names) to address the fact that §2G2.4 no longer exists, having been consolidated into §2G2.2 effective November 1, 2004 (see Appendix C to the Guidelines Manual, Amendment 664). Fifth, it makes a technical change in Appendix A (Statutory Index) to address the fact that the offenses that had been contained in subsections (c)(1)(A) and (c)(1)(B) of 18 U.S.C. § 2251 are now contained in subsections (d)(1)(A) and (d)(1)(B) of that section. In doing so, it also provides the appropriate reference for the offense that is now contained in subsection (c) of that section. Sixth, it makes a technical change in Appendix A (Statutory Index) to address the fact that offenses under section 2252A(g) are now covered by §2G2.6, while offenses under section 2252A(a) and (b) continue to be covered by §2G2.2.

Effective Date: The effective date of this amendment is November 1, 2009.

737. Amendment: The Commentary to §2A6.2 captioned "Application Notes" is amended in Note 4 in the second paragraph by striking "2" after "Note" and inserting "3".

The Commentary to §2B1.1 captioned "Application Notes", as amended by Amendment 726, is further amended in Note 1, in the paragraph that begins "'Personal information' means", by striking "(i)" and inserting "(A)"; by striking "(ii)" and inserting "(B)"; by striking "(iii)" and inserting "(C)"; by striking "(iv)" and inserting "(D)"; by striking "(v)" and inserting "(E)"; by striking "(vi)" and inserting "(F)"; and by striking "(vii)" and inserting "(G)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3(F)(iii) by striking "276a" and inserting "3142".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 4(C)(iii) by striking "his" and inserting "the addressee's".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 7(E) by striking "Enhancements" and inserting "Chapter Three Adjustments".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 8(C) by striking "Enhancement" and inserting "Chapter Three Adjustment".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 9 by striking the paragraph that begins "'Telecommunications service' has the meaning" as follows:

> "'Telecommunications service' has the meaning given that term in 18 U.S.C. § 1029(e)(9).";

and by inserting after the paragraph that begins "'Produce' includes manufacture" the following:

> "'Telecommunications service' has the meaning given that term in 18 U.S.C. § 1029(e)(9).".

The Commentary to §2B1.1 captioned "Application Notes", as amended by Amendment 726 is further amended in Note 14(A) by striking "this subsection" and inserting "subsection (b)(17)";

in the paragraph that begins "'Commodities law'" by striking "Commodities" before "Exchange" and inserting "Commodity"; by striking "Commodities" before "Futures" and inserting "Commodity";

in the paragraph that begins "'Commodity pool operator'" by striking "(4)" and inserting "(5)" each place it appears; by striking "Commodities" and inserting "Commodity";

in the paragraph that begins "'Commodity trading advisor'" by striking "(5)" and inserting "(6)" each place it appears; by striking "Commodities" and inserting "Commodity";

in the paragraph that begins "'Futures commission merchant'" by striking "Commodities"

and inserting "Commodity";

in the paragraph that begins "'Introducing broker'" by striking "Commodities" and inserting "Commodity";

in the paragraph that begins "'Investment adviser'" by inserting "(a)(11)" after "202";

in the paragraph that begins "'Person associated with a broker or dealer'" by striking "(48)" and inserting "(18)";

and in the paragraph that begins "'Person associated with an investment adviser'" by inserting "(a)(17)" after "202".

The Commentary to §2D1.6 captioned "Application Notes" is amended in Note 1 by inserting "a minimum offense level of 8 where the offense involves flunitrazepam (§2D1.1(c)(16));" after "(§2D1.1(c)(14));".

The Commentary to §2G1.1 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "'Commercial sex act'" by striking "(c)(1)" and inserting "(e)(3)".

The Commentary to §2G1.3 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "'Commercial sex act'" by striking "(c)(1)" and inserting "(e)(3)".

The Commentary to §2G2.1 captioned "Statutory Provisions", as amended by Amendment 736, is further amended by striking "(b)" and inserting "(a)".

The Commentary to §2H3.1 captioned "Application Notes", as amended by Amendment 726, is further amended in Note 4, in the paragraph that begins "'Personal information' means", by striking "(i)" and inserting "(A)"; by striking "(ii)" and inserting "(B)"; by striking "(iii)" and inserting "(C)"; by striking "(iv)" and inserting "(D)"; by striking "(v)" and inserting "(E)"; by striking "(vi)" and inserting "(F)"; and by striking "(vii)" and inserting "(G)".

The Commentary to §2H3.1 captioned "Application Notes" is amended in Note 5 by striking "(i)" and inserting "(A)"; and by striking "(ii)" and inserting "(B)".

The Commentary to §2J1.5 captioned "Statutory Provisions" is amended by striking "Provision" and inserting "Provisions"; and by striking "(2)" and inserting "(1)(B)".

The Commentary to §2J1.5 captioned "Application Notes" is amended in Note 2 by striking "this offense" and inserting "an offense under 18 U.S.C. § 3146(b)(1)(B)".

The Commentary to §2J1.5 captioned "Background" is amended by striking "This offense covered by this section" and inserting "The offense under 18 U.S.C. § 3146(b)(1)(B)".

The Commentary to §3B1.2 captioned "Application Notes" is amended in Note 6 by striking "(3)" and inserting "(5)".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the

Multiple-Count Rules" is amended in example 3 by striking "he" and inserting "the defendant"; and by striking "(8)" and inserting "(9)".

Appendix A (Statutory Index), as amended by Amendment 733, is further amended by striking the line that begins "50 U.S.C. App. § 527(e)";

and by inserting after the line that begins "50 U.S.C. App. § 462" the following:

"50 U.S.C. App. § 527(e) 2X5.2".

Reason for Amendment: This amendment makes certain technical and conforming changes to commentary.

First, it updates obsolete statutory and guideline references in §§2A6.2 (Stalking or Domestic Violence), Application Note 4; 2B1.1 (Theft, Property Destruction, and Fraud), Application Notes 3(F)(iii) and 14(A); 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), Application Note 1; 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), Application Note 1; 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), Statutory Provisions; 2J1.5 (Failure to Appear by Material Witness), Statutory Provisions; 3B1.2 (Mitigating Role), Application Note 6; and the Illustrations following 3D1.5 (Determining the Total Punishment).

Second, it makes clerical and stylistic changes to the Commentary to §2B1.1; the Commentary to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information); and the Illustrations following §3D1.5.

Third, it amends §2D1.6 (Use of Communication Facility in Committing Drug Offense; Attempt or Conspiracy), Application Note 1, to ensure that its description of the various minimum offense levels that apply to controlled substances under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) is more comprehensive (i.e., by including in that description the minimum offense level that applies to flunitrazepam).

Finally, it amends Appendix A (Statutory Index) to ensure that the line reference to 50 U.S.C. App. § 527(e) is placed in the appropriate order.

Effective Date: The effective date of this amendment is November 1, 2009.

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

(containing all guideline ranges having a minimum of at least ten but not more than twelve months); and Zone D (containing all guideline ranges having a minimum of fifteen months or more).

The Commentary to §5B1.1 captioned "Application Notes" is amended in Note 1(b) by striking "six" and inserting "nine"; and in Note 2 by striking "eight" and inserting "ten".

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 3 in the first paragraph by striking "six" and inserting "nine";

in Note 4 by striking "eight, nine, or ten months" and inserting "ten or twelve months"; by striking "8-14" and inserting "10-16" both places it appears; by striking "sentence of four" and inserting "sentence of five" both places it appears; by striking "four" before "months community" and inserting "five"; by striking "five" after "and a sentence of" and inserting "ten";

by striking Note 6 as follows:

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

and inserting the following:

> "6. There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.
>
> In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

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

in Note 7 by striking the last sentence as follows:

"Generally, such defendants have failed to reform despite the use of such alternatives.";

in Note 8 by striking "twelve" and inserting "15"; and by redesignating Note 8 as Note 9 and inserting after Note 7 the following:

"8. In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.".

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

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

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

comment and testimony, recent scholarly literature, current federal and state practices, and feedback in various forms from federal judges.

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

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

As a further reason for the zone expansion, Commission data indicate that courts often sentence offenders in Zone D with an applicable guideline range of 12-18 months to a term of imprisonment of 12 months and one day for the specific purpose of making such offenders eligible for credit for satisfactory behavior while in prison. See 18 U.S.C. § 3624(b). For such an offender, assuming the maximum "good time credit" is earned, the sentence effectively becomes approximately ten and one-half months. Given that prior to the amendment the highest guideline range in Zone C was 10-16 months, the Commission determined that offenders in Zone D with an applicable guideline range of 12-18 months, many of whom effectively serve a sentence at the lower end of the highest Zone C sentencing range, should be included in Zone C.

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

Under the application note as amended, the court may depart from the sentencing options authorized for Zone C (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B (under which all or most of

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

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

Effective Date: The effective date of this amendment is November 1, 2010.

739. **Amendment:** Chapter Five, Part H, is amended in the Introductory Commentary by striking the first paragraph as follows:

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

and inserting the following:

> " This Part addresses the relevance of certain specific offender characteristics in sentencing. The Sentencing Reform Act (the 'Act') contains several provisions regarding specific offender characteristics:
>
> > First, the Act directs the Commission to ensure that the guidelines and policy statements 'are entirely neutral' as to five characteristics – race, sex, national origin, creed, and socioeconomic status. See 28 U.S.C. § 994(d).
> >
> > Second, the Act directs the Commission to consider whether eleven specific offender characteristics, 'among others', have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the

extent that they do have relevance. See 28 U.S.C. § 994(d).

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

Fourth, the Act also directs the sentencing court, in determining the particular sentence to be imposed, to consider, among other factors, 'the history and characteristics of the defendant'. See 18 U.S.C. § 3553(a)(1).

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

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

Accordingly, the purpose of this Part is to provide sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner. Using such a framework in a uniform manner will help 'secure

nationwide consistency,' see Gall v. United States, 552 U.S. 38, 49 (2007), 'avoid unwarranted sentencing disparities,' see 28 U.S.C. § 991(b)(1)(B), 18 U.S.C. § 3553(a)(6), 'provide certainty and fairness,' see 28 U.S.C. § 991(b)(1)(B), and 'promote respect for the law,' see 18 U.S.C. § 3553(a)(2)(A).

This Part allocates specific offender characteristics into three general categories.

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

In the second category are specific offender characteristics that Congress directed the Commission to take into account in the guidelines only to the extent that they have relevance to sentencing. See 28 U.S.C. § 994(d). For some of these, the policy statements indicate that these characteristics may be relevant in determining whether a sentence outside the applicable guideline range is warranted (e.g., age; mental and emotional condition; physical condition). These characteristics may warrant a sentence outside the applicable guideline range if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. These specific offender characteristics also may be considered for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence.";

in the second paragraph by striking "The Commission has determined that certain circumstances" and inserting the following:

"In the third category are specific offender characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. See 28 U.S.C. § 994(e). The policy statements indicate that these characteristics";

by striking "or to the determination of" and inserting ", the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, or"; by striking "incidents" and inserting "aspects";

and by striking the last paragraph as follows:

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

and inserting the following:

> " As with the other provisions in this manual, these policy statements 'are evolutionary in nature'. See Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines); 28 U.S.C. § 994(o). The Commission expects, and the Sentencing Reform Act contemplates, that continuing research, experience, and analysis will result in modifications and revisions.
>
> The nature, extent, and significance of specific offender characteristics can involve a range of considerations. The Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as the Sentencing Reform Act contemplates. See, e.g., 28 U.S.C. § 995(a)(12)(A) (the Commission serves as a 'clearinghouse and information center' on federal sentencing). Among other things, this may include information on the use of specific offender characteristics, individually and in combination, in determining the sentence to be imposed (including, where available, information on rates of use, criteria for use, and reasons for use); the relationship, if any, between specific offender characteristics and (A) the 'forbidden factors' specified in 28 U.S.C. § 994(d) and (B) the 'discouraged factors' specified in 28 U.S.C. § 994(e); and the relationship, if any, between specific offender characteristics and the statutory purposes of sentencing.".

Section 5H1.1 is amended by striking the first sentence as follows:

> "Age (including youth) is not ordinarily relevant in determining whether a departure is warranted.",

and inserting the following:

> "Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.".

Section 5H1.3 is amended by striking the first paragraph as follows:

> "Mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted, except as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).",

and inserting the following:

> "Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. See also Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).
>
> In certain cases a downward departure may be appropriate to accomplish a specific

treatment purpose. See §5C1.1, Application Note 6.".

Section 5H1.4 is amended in the first paragraph by striking the first sentence as follows:

"Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a departure may be warranted.",

and inserting the following:

"Physical condition or appearance, including physique, may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.";

in the second sentence by striking "However, an" and inserting "An"; in the second paragraph by inserting "ordinarily" after "or abuse"; in the last sentence by striking "supervisory body" and inserting "probation office"; by inserting as the third paragraph the following:

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

in the fourth paragraph, as amended by this amendment, by striking "Similarly, where" and inserting "In a case in which".

Section 5H1.11 is amended by inserting as the first paragraph the following:

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

in the second paragraph, as amended by this amendment, by striking "Military, civic" and inserting "Civic".

Section 5K2.0(d)(1) is amended by striking "third and last sentences" and inserting "last sentence".

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

First, the amendment revises the introductory commentary to Chapter Five, Part H. As

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

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

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

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

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

Third, the amendment amends §5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works) to draw a distinction between military service and the other circumstances covered by that policy statement. As amended, the policy statement provides that military service "may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines". The Commission determined that applying this departure standard to consideration of military service is appropriate

because such service has been recognized as a traditional mitigating factor at sentencing. See, e.g., Porter v. McCollum, 130 S. Ct. 447, 455 (2009) ("Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines . . . .").

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

Effective Date: The effective date of this amendment is November 1, 2010.

740. **Amendment:** The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 7 by striking "Consideration" and inserting "Based on Seriousness of a Prior Conviction".

The Commentary to §2L1.2 captioned "Application Notes" is amended by adding at the end the following:

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

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.".

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

Several circuits have upheld departures based on cultural assimilation. See, e.g., United States v. Rodriguez-Montelongo, 263 F.3d 429, 433 (5th Cir. 2001); United States v. Sanchez-Valencia, 148 F.3d 1273, 1274 (11th Cir. 1998); United States v. Lipman, 133 F.3d 726, 730 (9th Cir. 1998). Other circuits have declined to rule on whether such a departure may be warranted. See, e.g., United States v. Galarza-Payan, 441 F.3d 885, 889 (10th Cir. 2006) ("We need not address that debate in the altered post-Booker landscape."); United

States v. Melendez-Torres, 420 F.3d 45, 51 n.3 (1st Cir. 2005); see also United States v. Ticas, 219 F. App'x 44, 45 (2d Cir. 2007) (acknowledging that the Second Circuit has never recognized cultural assimilation as a basis for a downward departure). Some circuits, though not foreclosing the possibility of cultural assimilation departures, have stated that district courts are within their discretion to deny such departures in light of a defendant's criminal past and society's increased interest in "keeping aliens who have committed crimes out of the United States following their deportation." United States v. Roche-Martinez, 467 F.3d 591, 595 (7th Cir. 2006); see also Galarza-Payan, supra, at 889-90 (stating that "in assessing the reasonableness of a sentence [] a particular defendant's cultural ties must be weighed against other factors such as (1) sentencing disparities among defendants with similar backgrounds and characteristics, and (2) the need for the sentence to reflect the seriousness of the crime and promote respect for the law").

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

Effective Date: The effective date of this amendment is November 1, 2010.

741. **Amendment:** Section 1B1.1 is amended by redesignating subdivisions (a) through (h) as (1) through (8), respectively; in subdivision (4) (as so redesignated) by striking "(a)" and inserting "(1)", and by striking "(c)" and inserting "(3)";

by striking the first paragraph as follows:

> "Except as specifically directed, the provisions of this manual are to be applied in the following order:",

and inserting the following:

> "(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (see 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:";

by redesignating subdivision (i) as subsection (b) and, in that subsection, by striking "Refer to" and inserting "The court shall then consider"; by striking "to" before "any"; and by adding at the end "See 18 U.S.C. § 3553(a)(5)."; and

by adding at the end the following:

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

The Commentary to §1B1.1 is amended by adding at the end the following:

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

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

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

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

Most circuits agree on a three-step approach, including the consideration of departure provisions in the Guidelines Manual, in determining the sentence to be imposed. See United States v. Dixon, 449 F.3d 194, 203-04 (1st Cir. 2006) (court must consider "any applicable departures"); United States v. Selioutsky, 409 F.3d 114, 118 (2d Cir. 2005) (court must consider "available departure authority"); United States v. Jackson, 467 F.3d 834, 838 (3d Cir. 2006) (same); United States v. Moreland, 437 F.3d 424, 433 (4th Cir. 2006) (departures "remain an important part of sentencing even after Booker"); United States v. Tzep-Mejia, 461 F.3d 522, 525 (5th Cir. 2006) ("Post-Booker case law recognizes three types of sentences under the new advisory sentencing regime: (1) a sentence within a properly calculated Guideline range; (2) a sentence that includes an upward or downward departure as allowed by the Guidelines, which sentence is also a Guideline sentence; or (3) a non-Guideline sentence which is either higher or lower than the relevant Guideline sentence." (internal footnote and citation omitted)); United States v. McBride, 434 F.3d 470,

476 (6th Cir. 2006) (district court "still required to consider . . . whether a Chapter 5 departure is appropriate"); United States v. Hawk Wing, 433 F.3d 622, 631 (8th Cir. 2006) ("the district court must decide if a traditional departure is appropriate", and after that must consider a variance (internal quotation omitted)); United States v. Robertson, 568 F.3d 1203, 1210 (10th Cir. 2009) (district courts must continue to apply departures); United States v. Jordi, 418 F.3d 1212, 1215 (11th Cir. 2005) (stating that "the application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered"). But see United States v. Johnson, 427 F.3d 423, 426 (7th Cir. 2006) (stating that departures are "obsolete").

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

Effective Date: The effective date of this amendment is November 1, 2010.

742. **Amendment:** Section 4A1.1 is amended by striking "items (a) through (f)" and inserting "subsections (a) through (e)"; in subsection (c) by striking "item" and inserting "subsection"; by striking subsection (e) as follows:

> "(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.";

and redesignating subsection (f) as (e); and in subsection (e) (as so redesignated) by striking "item" and inserting "subsection".

The Commentary to §4A1.1 captioned "Application Notes" is amended by striking "item" and inserting "subsection" each place it appears; by striking Note 5 as follows:

> "5. §4A1.1(e). Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) less than two years following release from confinement on a sentence counted under §4A1.1(a) or (b). This also applies if the defendant committed the instant offense while in imprisonment or escape status on such a sentence. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). However, if two points are added under §4A1.1(d), only one point is added under §4A1.1(e).";

and redesignating Note 6 as Note 5; and in Note 5 (as so redesignated) by striking "(f)" and

inserting "(e)" each place it appears.

The Commentary to §4A1.1 captioned "Background" is amended by striking "Subdivisions" and inserting "Subsections"; by striking "implements one measure of recency by adding" and inserting "adds"; and

by striking the paragraph that begins "Section 4A1.1(e)" as follows:

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

Section 4A1.2 is amended in subsection (a)(2) by striking "(f)" and inserting "(e)"; in subsection (k)(2) by striking subparagraph (A) as follows:

> "(A) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the points for §4A1.1(e) in respect to the recency of last release from confinement.";

and by striking "(B)"; in subsection (l) by striking "(f)" and inserting "(e)", and by striking "; §4A1.1(e) shall not apply"; in subsection (n) by striking "and (e)"; and in subsection (p) by striking "(f)" and inserting "(e)".

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 12(A) by striking "subdivision" and inserting "subsection".

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

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

As part of its review, the Commission undertook analyses to determine the extent to which recency points contribute to the ability of the criminal history score to predict the

defendant's risk of recidivism. See generally USSG Ch. 4, Pt. A, intro. comment ("To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered."). Recent research isolating the effect of §4A1.1(e) on the predictive ability of the criminal history score indicated that consideration of recency only minimally improves the predictive ability.

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

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

Effective Date: The effective date of this amendment is November 1, 2010.

743. **Amendment:** The Commentary to §2H1.1 captioned "Statutory Provisions" is amended by inserting "249," after "248,".

The Commentary to §2H1.1 captioned "Application Notes" is amended in Note 4 by inserting "gender identity," after "gender,".

Section 3A1.1(a) is amended by inserting "gender identity," after "gender,".

The Commentary to §3A1.1 captioned "Application Notes" is amended in Note 3 by inserting "gender identity," after "gender,"; and by adding after Note 4 the following:

> "5. For purposes of this guideline, 'gender identity' means actual or perceived gender-related characteristics. See 18 U.S.C. § 249(c)(4).".

The Commentary to §3A1.1 captioned "Background" is amended in the first paragraph by striking the following:

> "(i.e., a primary motivation for the offense was the race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of the victim)";

and by adding at the end of that paragraph the following:

> "In section 4703(a) of Public Law 111–84, Congress broadened the scope of that directive to include gender identity; to reflect that congressional action, the Commission has broadened the scope of this enhancement to include gender identity.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 247 the following:

"18 U.S.C. § 249 2H1.1";

and by inserting after the line referenced to 18 U.S.C. § 1369 the following:

"18 U.S.C. § 1389 2A2.2, 2A2.3, 2B1.1".

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

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

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

The second new offense, 18 U.S.C. § 1389 (Prohibition on attacks on United States servicemen on account of service), makes it unlawful to knowingly assault or batter a United States serviceman or an immediate family member of a United States serviceman, or to knowingly destroy or injure the property of such serviceman or immediate family member, on the account of the military service of that serviceman or the status of that individual as a United States serviceman. A person who violates 18 U.S.C. § 1389 is subject to a term of

imprisonment of not more than 2 years in the case of a simple assault, or damage of not more than $500, of not more than 5 years in the case of damage of more than $500, or of not less than 6 months nor more than 10 years in the case of a battery, or an assault resulting in bodily injury. The Commission determined that offenses under 18 U.S.C. § 1389 are similar to offenses involving assault or property damage that are already referenced to §§2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), and 2B1.1 (Theft, Property Destruction, and Fraud) and therefore amended Appendix A (Statutory Index) to refer the new offense to those guidelines.

Effective Date: The effective date of this amendment is November 1, 2010.

744. **Amendment:** Section 8B2.1(b)(4) is amended by striking "subdivision" and inserting "subparagraph" each place it appears.

The Commentary to §8B2.1 captioned "Application Notes" is amended in Note 2(D) by striking "subdivision" and inserting "subparagraph".

The Commentary to §8B2.1 captioned "Application Notes" is amended by redesignating Note 6 as Note 7, and by inserting after Note 5 the following:

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

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

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

and in Note 7, as redesignated by this amendment, by striking "subdivision" and inserting "subparagraph" each place it appears.

Section 8C2.5(f)(3) is amended in subparagraph (A) by striking "subdivision (B)" and inserting "subparagraphs (B) and (C)"; and by adding at the end the following:

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

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

directors);

(ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;

(iii) the organization promptly reported the offense to appropriate governmental authorities; and

(iv) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.".

The Commentary to §8C2.5 captioned "Application Notes" is amended in Note 10 in the second sentence by inserting "or (f)(3)(C)(iii)" after "subsection (f)(2)"; by redesignating Notes 11 through 14 as Notes 12 through 15, respectively; and by inserting after Note 10 the following:

"11. For purposes of subsection (f)(3)(C)(i), an individual has 'direct reporting obligations' to the governing authority or an appropriate subgroup thereof if the individual has express authority to communicate personally to the governing authority or appropriate subgroup thereof (A) promptly on any matter involving criminal conduct or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the compliance and ethics program.".

Section 8D1.4 is amended by striking subsections (b) and (c) as follows:

"(b) If probation is imposed under §8D1.1(a)(2), the following conditions may be appropriate to the extent they appear necessary to safeguard the organization's ability to pay any deferred portion of an order of restitution, fine, or assessment:

(1) The organization shall make periodic submissions to the court or probation officer, at intervals specified by the court, reporting on the organization's financial condition and results of business operations, and accounting for the disposition of all funds received.

(2) The organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

(3) The organization shall be required to notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major civil

litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

(4) The organization shall be required to make periodic payments, as specified by the court, in the following priority: (A) restitution; (B) fine; and (C) any other monetary sanction.

(c) If probation is ordered under §8D1.1(a)(3), (4), (5), or (6), the following conditions may be appropriate:

(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.

(2) Upon approval by the court of a program referred to in subdivision (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in subdivision (1). Such notice shall be in a form prescribed by the court.

(3) The organization shall make periodic reports to the court or probation officer, at intervals and in a form specified by the court, regarding the organization's progress in implementing the program referred to in subdivision (1). Among other things, such reports shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.

(4) In order to monitor whether the organization is following the program referred to in subdivision (1), the organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.",

and inserting the following:

"(b) If probation is imposed under §8D1.1, the following conditions may be appropriate:

(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance

and ethics program.

(2) Upon approval by the court of a program referred to in paragraph (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in paragraph (1). Such notice shall be in a form prescribed by the court.

(3) The organization shall make periodic submissions to the court or probation officer, at intervals specified by the court, (A) reporting on the organization's financial condition and results of business operations, and accounting for the disposition of all funds received, and (B) reporting on the organization's progress in implementing the program referred to in paragraph (1). Among other things, reports under subparagraph (B) shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.

(4) The organization shall notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

(5) The organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

(6) The organization shall make periodic payments, as specified by the court, in the following priority: (A) restitution; (B) fine; and (C) any other monetary sanction.".

The Commentary to §8D1.4 captioned "Application Note" is amended in Note 1 by striking "(a)(3) through (6)"; and by striking "(c)(3)" and inserting "(b)(3)".

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

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

conduct and (2) to prevent further similar criminal conduct.

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

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

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

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

The amendment also adds an application note that describes the "direct reporting obligations" necessary to meet the first criterion under §8C2.5(f)(3)(C). The application note provides that an individual has "direct reporting obligations" if the individual has express authority to communicate personally to the governing authority "promptly on any matter involving criminal conduct or potential criminal conduct" and "no less than annually on the implementation and effectiveness of the compliance and ethics program". The application note responds to public comment and testimony regarding the challenges operational compliance personnel may face when seeking to report criminal conduct to the governing authority of an organization and encourages compliance and ethics policies that

provide operational compliance personnel with access to the governing authority when necessary.

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

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

Effective Date: The effective date of this amendment is November 1, 2010.

745. **Amendment:** Section 2B1.1(c)(4) is amended by inserting "or a paleontological resource" after "resource"; and by inserting "or Paleontological Resources" after "Heritage Resources" each place it appears.

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "'National cemetery' means" the following:

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

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 14(A) by inserting "and 18 U.S.C. § 1348" after "7 U.S.C. § 1 et seq.)".

Section 2B1.5 is amended in the heading by inserting "or Paleontological Resources" after "Heritage Resources" each place it appears.

Section 2B1.5(b) is amended in each of paragraphs (1) and (2) by inserting "or paleontological resource" after "heritage resource"; and in paragraph (5) by inserting "or paleontological resources" after "heritage resources".

The Commentary to §2B1.5 captioned "Statutory Provisions" is amended by inserting "470aaa–5," after "16 U.S.C. §§".

The Commentary to §2B1.5 captioned "Application Notes" is amended in Note 1 by redesignating subparagraphs (A) through (G) as (i) through (vii), respectively; by striking "'Cultural Heritage Resource' Defined.—For purposes of this guideline, 'cultural heritage resource' means any of the following:" and inserting:

> "Definitions.—For purposes of this guideline:
>
> (A) 'Cultural heritage resource' means any of the following:";

by striking "(A)" before "has the meaning" and inserting "(I)"; by striking "(B)" before "includes" and inserting "(II)"; and by adding at the end the following:

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

The Commentary to §2B1.5 captioned "Application Notes" is amended in Note 2 by striking "Cultural Heritage" both places it appears; by striking "cultural heritage" each place it appears; and by inserting ", e.g.," after "See" each place it appears.

The Commentary to §2B1.5 captioned "Application Notes" is amended in Note 5(B) by striking "cultural heritage"; in Note 6(A) by inserting "or paleontological resources" after "resources", and by striking "cultural heritage" after "involving a" each place it appears; in Note 8 by striking "cultural heritage" each place it appears; and in Note 9 by inserting "or paleontological resources" after "resources" the first place it appears; and by inserting "or paleontological resources" after "resources)".

Section 2D1.11(e) is amended in subdivisions (1)-(10) by inserting the following list I chemicals in the appropriate place in alphabetical order by subdivision as follows:

(1) "1.3 KG or more of Iodine;",

(2) "At least 376.2 G but less than 1.3 KG of Iodine;",

(3) "At least 125.4 G but less than 376.2 G of Iodine;",

(4) "At least 87.8 G but less than 125.4 G of Iodine;",

(5) "At least 50.2 G but less than 87.8 G of Iodine;",

(6) "At least 12.5 G but less than 50.2 G of Iodine;",

(7) "At least 10 G but less than 12.5 G of Iodine;",

(8) "At least 7.5 G but less than 10 G of Iodine;",

(9) "At least 5 G but less than 7.5 G of Iodine;",

(10) "Less than 5 G of Iodine;"; and

in subdivisions (2)-(10), in list II chemicals, by striking the lines referenced to "Iodine", including the period, and in the lines referenced to "Toluene" by striking the semicolon and inserting a period.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 16 U.S.C. § 413 the following:

"16 U.S.C. § 470aaa–5 2B1.1, 2B1.5"; and

by inserting after the line referenced to 42 U.S.C. § 1396h(b)(2) the following:

"42 U.S.C. § 1396w–2 2H3.1".

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

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

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

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

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

increases the maximum base offense level for offenses involving iodine to level 30 and specifies the amount of iodine needed (1.3 kilograms) for base offense level 30 to apply.

Effective Date: The effective date of this amendment is November 1, 2010.

746. **Amendment:** The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 2 in the second paragraph by striking "(i)" and inserting "(A)"; and by striking "(ii)" and inserting "(B)"; in Note 6, in the first paragraph by striking "'is" and inserting "'was"; and by striking "was committed by the means set forth in" and inserting "involved conduct described in".

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 2 by striking "Probation Service" and inserting "probation office".

The Commentary to §1B1.9 captioned "Application Notes" is amended in Note 1 by inserting "or for which no imprisonment is authorized. See 18 U.S.C. § 3559" after "not more than five days".

The Commentary to §1B1.11 captioned "Application Notes" is amended in Note 2 by striking "Guideline" and inserting "Guidelines".

The Commentary to §1B1.13 captioned "Application Notes" is amended in Note 1 by striking "Subsection" and inserting "Subdivision".

The Commentary to §2A1.1 captioned "Application Notes" is amended in Note 1 by inserting ", see §2A4.1(c)(1)" after "occurs"; and by inserting ", see §2E1.3(a)(2)" after "racketeering".

The Commentary to §2A3.2 captioned "Application Notes" is amended in Note 5 by striking "kidnaping" and inserting "kidnapping" each place it appears.

The Commentary to §2A3.3 captioned "Application Notes" is amended in Note 1 by inserting "years" before "; (B)".

The Commentary to §2A3.5 captioned "Application Notes" is amended in Note 1 by striking "those terms in 42 U.S.C. § 16911(2), (3) and (4), respectively" and inserting "the terms 'tier I sex offender', 'tier II sex offender', and 'tier III sex offender', respectively, in 42 U.S.C. § 16911".

The Commentary to §2B1.4 captioned "Application Notes" is amended in Note 1 by striking "Subsection of".

The Commentary to §2B1.5 captioned "Application Notes" is amended in Note 1 by striking "299" and inserting "229"; and by striking "section 2(c) of Public Law 99–652 (40 U.S.C. § 1002(c))" and inserting "40 U.S.C. § 8902(a)(1)".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 2 by striking "(d)" and inserting "(D)".

The Commentary to §2B4.1 captioned "Background" is amended in the fourth paragraph by striking "was recently increased from two to" and inserting "is"; and by striking "Violations" and all that follows through "to the Medicaid program." as follows:

> "Violations of 42 U.S.C. §§ 1395nn(b)(1) and (b)(2), involve the offer or acceptance of a payment to refer an individual for services or items paid forunder the Medicare program. Similar provisions in 42 U.S.C. §§ 1396h(b)(1) and (b)(2) cover the offer or acceptance of a payment for referral to the Medicaid program.",

and inserting the following:

> "Violations of 42 U.S.C. § 1320a-7b involve the offer or acceptance of a payment to refer an individual for services or items paid for under a federal health care program (e.g., the Medicare and Medicaid programs).".

The Commentary to §2B6.1 captioned "Background" is amended by striking "§§ 511 and 553(a)(2)" and inserting "§ 511"; and by inserting "§ 553(a)(2) and" before "2321".

The Commentary to §2C1.1 captioned "Application Notes" is amended in Note 3 by striking "(A)" after "(b)(2)".

The Commentary to §2C1.2 captioned "Application Notes" is amended in Note 4 by striking "or" before "Trust" and inserting "of".

Section 2D1.1(c) is amended in each of Notes (H) and (I) to the Drug Quantity Table by striking "(25)" and inserting "(30)".

The Commentary to §2D1.11 captioned "Application Notes" is amended in Note 6 by striking "or" after "1319(c),"; by striking § 5124,"; and by inserting after "9603(b)" the following: ", and 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material)".

The Commentary to §2D1.12 captioned "Application Notes" is amended in Note 3 by striking "or" after "1319(c),"; by striking § 5124,"; and by inserting after "9603(b)" the following: ", and 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material)".

Section 2D1.14(a)(1) is amended by striking "(3)" and inserting "(5)" both places it appears.

The Commentary to §2D2.1 captioned "Background" is amended in the last paragraph by striking "Section 6371 of the Anti-Drug Abuse Act of 1988" and inserting "21 U.S.C. § 844(a)" both places it appears.

The Commentary to §2G3.1 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "'Distribution' means" by inserting "transmission," after "production,".

Section 2H4.2(b)(1) is amended by striking "(i)" and inserting "(A)"; and by striking "(ii)" and inserting "(B)".

The Commentary to §2K1.3 captioned "Application Notes" is amended in Note 10 by striking "(1)" and inserting "(A)"; by striking "(2)" and inserting "(B)"; by striking "(3)" and inserting "(C)"; and by striking "(4)" and inserting "(D)".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 2 by inserting "That Is" after "Firearm"; and by inserting "that is" after "'semiautomatic firearm".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 10 in the first paragraph by striking "; §4A1.2, comment. (n.3)"; in Note 11 by striking "(1)" and inserting "(A)"; by striking "(2)" and inserting "(B)"; by striking "(3)" and inserting "(C)"; and by striking "(4)" and inserting "(D)".

The Commentary to §2K2.5 captioned "Application Notes" is amended in Note 2 by striking "(f)" and inserting "(g)"; and in Note 3 by inserting "See 18 U.S.C. § 924(a)(4)." after "other offense.".

The Commentary to §2L2.1 captioned "Statutory Provisions" is amended by striking "(b)," after "1325"; and by inserting ", (d)" after "(c)".

The Commentary to §2L2.2 captioned "Statutory Provisions" is amended by striking "(b)," after "1325"; and by inserting ", (d)" after "(c)".

The Commentary to §2M3.1 captioned "Application Notes" is amended in Note 1 by striking "12356" and inserting "12958 (50 U.S.C. § 435 note)".

The Commentary to §2M3.3 captioned "Statutory Provisions" is amended by striking "(b), (c)".

The Commentary to §2M3.9 captioned "Application Notes" is amended in Note 3 by inserting "See 50 U.S.C. § 421(d)." after "imprisonment.".

The Commentary to §2M6.1 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "'Foreign terrorist" by striking "1219" and inserting "1189"; and in the paragraph that begins "'Restricted person" by striking "(b)" and inserting "(d)".

The Commentary to §2Q1.2 captioned "Background" is amended by striking "last two" and inserting "fifth and sixth".

Section 2Q1.6(a)(1) is amended by striking "Substance" and inserting "Substances".

The Commentary to §2Q2.1 captioned "Application Notes" is amended in Note 3 by inserting ", Subtitle B," after "7 C.F.R.".

Chapter Two, Part T, Subpart 2, is amended in the Introductory Commentary by striking "section" and inserting "subpart"; and by inserting "of Chapter 51 of Subtitle E" after "Subchapter J".

The Commentary to §2X5.2 captioned "Statutory Provisions" is amended by striking "§ 1129(a),".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4 by redesignating subdivisions (a) through (k) as (A) through (K); and in Note 5 by redesignating subdivisions (a) through (e) as (A) through (E).

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 1 by redesignating subdivisions (a) through (h) as (A) through (H).

Section 5K2.17 is amended by striking "(A)" and inserting "(1)"; and by striking "(B)" and inserting "(2)".

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. § 13(f) by striking "(f)" and inserting "(e)";

in the line referenced to 8 U.S.C. § 1325(b) by striking "(b)" and inserting "(c)";

in the line referenced to 8 U.S.C. § 1325(c) by striking "(c)" and inserting "(d)";

by inserting after the line referenced to 18 U.S.C. § 247 the following:

"18 U.S.C. § 248 2H1.1";

by striking the line referenced to 18 U.S.C. § 1129(a);

by inserting after the line referenced to 42 U.S.C. § 1320a-7b the following:

"42 U.S.C. § 1320a-8b 2X5.1, 2X5.2";

in the line referenced to 50 U.S.C. § 783(b) by striking "(b)"; and

by striking the line referenced to 50 U.S.C. § 783(c).

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

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

(1) §1B1.3 (Relevant Conduct), Application Note 6, to ensure that two quotations contained in that note are accurate;

(2) §1B1.8 (Use of Certain Information), Application Note 2, to revise a reference to the "Probation Service";

(3) §1B1.9 (Class B or C Misdemeanors and Infractions), Application Note 1, to reflect that some infractions do not have any authorized term of imprisonment;

(4) §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), Application Note 2, to correct a typographical error;

(5) §2A1.1 (First Degree Murder), Application Note 1, to provide specific citations for the examples given;

(6) §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), Application Note 5, to correct typographical errors;

(7) §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), Application Note 1, to correct a typographical error;

(8) §2A3.5 (Failure to Register as a Sex Offender), Application Note 1, to ensure that the statutory definitions referred to in that note are accurately cited;

(9) §2B1.4 (Insider Trading), Application Note 1, to correct a typographical error;

(10) §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources), Application Note 1, to provide updated citations to statutes and regulations;

(11) §2B3.1 (Robbery), Application Note 2, to correct a typographical error;

(12) §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), Background, to provide an updated description and reference to the statute criminalizing bribery in connection with Medicare and Medicaid referrals;

(13) §2B6.1 (Altering or Removing Motor Vehicle Identification Numbers), Background, to update the statutory maximum term of imprisonment for violations of 18 U.S.C. § 553(a)(2);

(14) §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe), Application Note 3, to ensure that the subsection relating to "loss" is accurately cited;

(15) §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), Application Note 4, to correct a typographical error;

(16) §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking), in the Notes to the Drug Quantity Table, to provide updated citations to regulations;

(17) both §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical), Application Note 6, and §2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material), Application Note 3, to provide a more accurate statutory citation and description;

(18) §2D1.14 (Narco-Terrorism), subsection (a)(1), to provide an updated guideline reference;

(19) §2D2.1 (Unlawful Possession), Commentary, to provide updated statutory references;

(20) §2G3.1 (Importing, Mailing, or Transporting Obscene Matter), Application Note 1, to make the definition of "distribution" in that guideline consistent with the definition of "distribution" in the child pornography guidelines;

(21) §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), Application Notes 2 and 10, to ensure that a quotation contained in Note 2 is accurate and that a citation in Note 10 is accurate;

(22) §2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone), Application Notes 2 and 3, to provide updated statutory references;

(23) both §2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport), Statutory Provisions, and §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use), Statutory Provisions, to provide updated statutory references;

(24) §2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government), Application Note 1, to provide an updated reference to an executive order;

(25) §2M3.3 (Transmitting National Defense Information), to provide an updated statutory reference;

(26) §2M3.9 (Disclosure of Information Identifying a Covert Agent), Application Note 3, to provide an updated statutory reference;

(27) §2M6.1 (Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction), Application Note 1, to provide updated statutory references;

(28) §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides), Background, to provide updated guideline references;

(29) §2Q1.6 (Hazardous or Injurious Devices on Federal Lands), subsection (a)(1), to correct a typographical error;

(30) §2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), Application Note 3, to provide a more complete reference to regulations;

(31) Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes), Introductory Commentary, to provide a more complete statutory reference;

(32) §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)), to strike an erroneous statutory reference;

(33) Appendix A (Statutory Index), to provide updated statutory references and strike an erroneous statutory reference.

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

Effective Date: The effective date of this amendment is November 1, 2010.

747. **Amendment:** The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting "or Paleontological Resources" after "Resources" both places it appears.

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3 in the last paragraph by inserting "or Paleontological Resources" after "Resources"; by inserting "or paleontological resource" before ", loss"; by striking "cultural heritage" after "to that" and by striking "cultural heritage" after "of the".

The Commentary to §2K1.3 captioned "Application Notes" is amended in Note 9 by striking "; §4A1.2, comment. (n.3)".

The Commentary to §2P1.1 captioned "Application Notes" is amended in Note 5 by striking the comma after "escape)" and inserting "and"; and by striking ", and §4A1.1(e) (recency)".

The Commentary to §3A1.2 captioned "Application Notes" is amended in Note 3 by striking "§2B3.1(a)" and inserting "§2B3.1(b)(1)".

The Commentary to §3C1.1 captioned "Application Notes", as amended by Amendment 746, is amended in Note 4(F) by inserting "judge" after "magistrate"; and in Note 5(B) by striking

"4(g)" and inserting "4(G)".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 9 by striking "his" and inserting "the defendant's"; and by striking "he" and inserting "the defendant".

The Commentary to §3C1.2 captioned "Application Notes" is amended in Note 5 by striking "his" and inserting "the defendant's" and by striking "he" and inserting "the defendant".

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 3 by striking "1(a)" and inserting "1(A)".

The Commentary to §4B1.3 captioned "Application Notes" is amended in Note 2 by striking "(1)" and inserting "(A)"; by striking "(2)" and inserting "(B)"; and by striking "his" and inserting "the defendant's".

The Commentary to §4B1.3 captioned "Background" is amended by striking "he" and inserting "the defendant"; and by striking "his" and inserting "the defendant's".

The Commentary to §5B1.1 captioned "Application Notes", as amended by Amendment 738, is amended in Note 1 by redesignating subdivisions (a) and (b) as (A) and (B).

The Commentary to §5D1.1 captioned "Application Notes" is amended in Note 1 by redesignating subdivisions (1) through (5) as (A) through (E).

The Commentary to §5E1.5 captioned "Background" is amended by striking "1302c-9" and inserting "1320c-9".

The Commentary to §5G1.2 captioned "Application Notes" is amended in Note 1 in the second paragraph by striking "(1)" and inserting "(A)" and by striking "(2)" and inserting "(B)".

The Commentary to §5G1.3 captioned "Application Notes" is amended in Note 2(C) by striking "Judgement" and inserting "Judgment".

The Commentary to §7B1.4 captioned "Application Notes" is amended in Note 2 by striking "Adequacy" and inserting "Departures Based on Inadequacy"; and in Note 3 by striking "he" and inserting "the defendant".

The Commentary to §8A1.2 captioned "Application Notes" is amended in Note 2 by striking "and" after "Procedures" and inserting a comma; by inserting ", and Crime Victims' Rights" after "Agreements"; and in Note 3 by redesignating subdivisions (a) through (j) as subdivisions (A) through (J).

Reason for Amendment: This amendment makes certain technical and conforming changes to commentary in the Guidelines Manual.

First, the amendment makes certain technical and conforming changes in connection with the amendments that the Commission submitted to Congress on April 29, 2010. Those conforming changes are as follows:

(1) Amendment 745 expanded the scope of §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) to cover not only cultural heritage resources, but also paleontological resources. To reflect this expanded scope, conforming changes are made to §2B1.1 (Theft, Property Destruction, and Fraud), Application Notes 1 and 3.

(2) Amendment 746 made a technical change to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), Application Note 10, to correct an inaccurate citation. To address a parallel inaccurate citation in §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), Application Note 9, a parallel technical change is made there.

(3) Amendment 742 eliminated the use of "recency" points in calculating the criminal history score. A conforming change is made in §2P1.1 (Escape, Instigating or Assisting Escape), Application Note 5, to delete an obsolete reference to "recency."

Second, the amendment makes certain other stylistic and clerical changes to commentary in the Guidelines Manual. It amends §3A1.2 (Official Victim), Application Note 3, to provide an accurate reference to an enhancement in the robbery guideline. It amends §3C1.1 (Obstructing or Impeding the Administration of Justice), Application Note 4, to replace the obsolete term "magistrate" with the term "magistrate judge." It amends §5E1.5 (Costs of Prosecution), Background, to correct a typographical error in a statutory citation. It amends §7B1.4 (Term of Imprisonment), Application Note 2, and §8A1.2 (Application Instructions - Organizations), Application Note 2, to provide accurate references to guideline titles. Finally, it makes certain other stylistic changes to promote stylistic consistency and gender neutrality.

Effective Date: The effective date of this amendment is November 1, 2010.

748. Amendment: Section 2D1.1(a)(5) is amended by adding at the end the following:

"If the resulting offense level is greater than level 32 and the defendant receives the 4-level (‘minimal participant’) reduction in §3B1.2(a), decrease to level 32.".

Section 2D1.1(b) is amended by redesignating subdivisions (10) and (11) as subdivisions (13) and (16); by redesignating subdivisions (2) through (9) as subdivisions (3) through (10); by inserting after subdivision (1) the following:

"(2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels.";

by inserting after subdivision (10), as redesignated by this amendment, the following:

"(11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by 2 levels.

(12) If the defendant maintained a premises for the purpose of manufacturing or

distributing a controlled substance, increase by 2 levels.";

by inserting after subdivision (13), as redesignated by this amendment, the following:

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

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

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

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

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

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

increase by 2 levels.

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

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

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

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

decrease by 2 levels.".

Section 2D1.1(c) is amended in subdivision (1) in the third entry by striking "4.5" and inserting "8.4"; in subdivision (2) in the third entry by striking "1.5" and inserting "2.8"; by striking "4.5" and inserting "8.4"; in subdivision (3) in the third entry by striking "500" and inserting "840"; by striking "1.5" and inserting "2.8"; in subdivision (4) in the third entry by striking "150" and inserting "280"; by striking "500" and inserting "840"; in subdivision (5) in the third entry by striking "50" and inserting "196"; by striking "150" and inserting "280"; in subdivision (6) in the third entry by striking "35" and inserting "112"; by striking "50" and inserting "196"; in subdivision (7) in the third entry by striking "20" and inserting "28"; by striking "35" and inserting "112"; in subdivision (8) in the third entry by striking "5" and inserting "22.4"; by striking "20" and inserting "28"; in subdivision (9) in the third entry by striking "4" and inserting "16.8"; by striking "5" and inserting "22.4"; in subdivision (10) in the third entry by striking "3" and inserting "11.2"; by striking "4" and inserting "16.8"; in subdivision (11) in the third entry by striking "2" and inserting "5.6"; by striking "3" and inserting "11.2"; in subdivision (12) in the third entry by striking "1" and inserting "2.8"; by striking "2" and inserting "5.6"; in subdivision (13) in the third entry by striking "500 MG" and inserting "1.4 G"; by striking "1" and inserting "2.8"; and in subdivision (14) in the third entry by striking "500 MG" and inserting "1.4 G".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 3 by inserting:

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

(A) Application of Subsection (b)(1).—" before "Definitions";

by inserting "in subsection (b)(1)" after "weapon possession"; by striking "adjustment" and inserting "enhancement"; by striking "his" and inserting "the defendant's"; and by adding at the end the following:

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

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 8 in the last paragraph by striking "(2)" and inserting "(3)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10(B) in the first paragraph by striking "(Except Cocaine Base)" after "Differing Controlled Substances"; and by striking the sentence beginning "To determine".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10(C) by striking "(Except Cocaine Base)" after "Differing Controlled Substances"; and in subdivision (C)(iii) by striking "five kilograms of marihuana" and inserting "2 grams of cocaine base"; by inserting ", and the cocaine base is equivalent to 7.142 kilograms of marihuana" after "16 kilograms of marihuana"; and by striking "21" and inserting "23.142".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 by striking subdivision (D) as follows:

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

(i) In General.—Except as provided in subdivision (ii), if the offense involves cocaine base ("crack") and one or more other controlled substance, determine the combined offense level as provided by subdivision (B) of this note, and reduce the combined offense level by 2 levels.

(ii) Exceptions to 2-level Reduction.—The 2-level reduction provided in subdivision (i) shall not apply in a case in which:

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

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

(iii) Examples.—

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

(II) The case involves 5 gm of cocaine base and 6 kg of heroin. Under the Drug Equivalency Tables in subdivision (E) of this note, 5 gm of cocaine base converts to 100 kg of marihuana (5 gm x 20 kg = 100 kg), and 6 kg of heroin

converts to 6,000 kg of marihuana (6,000 gm x 1 kg = 6,000 kg), which, when added together results in a combined equivalent quantity of 6,100 kg of marihuana. Under the Drug Quantity Table, 6,100 kg of marihuana corresponds to a combined offense level of 34, which is reduced by two levels to 32. For the heroin, the 6,000 kg of marihuana corresponds to an offense level 34 under the Drug Quantity Table. Because the combined offense level for the two drug types after the 2-level reduction is less than the offense level for the heroin, the reduction does not apply and the combined offense level for the two drugs remains level 34.";

and by redesignating subdivision (E) as subdivision (D).

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10(D), as redesignated by this amendment, in the table captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*" in the line referenced to Cocaine Base by striking "20 kg" and inserting "3,571 gm".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 18 by striking "(2)" and inserting "(3)", and by striking "(4)" and inserting "(5)";

in Note 19 by striking "(10)" and inserting "(13)" in both places;

in Note 20 by striking "(10)" and inserting "(13)" in both places;

in Note 21 by striking "(11)" and inserting "(16)" each place it appears;

in Note 23 by striking "(6)" and inserting "(7)" each place it appears;

in Note 25 by striking "(7)" and inserting "(8)" in both places;

and in Note 26 by striking "(8)" and inserting "(9)" in both places.

The Commentary to §2D1.1 captioned "Application Notes" is amended by adding at the end the following:

"27. Application of Subsection (b)(11).—Subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant. Such conduct is covered by §3C1.1 (Obstructing or Impeding the Administration of Justice) and, if applicable, §2D1.1(b)(14)(D).

28. Application of Subsection (b)(12).—Subsection (b)(12) applies to a defendant who knowingly maintains a premises (i.e., a 'building, room, or enclosure,' see §2D1.8, comment. (backg'd.)) for the purpose of manufacturing or distributing a controlled substance.

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

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

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

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

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

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

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

The Commentary to §2D1.1 captioned "Background" is amended by inserting after the paragraph that begins "For marihuana plants" the following:

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

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

in the paragraph that begins "Specific Offense Characteristic" by striking "Specific Offense Characteristic (b)(2)" and inserting "Subsection (b)(3)";

by inserting after the paragraph that begins "The dosage weight" the following:

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

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

in the paragraph that begins "Subsection (b)(10)(A)" by striking "(10)" and inserting "(13)";

in the paragraph that begins "Subsections (b)(10)(C)(ii)" by striking "(10)" and inserting "(13)";

and by adding at the end the following:

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

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

Section 2D1.14(a)(1) is amended by striking "(11)" and inserting "(16)".

Section 2D2.1(b) is amended by striking "References" and inserting "Reference"; by striking subdivision (1) as follows:

"(1) If the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) as if the defendant had been convicted of possession of that mixture or substance with intent to distribute.";

and by redesignating subdivision (2) as subdivision (1).

The Commentary to §2D2.1 captioned "Background" is amended by striking "five" and inserting "three"; and by striking the last paragraph as follows:

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

Section 2K2.4 captioned "Application Notes" is amended in Note 4 by inserting after the first paragraph the following:

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

The Commentary to §3B1.4 captioned "Application Notes" is amended in Note 2 by adding at the end as the last sentence the following: "For example, if the defendant receives an enhancement under §2D1.1(b)(14)(B) for involving an individual less than 18 years of age in the offense, do not apply this adjustment.".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 7 by adding at the end the following new paragraph:

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

Reason for Amendment: This amendment implements the emergency directive in section 8 of the Fair Sentencing Act of 2010, Pub. L. 111–220 (the "Act"). The Act reduced the statutory penalties for cocaine base ("crack cocaine") offenses, eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine, and contained directives requiring the Commission to review and amend the guidelines to account for specified aggravating and mitigating circumstances in certain drug cases. The emergency amendment authority provided in section 8 of the Act required the Commission to promulgate the guidelines, policy statements, or amendments provided for in the Act, and to make such conforming changes to the guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law, not later than 90 days after the date of enactment of the Act.

First, the amendment amends the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to account for the changes in the statutory penalties made in section 2 of the Act. Section 2 of the Act reduced the statutory penalties for offenses involving manufacturing or trafficking in crack cocaine by increasing the quantity thresholds required to trigger a mandatory minimum term of imprisonment. The quantity threshold required to trigger the 5-year mandatory minimum term of imprisonment was increased from 5 grams to 28 grams, and the quantity threshold required to trigger the 10-year mandatory minimum term of imprisonment was increased from 50 grams to 280 grams. See 21 U.S.C. §§ 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3).

To account for these statutory changes, the amendment conforms the guideline penalty structure for crack cocaine offenses to the approach followed for other drugs, i.e., the base offense levels for crack cocaine are set in the Drug Quantity Table so that the statutory minimum penalties correspond to levels 26 and 32. See generally §2D1.1, comment. (backg'd.). Accordingly, using the new drug quantities established by the Act, offenses involving 28 grams or more of crack cocaine are assigned a base offense level of 26, offenses involving 280 grams or more of crack cocaine are assigned a base offense level of

32, and other offense levels are established by extrapolating upward and downward. Conforming to this approach ensures that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionally reflected throughout the Drug Quantity Table.

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

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

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

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

In addition, the amendment makes a conforming change to the commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to address cases in which the defendant is sentenced under both §2D1.1 (for a drug trafficking offense) and §2K2.4 (for an offense under 18 U.S.C. § 924(c)). In such a case, the sentence under §2K2.4 accounts for any weapon enhancement; therefore, in determining

the sentence under §2D1.1, the weapon enhancement in §2D1.1(b)(1) does not apply. See §2K2.4, comment. (n. 4). The amendment amends this commentary to similarly provide that, in a case in which the defendant is sentenced under both §§2D1.1 and 2K2.4, the new enhancement at §2D1.1(b)(2) also is accounted for by §2K2.4 and, therefore, does not apply.

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

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

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

The amendment also adds commentary in §2D1.1 at Application Note 28 providing that among the factors the court should consider in determining whether the defendant "maintained" the premises are (A) whether the defendant held a possessory interest (e.g., owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises. Application Note 28 also provides that manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses of the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

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

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

(ii) The defendant--
  (I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;
  (II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;
  (III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or
  (IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.

(iii) The defendant was involved in the importation into the United States of a controlled substance.

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

(v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood."

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

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

Similarly, Application Note 7 to §3C1.1 is amended to clarify that the increase of two levels under this section would not apply if the defendant receives an enhancement under §2D1.1(b)(14)(D).

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

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

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

Ninth, the amendment amends §2D2.1 (Unlawful Possession; Attempt or Conspiracy) to account for the changes in the statutory penalties for simple possession of crack cocaine made in section 3 of the Act. Section 3 of the Act amended 21 U.S.C. § 844(a) to eliminate the 5-year mandatory minimum term of imprisonment (and 20-year statutory maximum) for simple possession of more than 5 grams of crack cocaine (or, for certain repeat offenders, more than 1 gram of crack cocaine). Accordingly, the statutory penalty for simple possession of crack cocaine is now the same as for simple possession of most other controlled substances: for a first offender, a maximum term of imprisonment of one year; for repeat offenders, maximum terms of 2 years or 3 years, and minimum terms of 15 days or 90 days, depending on the prior convictions. See 21 U.S.C. § 844(a). To account for this statutory change, the amendment deletes the cross reference at §2D2.1(b)(1) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under the drug trafficking guideline, §2D1.1.

Effective Date: The effective date of this amendment is November 1, 2010.

749. Amendment: Section 2B1.1(b) is amended by redesignating subdivisions (8) through (17) as subdivisions (9) through (18); and by inserting after subdivision (7) the following:

"(8) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than $1,000,000, increase by 2 levels; (ii) more than $7,000,000, increase by 3 levels; or (iii) more than $20,000,000, increase by 4 levels.".

Section 2B1.1(b) is amended in subdivision (15), as redesignated by this amendment, by striking "(14)" and inserting "(15)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "'Equity securities'" the following:

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

and by inserting after the paragraph that begins "'Foreign instrumentality'" the following:

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

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3(F) by adding at the end the following:

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

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 7 by striking "(8)" and inserting "(9)" each place it appears;

in Note 8 by striking "(9)" and inserting "(10)" each place it appears;

in Note 9 by striking "(10)" and inserting "(11)" each place it appears;

in Note 10 by striking "(12)" and inserting "(13)" in both places;

in Note 11 and Note 12 by striking "(14)" and inserting "(15)" each place it appears;

in Note 13 by striking "(16)" and inserting "(17)" each place it appears and by striking "(14)" and inserting "(15)" in both places;

in Note 14 by striking "(b)(17)" and inserting "(b)(18)" each place it appears;

in Note 19 by striking "(16)" and inserting "(17)" and by striking "(11)" and inserting "(12)".

The Commentary to §2B1.1 captioned "Background" is amended by inserting after the paragraph that begins "Subsection (b)(6)" the following:

> "Subsection (b)(8) implements the directive to the Commission in section 10606 of

Public Law 111–148.".

The Commentary to §2B1.1 captioned "Background" is amended in the paragraph that begins "Subsection (b)(8)(D)" by striking "(8)" and inserting "(9)";

in the paragraph that begins "Subsection (b)(9)" by striking "(9)" and inserting "(10)";

in the paragraph that begins "Subsections (b)(10)(A)(i)" by striking "(10)" and inserting "(11)";

in the paragraph that begins "Subsection (b)(10)(C)" by striking "(10)" and inserting "(11)";

in the paragraph that begins "Subsection (b)(11)" by striking "(11)" and inserting "(12)";

in the paragraph that begins "Subsection (b)(13)(B)" by striking "(13)" and inserting "(14)";

in the paragraph that begins "Subsection (b)(14)(A)" by striking "(14)" and inserting "(15)";

in the paragraph that begins "Subsection (b)(14)(B)(i)" by striking "(14)" and inserting "(15)";

in the paragraph that begins "Subsection (b)(15)" by striking "(15)" and inserting "(16)"; and

in the paragraph that begins "Subsection (b)(16)" by striking "(16)" and inserting "(17)" in both places.

The Commentary to §3B1.2 captioned "Application Notes" is amended in Note 3(A) by adding at the end the following:

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

Appendix A (Statutory Index) is amended by inserting after the line referenced to 12 U.S.C. § 4641 the following:

"12 U.S.C. § 5382	2H3.1";

by inserting after the in the line referenced to 15 U.S.C. § 78u(c) the following:

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

in the line referenced to 29 U.S.C. § 1131 by inserting "(a)" after "1131"; and

by inserting after the line referenced to 29 U.S.C. § 1141 the following:

"29 U.S.C. § 1149 2B1.1".

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

Response to Directive

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

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

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

(i) a 2-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than $1,000,000 and less than $7,000,000;

(ii) a 3-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than $7,000,000 and less than $20,000,000;

(iii) a 4-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than $20,000,000; and

(iv) if appropriate, otherwise amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses involving Government health care programs.

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

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

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

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

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

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

New Offenses

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

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

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

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

Effective Date: The effective date of this amendment is November 1, 2011.

750. Amendment: Sections 2D1.1, 2D1.14, 2D2.1, 2K2.4, 3B1.4, and 3C1.1, effective November 1, 2010 (see Appendix C, Amendment 748), as set forth in Supplement to the 2010 Guidelines Manual (effective November 1, 2010); see also 75 FR 66188 (October 27, 2010), are repromulgated as follows:

PART A

The Drug Quantity Table in §2D1.1(c) and Note 10 of the Commentary to §2D1.1 captioned "Application Notes" are repromulgated without change.

PART B

All provisions of §2D1.1 not repromulgated by Part A of this amendment are repromulgated without change, except as follows:

The Commentary to §2D1.1 captioned "Application Notes" is amended by striking Note 28 as follows:

"28. Application of Subsection (b)(12).—Subsection (b)(12) applies to a defendant who knowingly maintains a premises (i.e., a 'building, room, or enclosure,' see §2D1.8, comment. (backg'd.)) for the purpose of manufacturing or distributing a controlled substance.

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

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

and inserting a new Note 28 as follows:

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

Among the factors the court should consider in determining whether the defendant 'maintained' the premises are (A) whether the defendant held a

possessory interest in (e.g., owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.

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

Sections 2D1.14, 2K2.4, 3B1.4, and 3C1.1 are repromulgated without change.

PART C

Section 2D2.1 is repromulgated without change.

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

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

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

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

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

To account for these statutory changes, the amendment conforms the guideline penalty structure for crack cocaine offenses to the approach followed for other drugs, i.e., the base offense levels for crack cocaine are set in the Drug Quantity Table so that the statutory minimum penalties correspond to levels 26 and 32, which was the approach used for crack cocaine offenses prior to November 1, 2007. See §2D1.1, comment. (backg'd.); USSG App. C, Amendment 706 (effective November 1, 2007). Accordingly, using the new drug quantities established by the Act, offenses involving 28 grams or more of crack cocaine are assigned a base offense level of 26, offenses involving 280 grams or more of crack cocaine are assigned a base offense level of 32, and other offense levels are established by extrapolating proportionally upward and downward on the Drug Quantity Table. Conforming the guideline penalty structure for crack cocaine offenses to the approach followed for all other drugs ensures that the quantity-based relationship established by statute between crack cocaine offenses and offenses involving all other drugs is consistently and proportionally reflected throughout the Drug Quantity Table at all drug quantities.

Estimating the likely future sentencing impact of the amendment to the Drug Quantity Table is difficult because the reductions in the statutory penalties for crack cocaine offenses may result in changes in prosecutorial and other practices. With that important caveat, the Commission estimates that approximately 63 percent of crack cocaine offenders sentenced after November 1, 2011, will receive a lower sentence as a result of the change to the Drug Quantity Table, with an average sentence decrease of approximately 26 percent. For example, under the Drug Quantity Table in effect from November 1, 2007 through October 31, 2010, an offense involving 5 grams of crack cocaine was assigned a base offense level of 24, which corresponds to a guideline sentencing range of 51 to 63 months. Under the Drug Quantity Table as amended, 5 grams of crack cocaine is assigned a base offense level of 16, which corresponds to a guideline sentencing range of 21 to 27 months. Similarly, under the Drug Quantity Table in effect from November 1, 2007 through October 31, 2010, an offense involving 50 grams of crack cocaine was assigned a base offense level of 30, which corresponds to a guideline sentencing range of 97 to121 months. Under the Drug Quantity Table as amended, 50 grams of crack cocaine is assigned a base offense level of 26, which corresponds to a guideline sentencing range of 63 to 78 months.

It is important to note that no crack cocaine offender will receive an increased sentence as

a result of the amendment to the Drug Quantity Table. As indicated above, not all crack cocaine offenders sentenced after November 1, 2011, will receive a lower sentence as a result of the change to the Drug Quantity Table. This is the case for a variety of reasons. Among the reasons, compared to the Drug Quantity Table in effect from November 1, 2007 through October 31, 2010, the amendment does not lower the base offense levels, and therefore does not lower the sentences, for offenses involving the following quantities of crack cocaine: less than 500 milligrams; at least 28 grams but less than 35 grams; at least 280 grams but less than 500 grams; at least 840 grams but less than 1.5 kilograms; at least 2.8 kilograms but less than 4.5 kilograms; and 8.5 kilograms or more. In addition, some offenders are sentenced at the statutory mandatory minimum and therefore cannot have their sentences lowered by an amendment to the guidelines. See §5G1.1(b) (Sentencing on a Single Count of Conviction). Other offenders are sentenced pursuant to §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal), which result in sentencing guideline ranges that are unaffected by a reduction in the Drug Quantity Table.

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

Part B. Aggravating and Mitigating Factors in Drug Trafficking Cases

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

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

Second, Part B amends §2D1.1 to create a new specific offense characteristic at subsection (b)(2) providing an enhancement of 2 levels if the defendant used violence, made a credible

threat to use violence, or directed the use of violence. The new specific offense characteristic responds to section 5 of the Act, which directed the Commission to "ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense."

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

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

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

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

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

The amendment also adds commentary in §2D1.1 at Application Note 28 providing that the enhancement applies to a defendant who knowingly maintains premises (i.e., a building,

room, or enclosure) for the purpose of maintaining or distributing a controlled substance. The new amendment differs from the temporary, emergency revisions in clarifying that distribution includes storage of a controlled substance for the purpose of distribution.

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

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

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

(ii) The defendant—
- (I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;
- (II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;
- (III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or
- (IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the

offense.

(iii) The defendant was involved in the importation into the United States of a controlled substance.

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

(v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood."

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

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

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

(A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;

(B) was to receive no monetary compensation from the illegal transaction; and

(C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense."

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

Part C. Simple Possession of Crack Cocaine

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

Effective Date: The effective date of this amendment is November 1, 2011.

751. **Amendment:** The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 8, in the first paragraph by adding at the end as the last sentence the following:

"Likewise, an adjustment under §3B1.3 ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility. See 21 U.S.C. § 822(g).".

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

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

Effective Date: The effective date of this amendment is November 1, 2011.

752. **Amendment:** The Commentary to §2J1.1 captioned "Application Notes" is amended in Note 2 by inserting "In such a case, do not apply §2B1.1(b)(8)(C) (pertaining to a violation of a prior, specific judicial order)." after "failed to pay.".

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

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

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

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

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

Effective Date: The effective date of this amendment is November 1, 2011.

753. **Amendment:** Section 2K2.1(a) is amended in subdivision (4)(B) by striking "or" before

"(II) is"; and by adding at the end the following:

> "or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;";

and in subdivision (6) by striking "or" before "(B)"; and by adding at the end the following:

> "or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;".

Section 2K2.1(b) is amended by striking subdivision (6) as follows:

> "(6) If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.",

and inserting a new subdivision (6) as follows:

> "(6) If the defendant—
>
> (A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or
>
> (B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,
>
> increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 13(D) by inserting "(B)" after "(b)(6)".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 14 by inserting "(B)" after "(b)(6)" each place it appears.

The Commentary to §2K2.1 captioned "Application Notes" is amended by adding at the end the following:

> "15. <u>Certain Convictions Under 18 U.S.C. §§ 922(a)(6), 922(d), and</u>

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

The Commentary to §2M5.1 captioned "Statutory Provisions" is amended by inserting "22 U.S.C. § 8512; 50 U.S.C. § 1705; " after "2332d;".

Section 2M5.2(a)(2) is amended by inserting "(A)" before "non-fully"; and by striking "ten" and inserting "two, (B) ammunition for non-fully automatic small arms, and the number of rounds did not exceed 500, or (C) both".

The Commentary to §2M5.2 captioned "Statutory Provisions" is amended by inserting ", 8512; 50 U.S.C. § 1705" after "2780".

The Commentary to §2M5.3 captioned "Statutory Provisions" is amended by inserting "22 U.S.C. § 8512;" before "50 U.S.C. "; and by striking "§ 1701,".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 22 U.S.C. § 4221 the following:

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

by striking the line referenced to 50 U.S.C. § 1701;

and in the line referenced to 50 U.S.C. § 1705 by inserting "2M5.1, 2M5.2," before "2M5.3".

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

The amendment amends the primary firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), to address the general concern of firearms crossing the border and the specific concern about straw purchasers. The amendment also amends the guideline for arms export violations, §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), to provide greater penalties for export offenses involving small arms and more guidance on export offenses

involving ammunition. Finally, the amendment revises the references in Appendix A (Statutory Index) for certain offenses, including providing a reference for a new offense created by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111–195.

Firearms Leaving the United States

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

Prior to the amendment, some courts have applied subsection (b)(6) to cases in which the defendant has transported or attempted to transport firearms across the border. These courts have concluded that because transporting a firearm outside the United States is generally a felony under federal law, such conduct may qualify as "another felony offense" for purposes of subsection (b)(6). See, e.g., United States v. Juarez, 626 F.3d 246 (5th Cir. 2010) (holding that, under the guideline as amended by the Commission in 2008, the district court did not plainly err in applying §2K2.1(b)(6) to a defendant who transferred firearms with reason to believe they would be taken across the border in a manner that would violate 22 U.S.C. § 2778(b) and (c), which prohibits, among other things, the unlicensed export of defense articles and punishes such violations by up to 20 years' imprisonment). However, for clarity and to promote consistency of application, the Commission created a separate, distinct prong (A) in subsection (b)(6) to cover this conduct.

Straw Purchasers

Second, the amendment amends §2K2.1 to address the concerns about straw purchasers. The amendment increases penalties for certain defendants convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) for making a false statement in connection with a firearms transaction. Specifically, the amendment increases penalties for a defendant who is convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. The base offense level for a defendant convicted under either of these statutes has been level 12, or level 18 if the offense involved

a firearm described in 26 U.S.C. § 5845(a). See §2K2.1(a)(5), (7). The amendment amends subsections (a)(4)(B) and (a)(6) to increase the base offense level for these defendants to level 14, or 20 if the offense involved either a semiautomatic firearm that is capable of accepting a large capacity magazine or a firearm described in 26 U.S.C. § 5845(a).

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

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

Export Offenses Involving Small Arms or Ammunition

Third, the amendment amends §2M5.2 to narrow the application of the alternative base offense level of 14 at subsection (a)(2). The alternative base offense level of 14 has applied "if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns) and the number of weapons did not exceed ten." See §2M5.2(a)(2). The amendment reduces the threshold number of small arms in subsection (a)(2) from ten to two. The Commission determined that export offenses involving more than two firearms are more serious and more likely to involve trafficking. Narrowing the application of subsection (a)(2) also brings §2M5.2 into greater conformity with §2K2.1 in how it accounts for the number of firearms involved in the offense. See §2K2.1(b)(1) (providing a tiered enhancement of 2 to 10 levels if the offense involved three or more firearms); §2K2.1, comment. (n.13) (specifying that the trafficking enhancement in §2K2.1(b)(5) applies if the offense involved two or more firearms and other requirements are also met).

The amendment also amends §2M5.2 to address cases in which the defendant possessed ammunition, either in a case involving ammunition only or in a case involving ammunition and small arms. There appears to be differences in how §2M5.2 is being applied by the

courts in such cases. Under the amendment, a defendant with ammunition will receive the alternative base offense level of 14 if the ammunition consisted of not more than 500 rounds of ammunition for small arms. Such ammunition typically is sold in quantities of not more than 500 rounds, depending on the manufacturer and the type of ammunition. The Commission determined that, as with export offenses involving more than two firearms, export offenses involving more than 500 rounds of ammunition are more serious and more likely to involve trafficking.

References in Appendix A (Statutory Index)

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

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

Effective Date: The effective date of this amendment is November 1, 2011.

754. **Amendment:** Section 2L1.2(b)(1)(A) is amended by inserting "if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points" after "16 levels".

Section 2L1.2(b)(1)(B) is amended by inserting "if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points" after "12 levels".

The Commentary to 2L1.2 captioned "Application Notes" is amended in Note 1 by adding at the end the following:

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

The Commentary to 2L1.2 captioned "Application Notes" is amended in Note 7 by inserting after "warranted. (B)" the following: "In a case in which the 12-level enhancement under subsection (b)(1)(A) or the 8-level enhancement in subsection (b)(1)(B) applies but that enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction, an upward departure may be warranted. (C)".

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

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

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

Under the amendment, defendants with predicate offenses that qualify for an enhancement under subsections (b)(1)(A) and (B) continue to receive an enhancement, regardless of whether the prior convictions receive criminal history points under Chapter Four. Other provisions in the guidelines exclude consideration of a predicate conviction because of the age of the predicate conviction. See, e.g., §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), comment. (n.9); §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), comment. (n.10); §4B1.2 (Definitions of Terms Used in Section 4B1.1), comment. (n.3). The amendment conforms §2L1.2(b)(1)(A) and (B) more closely to those provisions, but because of the seriousness of the predicate offenses covered by subsection (b)(1)(A) and (B) reduces, rather than eliminates, the 16- and 12-level enhancements. See, e.g., Amezcua-Vasquez, 567 F.3d at 1055 (acknowledging that it is "reasonable to take some account of an aggravated felony, no matter how stale, in assessing the seriousness of an unlawful reentry into the country"). See also id. at 1055 (in certain cases in which the prior conviction is "stale", an enhancement may be appropriate to address the "seriousness" of the prior conviction but need not be of the "same magnitude"); Chavez-Suarez, 597 F.3d at 1139 (same). For similar reasons, the amendment also adds an upward departure provision at Application Note 7 for cases in which the lower 12- or 8-level enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction. Conforming changes to the Commentary are also made.

Effective Date: The effective date of this amendment is November 1, 2011.

755. **Amendment:** The Commentary to §3B1.2 captioned "Application Notes" is amended in Note 3(C) by inserting "is based on the totality of the circumstances and" after "adjustment,"; and by striking the last sentence as follows:

> "As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.".

The Commentary to §3B1.2 captioned "Application Notes" is amended in Note 4 by striking the last sentence as follows:

> "It is intended that the downward adjustment for a minimal participant will be used infrequently".

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

Effective Date: The effective date of this amendment is November 1, 2011.

756. Amendment: Section 5D1.1 is amended by striking subsection (a) as follows:

"(a) The court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, or when required by statute.",

and inserting the following:

"(a) The court shall order a term of supervised release to follow imprisonment—

(1) when required by statute (see 18 U.S.C. § 3583(a)); or

(2) except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed.";

and in subsection (b) by adding at the end the following: "See 18 U.S.C. § 3583(a).".

Section 5D1.1 is amended by adding at the end the following:

"(c) The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.".

The Commentary to §5D1.1 captioned "Application Notes" is amended by striking Notes 1 and 2 as follows:

"1. Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment if a sentence of imprisonment of more than one year is imposed or if a term of supervised release is required by a specific statute. The court may depart from this guideline and not impose a term of supervised release if it determines that supervised release is neither required by statute nor required for any of the following reasons: (A) to protect the public welfare; (B) to enforce a financial condition; (C) to provide drug or alcohol treatment or testing; (D) to assist the reintegration of the defendant into the community; or (E) to accomplish any other sentencing purpose authorized by statute.

2. Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment of one year or less for any of the reasons set forth in Application Note 1.",

and inserting the following:

"1. Application of Subsection (a).—Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment when

supervised release is required by statute or, except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed. The court may depart from this guideline and not impose a term of supervised release if supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary.

2. Application of Subsection (b).—Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment in any other case, after considering the factors set forth in Note 3.

3. Factors to Be Considered.—

(A) Statutory Factors.—In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors:

(i) the nature and circumstances of the offense and the history and characteristics of the defendant;

(ii) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(iii) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(iv) the need to provide restitution to any victims of the offense.

See 18 U.S.C. § 3583(c).

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

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

4. Community Confinement or Home Detention Following Imprisonment.—A term of supervised release must be imposed if the court wishes to impose

a 'split sentence' under which the defendant serves a term of imprisonment followed by a period of community confinement or home detention pursuant to subsection (c)(2) or (d)(2) of §5C1.1 (Imposition of a Term of Imprisonment). In such a case, the period of community confinement or home detention is imposed as a condition of supervised release.

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

Section 5D1.2(a) is amended in subdivision (1) by striking "three" and inserting "two"; and by adding at the end the following: "See 18 U.S.C. § 3583(b)(1).".

Section 5D1.2(a) is amended in subdivision (2) by striking "two years" and inserting "one year"; and by adding at the end the following: "See 18 U.S.C. § 3583(b)(2).".

Section 5D1.2(a) is amended in subdivision (3) by adding at the end the following: "See 18 U.S.C. § 3583(b)(3).".

The Commentary to §5D1.2 captioned "Application Notes" is amended by adding at the end the following:

"4. Factors Considered.—The factors to be considered in determining the length of a term of supervised release are the same as the factors considered in determining whether to impose such a term. See 18 U.S.C. § 3583(c); Application Note 3 to §5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is long enough to address the purposes of imposing supervised release on the defendant.

5. Early Termination and Extension.—The court has authority to terminate or extend a term of supervised release. See 18 U.S.C. § 3583(e)(1), (2). The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.".

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

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

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

Finally, the amendment adds commentary in §§5D1.1 and 5D1.2 that provides guidance on the factors a court should consider in deciding whether to order a term of supervised release (when not required by statute) and, if so, how long such a term should be. Such factors

include the extent of an offender's criminal record, which research shows to be predictive of an offender's likelihood of complying with the conditions of supervision. See Federal Offenders Sentenced to Supervised Release at 66-67 (Figure 4) (noting that the rates of revocation for offenders increased steadily across the six Criminal History Categories (CHC), from 18.7% for offenders in CHC I to 59.8% in CHC VI).

Effective Date: The effective date of this amendment is November 1, 2011.

757. **Amendment:** Section 5K2.0(e) is amended by striking "written judgment and commitment order" and inserting "statement of reasons form".

The Commentary to §5K2.0 captioned "Application Notes" is amended in Note 3(C) in the second paragraph by striking "written judgment and commitment order" and inserting "statement of reasons form"; and in Note 5 by striking "written judgment and commitment order" and inserting "statement of reasons form".

Section 6B1.2(b)(2) is amended by striking "departs from" and inserting "is outside"; by striking "specifically set forth in writing", and inserting "set forth with specificity"; and by striking "or judgment and commitment order" and inserting "form".

Section 6B1.2(c)(2) is amended by striking "departs from" and inserting "is outside"; by striking "specifically set forth in writing" and inserting "set forth with specificity"; and by striking "or judgment and commitment order" and inserting "form".

The Commentary to §6B1.2 is amended in the second paragraph by striking "departs from" and inserting "is outside"; by striking "(i.e., that such departure is authorized by 18 U.S.C. § 3553(b)) and those reasons are specifically set forth in writing in the statement of reasons or the judgment and commitment order", and inserting" and those reasons are set forth with specificity in the statement of reasons form. See 18 U.S.C. § 3553(c)".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 2237(a)(2)(B) the following:

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

and by inserting after the line referenced to 33 U.S.C. § 1908 the following:

"33 U.S.C. § 3851	2Q1.2".

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

Plea Agreements

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

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

Coast Guard Authorization Act of 2010

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

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

> the operator of a vessel to knowingly fail to obey a law enforcement order to heave to, see 18 U.S.C. § 2237(a)(1);
>
> a person on board a vessel to forcibly interfere with a law enforcement boarding or other law enforcement action, or to resist arrest, see 18 U.S.C. § 2237(a)(2)(A); or
>
> a person on board a vessel to provide materially false information to a law enforcement officer during a boarding regarding the vessel's destination, origin, ownership, registration, nationality, cargo, or crew, see 18 U.S.C. § 2237(a)(2)(B).

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

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

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

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

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

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

> to §§2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) and 2A2.2 to account for when the section 2237 offense involves a violation of section 113, because section 113 offenses are referenced to those guidelines;
>
> to §§2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit

Conduct; Advertisement for Minors to Engage in Production) to account for when the section 2237 offense involve a violation of 18 U.S.C. § 1591 (which is within chapter 77), because offenses under section 1591 are referenced to those guidelines;

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

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

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

Effective Date: The effective date of this amendment is November 1, 2011.

758. **Amendment:** Chapter Two is amended in the introductory commentary by inserting "and Related Adjustments" after "(Obstruction".

The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 2(A) by inserting "and Related Adjustments" after "(Obstruction"; and in Note 3 by inserting "and Related Adjustments" after "(Obstruction".

The Commentary to §2J1.3 captioned "Application Notes" is amended in Note 2 by inserting "and Related Adjustments" after "(Obstruction"; and in Note 3 by inserting "and Related Adjustments" after "(Obstruction".

The Commentary to §2J1.6 captioned "Application Notes" is amended in Note 2 by inserting "and Related Adjustments" after "(Obstruction"; and in Note 4 by striking "Obstruction of Justice" and inserting "Obstructing or Impeding the Administration of Justice".

The Commentary to §2J1.9 captioned "Application Notes" is amended in Note 1 by inserting "and Related Adjustments" after "(Obstruction"; and in Note 2 by inserting "and Related Adjustments" after "(Obstruction".

Section 2Q2.1(c)(1) is amended by inserting "or paleontological resource" after "heritage resource"; and by inserting "or Paleontological Resources" after "Heritage Resources" in both places.

Section 3C1.1 is amended by striking "(A)" and inserting "(1)"; by striking "(B)" and inserting "(2)"; by striking "(i)" and inserting "(A)"; and by striking "(ii)" and inserting "(B)".

Section 4A1.2(k)(2) is amended by striking "(i)" and inserting "(A)"; by striking "(ii)" and inserting "(B)"; and by striking "(iii)" and inserting "(C)".

Section 4B1.1(b) is amended by redesignating (A) through (G) as (1) through (7).

The Commentary to §5E1.2 captioned "Application Notes" is amended in Note 6 by inserting "and Related Adjustments" after "(Obstruction".

The Commentary to §8A1.2 captioned "Application Notes" is amended in Note 2 by inserting "and Related Adjustments" after "(Obstruction".

Section 8B2.1(a) is amended by striking "(c)" and inserting "(b)".

The Commentary to §8C2.3 captioned "Application Notes" is amended in Note 2 by inserting "and Related Adjustments" after "(Obstruction".

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

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

(1) Amendment 744 made changes to the organizational guidelines in Chapter Eight, including a change that consolidated subsections (b) and (c) of §8D1.4 (Recommended Conditions of Probation — Organizations) into a single subsection (b). To reflect this consolidation, subsection (a) of §8B2.1 (Effective Compliance and Ethics Program) is changed so that it refers to the correct subsection of §8D1.4.

(2) Amendment 745 expanded the scope of §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) to cover not only cultural heritage resources but also paleontological resources. To reflect this expanded scope, a conforming change is made to subsection (c)(1) of §2Q2.1 (Offenses Involving Fish, Wildlife, and Plants).

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

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

Effective Date: The effective date of this amendment is November 1, 2011.

759. **Amendment:** Section 1B1.10(b) is amended in subdivision (2) by striking "Limitations" and inserting "Limitation"; in subdivision (2)(A) by striking "In General" and inserting "Limitation"; in subdivision (2)(B) by inserting "for Substantial Assistance" after "Exception"; by striking "original"; by inserting "pursuant to a government motion to reflect the defendant's substantial assistance to authorities" after "of sentencing"; and by striking the last sentence as follows:

> "However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.".

Section 1B1.10(c) is amended by striking "and"; and by inserting ", and 750 (parts A and C only)" before the period at the end.

The Commentary to §1B1.10 captioned "Application Notes" is amended in Note 1(A) in the first sentence by inserting "(i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance)" before the period; and in Note 1(B)(iii) by striking "original".

The Commentary to §1B1.10 captioned "Application Notes" is amended in Note 3 in the first paragraph by striking "original" in both places; by striking "shall not" and inserting "may" in both places; by inserting "as provided in subsection (b)(2)(A)," after "Specifically,"; by inserting "no" before "less than the minimum"; by striking "41 to 51" and inserting "70 to 87"; by striking "41" and inserting "70"; by striking "30 to 37" and inserting "51 to 63"; by striking "to a term less than 30 months" and inserting ", but shall not reduce it to a term less than 51 months"; and by striking the second paragraph as follows:

> "If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subsection (b)(1) may be appropriate. For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (C) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate.",

and inserting the following new paragraphs:

> "If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above

was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are §5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).";

and in the fifth paragraph, as redesignated by this amendment, by inserting "See subsection (b)(2)(C)." after "time served.".

The Commentary to §1B1.10 captioned "Application Notes" is amended by redesignating Note 4 as Note 5 and inserting after Note 3 the following:

"4. Application to Amendment 750 (Parts A and C Only).—As specified in subsection (c), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in §2D1.1 for crack cocaine and made related revisions to Application Note 10 to §2D1.1. Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.".

The Commentary to §1B1.10 captioned "Application Notes" is amended by adding at the end the following:

"6. Use of Policy Statement in Effect on Date of Reduction.—Consistent with subsection (a) of §1B1.11 (Use of Guidelines Manual in Effect on Date of

Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).".

The Commentary to §1B1.10 captioned "Background" is amended in the second paragraph by adding at the end as the last sentence the following:

"The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by United States v. Booker, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. See Dillon v. United States, 130 S. Ct. 2683 (2010).".

Reason for Amendment: This amendment amends §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement) in four ways. First, it expands the listing in §1B1.10(c) to implement the directive in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application. Second, it amends §1B1.10 to change the limitations that apply in cases in which the term of imprisonment was less than the minimum of the applicable guideline range at the time of sentencing. Third, it amends the commentary to §1B1.10 to address an application issue about what constitutes the "applicable guideline range" for purposes of §1B1.10. Fourth, it adds an application note to §1B1.10 to specify that the court shall use the version of §1B1.10 that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

First, the Commission has determined, under the applicable standards set forth in the background commentary to §1B1.10, that Amendment 750 (Parts A and C only) should be included in §1B1.10(c) as an amendment that may be considered for retroactive application. Part A amended the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) for crack cocaine and made related revisions to Application Note 10 to §2D1.1. Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.

Under the applicable standards set forth in the background commentary to §1B1.10, the Commission considers, among other factors, (1) the purpose of the amendment, (2) the magnitude of the change in the guideline range made by the amendment, and (3) the difficulty of applying the amendment retroactively. See §1B1.10, comment. (backg'd.). Applying those standards to Parts A and C of Amendment 750, the Commission determined that, among other factors:

(1) The purpose of Parts A and C of Amendment 750 was to account for the changes in the statutory penalties made by the Fair Sentencing Act of 2010, Pub. L. 111–220, 124 Stat. 2372, for offenses involving cocaine base ("crack cocaine"). See USSG App. C, Amend. 750 (Reason for Amendment). The Fair Sentencing Act of 2010 did not contain a provision making the statutory changes retroactive. The Act directed the Commission to promulgate guideline amendments implementing the Act. The guideline amendments implementing the Act have the effect of reducing the term of imprisonment recommended in the guidelines for certain defendants, and the Commission has a statutory duty to consider whether the

resulting guideline amendments should be made available for retroactive application. See 28 U.S.C. § 994(u) ("If the Commission reduces the term of imprisonment recommended in the guidelines . . . it shall specify in what circumstances and by what amount sentences of prisoners . . . may be reduced."). In carrying out its statutory duty to consider whether to give Amendment 750 retroactive effect, the Commission also considered the purpose of the underlying statutory changes made by the Act. Those statutory changes reflect congressional action consistent with the Commission's long-held position that the then-existing statutory penalty structure for crack cocaine "significantly undermines the various congressional objectives set forth in the Sentencing Reform Act and elsewhere" (see USSG App. C, Amend. 706 (Reason for Amendment)). The Fair Sentencing Act of 2010 specified in its statutory text that its purpose was to "restore fairness to Federal cocaine sentencing" and provide "cocaine sentencing disparity reduction". See 124 Stat. at 2372.

It is important to note that the inclusion of Amendment 750 (Parts A and C) in §1B1.10(c) only allows the guideline changes to be considered for retroactive application; it does not make any of the statutory changes in the Fair Sentencing Act of 2010 retroactive.

(2) The number of cases potentially involved is substantial, and the magnitude of the change in the guideline range is significant. As indicated in the Commission's analysis of cases potentially eligible for retroactive application of Parts A and C of Amendment 750, approximately 12,000 offenders would be eligible to seek a reduced sentence and the average sentence reduction would be approximately 23 percent.

(3) The administrative burdens of applying Parts A and C of Amendment 750 retroactively are manageable. This determination was informed by testimony at the Commission's June 1, 2011, public hearing on retroactivity and by other public comment received by the Commission on retroactivity. The Commission also considered the administrative burdens that were involved when its 2007 crack cocaine amendments were applied retroactively. See USSG App. C, Amendments 706 and 711 (amending the guidelines applicable to crack cocaine, effective November 1, 2007) and Amendment 713 (expanding the listing in §1B1.10(c) to include Amendments 706 and 711 as amendments that may be considered for retroactive application, effective March 3, 2008). The Commission received comment and testimony indicating that those burdens were manageable and that motions routinely were decided based on the filings, without the need for a hearing or the presence of the defendant, and did not constitute full resentencings. The Commission determined that applying Parts A and C of Amendment 750 would likewise be manageable, given that, among other things, significantly fewer cases would be involved. As indicated in the Commission's Preliminary Crack Cocaine Retroactivity Report (April 2011 Data) regarding retroactive application of the 2007 crack cocaine amendments, approximately 25,500 offenders have requested a sentence reduction pursuant to retroactive application of the 2007 crack cocaine amendments and approximately 16,500 of those requests have been granted.

In addition, public safety will be considered in every case because §1B1.10 requires the

court, in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction. See §1B1.10, comment. (n.1(B)(ii)).

Second, in light of public comment and testimony and recent case law, the amendment amends §1B1.10 to change the limitations that apply in cases in which the term of imprisonment was less than the minimum of the applicable guideline range at the time of sentencing. Under the amendment, the general limitation in subsection (b)(2)(A) continues to be that the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum of the amended guideline range. The amendment restricts the exception in subsection (b)(2)(B) to cases involving a government motion to reflect the defendant's substantial assistance to authorities (i.e., under §5K1.1 (Substantial Assistance to Authorities), 18 U.S.C. § 3553(e), or Fed. R. Crim. P. 35(b)). For those cases, a reduction comparably less than the amended guideline range may be appropriate.

The version of §1B1.10 currently in effect draws a different distinction for cases in which the term of imprisonment was less than the minimum of the applicable guideline range, one rule for downward departures (stating that "a reduction comparably less than the amended guideline range . . . may be appropriate") and another rule for variances (stating that "a further reduction generally would not be appropriate"). See §1B1.10(b)(2)(B). The Commission has received public comment and testimony indicating that this distinction has been difficult to apply and has prompted litigation. The Commission has determined that, in the specific context of §1B1.10, a single limitation applicable to both departures and variances furthers the need to avoid unwarranted sentencing disparities and avoids litigation in individual cases. The limitation that prohibits a reduction below the amended guideline range in such cases promotes conformity with the amended guideline range and avoids undue complexity and litigation.

Nonetheless, the Commission has determined that, in a case in which the term of imprisonment was below the guideline range pursuant to a government motion to reflect the defendant's substantial assistance to authorities (e.g., under §5K1.1), a reduction comparably less than the amended guideline range may be appropriate. Section 5K1.1 implements the directive to the Commission in its organic statute to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." See 28 U.S.C. § 994(n). For other provisions authorizing such a government motion, see 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect a defendant's substantial assistance); Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect a defendant's substantial assistance). The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide substantial assistance) are subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing.

Third, the amendment amends the commentary to §1B1.10 to address an application issue. Circuits have conflicting interpretations about when, if at all, the court applies a departure provision before determining the "applicable guideline range" for purposes of §1B1.10. The First, Second, and Fourth Circuits have held that, for §1B1.10 purposes, at least some departures (e.g., departures under §4A1.3 (Departures Based on Inadequacy of Criminal History Category) (Policy Statement)) are considered before determining the applicable guideline range, while the Sixth, Eighth, and Tenth Circuits have held that "the only applicable guideline range is the one established before any departures". See United States v. Guyton, 636 F.3d 316, 320 (7th Cir. 2011) (collecting and discussing cases; holding that departures under §5K1.1 are considered after determining the applicable guideline range but declining to address whether departures under §4A1.3 are considered before or after). Effective November 1, 2010, the Commission amended §1B1.1 (Application Instructions) to provide a three-step approach in determining the sentence to be imposed. See USSG App. C, Amend. 741 (Reason for Amendment). Under §1B1.1 as so amended, the court first determines the guideline range and then considers departures. Id. ("As amended, subsection (a) addresses how to apply the provisions in the Guidelines Manual to properly determine the kinds of sentence and the guideline range. Subsection (b) addresses the need to consider the policy statements and commentary to determine whether a departure is warranted."). Consistent with the three-step approach adopted by Amendment 741 and reflected in §1B1.1, the amendment adopts the approach of the Sixth, Eighth, and Tenth Circuits and amends Application Note 1 to clarify that the applicable guideline range referred to in §1B1.10 is the guideline range determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance.

Fourth, the amendment adds an application note to §1B1.10 to specify that, consistent with subsection (a) of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of §1B1.10 that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Finally, the amendment amends the commentary to §1B1.10 to refer to Dillon v. United States, 130 S. Ct. 2683 (2010). In Dillon, the Supreme Court concluded that proceedings under section 3582(c)(2) are not governed by United States v. Booker, 543 U.S. 220 (2005), and that §1B1.10 remains binding on courts in such proceedings.

Effective Date: The effective date of this amendment is November 1, 2011.

760. **Amendment**: The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 3(A) by striking ", and 2D2.1(b)(1)"; and inserting "and" before "2D1.12(c)(1)".

The Commentary to §2J1.1 captioned "Application Notes" is amended in each of Note 2 and Note 3 by striking "§2B1.1(b)(8)(C)" and inserting "§2B1.1(b)(9)(C)".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4 in the third paragraph by striking "§2K2.1(b)(6)" and inserting "§2K2.1(b)(6)(B)" in both places.

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in Note 3 by striking "§2B1.1(b)(9)" and inserting "§2B1.1(b)(10)".

Reason for Amendment: This amendment makes certain technical and conforming changes in connection with certain recently promulgated amendments. See 76 Fed. Reg. 24960 (May 3, 2011). The technical and conforming changes are as follows:

(1) Amendment 749 renumbered specific offense characteristics in §2B1.1 (Theft, Property Destruction, and Fraud), including the specific offense characteristic for violation of a prior, specific order (from (b)(8)(C) to (b)(9)(C)) and the specific offense characteristic for sophisticated means (from (b)(9) to (b)(10)). To reflect these renumberings, conforming changes are made to Application Notes 2 and 3 to §2J1.1 (Contempt) and to the Commentary following §3D1.5 (Determining the Total Punishment).

(2) Amendment 750 amended §2D2.1 (Unlawful Possession; Attempt or Conspiracy) to delete a cross-reference at subsection (b)(1). To reflect this deletion, a conforming change is made to Application Note 3(A) to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

(3) Amendment 753 renumbered the specific offense characteristic in §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) for using or possessing a firearm in connection with another felony offense from (b)(6) to (b)(6)(B). To reflect this renumbering, conforming changes are made to Application Note 4 to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes).

Effective Date: The effective date of this amendment is November 1, 2011.