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

This volume of Appendix C presents the 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.

For amendments to the guidelines, policy statements, and official commentary effective November 1, 1997, and earlier, *see* Appendix C, Volume I.

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

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

"(8) If the offense involved theft of property from a national cemetery, increase by 2 levels.".

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

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

The Commentary to §2B1.1 captioned "Background" is amended by adding at the end the following new paragraph:

" Subsection (b)(8) implements the instruction to the Commission in section 2 of Public Law 105–101.".

Section 2B1.3(b) is amended by adding at the end the following new subdivision:

"(4) If property of a national cemetery was damaged or destroyed, increase by 2 levels.".

The Commentary to §2B1.3 captioned "Application Notes" is amended in Note 1 by adding at the end the following new paragraph:

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

the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.".

The Commentary to §2B1.3 captioned "Background" is amended by inserting before the first paragraph the following:

" Subsection (b)(4) implements the instruction to the Commission in section 2 of Public Law 105–101.".

Section 2K1.4(b) is amended by striking "Characteristic" and inserting "Characteristics"; and by adding at the end the following new subdivision:

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

The Commentary to §2K1.4 is amended by adding at the end the following new application note and background commentary:

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

Background: Subsection (b)(2) implements the directive to the Commission in section 2 of Public Law 105–101.".

Reason for Amendment: The purpose of this amendment is to provide an increase for property offenses committed against national cemeteries. This amendment implements the directive to the Commission in the Veterans' Cemetery Protection Act of 1997, Pub. L. 105–101, § 2, 111 Stat. 2202, 2202 (1997). This Act directs the Commission to provide a sentence enhancement of not less than two levels for any offense against the property of a national cemetery. In response to the legislation, this amendment adds a two-level enhancement to §§2B1.1 (Theft), 2B1.3 (Property Destruction), and 2K1.4 (Arson). "National cemetery" is defined in the same way as that term is defined in the statute.

Effective Date: The effective date of this amendment is November 1, 1998.

577. Amendment: Section 2F1.1(b) is amended by striking subdivision (5) in its entirety as follows:

"(5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.",

and inserting:

"(5) (A) If the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) if a substantial part of a fraudulent scheme was committed from outside the United States; or (C) if the offense otherwise involved

sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.".

Section 2F1.1(b) is amended by adding at the end the following new subdivision:

"(7) If the offense was committed through mass-marketing, increase by 2 levels.".

The Commentary to §2F1.1 captioned "Application Notes" is amended by redesignating Notes 14 through 18, as Notes 15 through 19, respectively; and by inserting after Note 13 the following new Note 14:

"14. For purposes of subsection (b)(5)(B), 'United States' means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

For purposes of subsection (b)(5)(C), 'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.".

The Commentary to §2F1.1 captioned "Application Notes" is amended by adding at the end the following new note:

"20. 'Mass-marketing,' as used in subsection (b)(7), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.".

Section 2T1.1(b) is amended by striking subdivision (2) in its entirety as follows:

"(2) If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels.",

and inserting the following:

"(2) If the offense involved sophisticated concealment, increase by 2 levels.".

The Commentary to §2T1.1 captioned "Application Notes" is amended by striking Note 4 in its entirety as follows:

"4. 'Sophisticated means,' as used in subsection (b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a

routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.",

and inserting the following:

"4. For purposes of subsection (b)(2), 'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.".

Section 2T1.4(b) is amended by striking subdivision (2) in its entirety as follows:

"(2) If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels.",

and inserting the following:

"(2) If the offense involved sophisticated concealment, increase by 2 levels.".

The Commentary to §2T1.4 captioned "Application Notes" is amended by striking Note 3 in its entirety as follows:

"3. 'Sophisticated means,' as used in §2T1.4(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts or transactions through corporate shells or fictitious entities.",

and inserting the following:

"3. For purposes of subsection (b)(2), 'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.".

Section 2T3.1(b) is amended by striking subdivision (1) in its entirety as follows:

"(1) If sophisticated means were used to impede discovery of the nature or existence of the offense, increase by 2 levels.",

and inserting the following:

"(1) If the offense involved sophisticated concealment, increase by 2 levels.".

The Commentary to §2T3.1 captioned "Application Notes" is amended by adding at the end

the following new note:

"3. For purposes of subsection (b)(1), 'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.".

Reason for Amendment: This amendment has three purposes: (1) to provide an increase for fraud offenses that use mass-marketing to carry out the fraud; (2) to provide an increase for fraud offenses that involve conduct, such as sophisticated concealment, that makes it difficult for law enforcement authorities to discover the offense or apprehend the offender; and (3) to clarify and conform an existing enhancement that provides an increase for tax offenses that similarly involve sophisticated concealment.

First, this amendment adds a two-level enhancement in the fraud guideline for offenses that are committed through mass-marketing. The Commission identified mass-marketing as a central component of telemarketing fraud and also determined that there were other fraudulent schemes that relied on mass-marketing to perpetrate the offense (for example, Internet fraud). Accordingly, rather than provide a limited enhancement for telemarketing fraud only, the Commission determined that a generally applicable specific offense characteristic in the fraud guideline would better provide consistent and proportionate sentencing increases for similar types of fraud, while also ensuring increased sentences for persons who engage in mass-marketed telemarketing fraud.

Second, this amendment provides an increase for fraud offenses that involve conduct, such as sophisticated concealment, that makes it difficult for law enforcement authorities to discover the offense or apprehend the offenders. The new enhancement provides a two-level increase and a "floor" offense level of level 12 in the fraud guideline and replaces the current enhancement for "the use of foreign bank accounts or transactions to conceal the true nature or extent of fraudulent conduct." There are three alternative provisions to the enhancement. The first two prongs address conduct that the Commission has been informed often relates to telemarketing fraud, although the conduct also may occur in connection with fraudulent schemes perpetrated by other means. Specifically, the Commission has been informed that fraudulent telemarketers increasingly are conducting their operations from Canada and other locations outside the United States. Additionally, testimony offered at a Commission hearing on telemarketing fraud indicated that telemarketers often relocate their schemes to other jurisdictions once they know or suspect that enforcement authorities have discovered the scheme. Both types of conduct are specifically covered by the new enhancement. The third prong provides an increase if any offense covered by the fraud guideline otherwise involves sophisticated concealment. This prong addresses cases in which deliberate steps are taken to make the offense, or its extent, difficult to detect.

Third, this amendment provides a two-level enhancement for conduct related to sophisticated concealment of a tax offense. The primary purpose of this amendment is to conform the language of the current enhancement for "sophisticated means" in the tax guidelines to the essentially equivalent language of the new sophisticated concealment enhancement provided in the fraud guideline. Additionally, the amendment resolves a circuit conflict regarding whether the enhancement applies based on the personal conduct of the defendant or the

overall offense conduct for which the defendant is accountable. Consistent with the usual relevant conduct rules, application of this new enhancement for sophisticated concealment accordingly is based on the overall offense conduct for which the defendant is accountable.

Effective Date: The effective date of this amendment is November 1, 1998.

578. **Amendment:** Section 2K2.1(a) is amended in subdivision (4) by striking "the defendant" after "20, if"; in subdivision (4)(A) by inserting "the defendant" before "had one"; in subdivision (4)(B) by striking "is a prohibited person, and"; and in subdivision (4)(B) by inserting "; and the defendant (i) is a prohibited person; or (ii) is convicted under 18 U.S.C. § 922(d)" after "§ 921(a)(30)".

Section 2K2.1(a)(6) is amended by inserting "(A)" after "defendant"; and by inserting "; or (B) is convicted under 18 U.S.C. § 922(d)" after "person".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 6 by striking "or" before "(vi)"; and by inserting "; or (vii) has been convicted in any court of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33)" after "§ 922(d)(8)".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 12 in the first paragraph by striking "924(j) or (k), or 26 U.S.C. § 5861(g) or (h)" and inserting "924 (l) or (m)"; and in the second paragraph by striking "only" after "if the"; and by inserting "or 26 U.S.C. § 5861(g) or (h)" after "922(k)".

Reason for Amendment: This amendment has three purposes: (1) to change the definition of "prohibited person" in the firearms guideline so that it includes a person convicted of a misdemeanor crime of domestic violence; (2) to provide the same base offense levels for both a prohibited person and a person who is convicted under 18 U.S.C. § 922(d) of transferring a firearm to a prohibited person; and (3) to make several technical and conforming changes to the firearms guideline.

The first part of the amendment amends Application Note 6 of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to include a person convicted of a misdemeanor crime of domestic violence within the scope of "prohibited person" for purposes of that guideline. It also defines "misdemeanor crime of domestic violence" by reference to the new statutory definition of that term in 18 U.S.C. § 921(a).

This part of the amendment addresses section 658 of the Treasury, Postal Service, and General Government Appropriations Act, Pub. L. 104–208, 110 Stat. 3009 (1996) (contained in the Omnibus Consolidated Appropriations Act for Fiscal Year 1997). Section 658 amended 18 U.S.C. § 922(d) to prohibit the sale of a firearm or ammunition to a person who has been convicted in any court of a misdemeanor crime of domestic violence. It also amended 18 U.S.C. § 922(g) to prohibit a person who has been convicted in any court of a misdemeanor crime of domestic violence from transporting or receiving a firearm or ammunition. Section 922(s)(3)(B)(i), which lists the information a person not licensed under 18 U.S.C. § 923 must include in a statement to the handgun importer, manufacturer, or dealer, was amended to require certification that the person to whom the gun is transferred was not convicted in any court of a misdemeanor crime of domestic violence. Section 658

also amended 18 U.S.C. § 921(a) to define "misdemeanor crime of domestic violence".

Violations of 18 U.S.C. § 922(d) and (g) are covered by §2K2.1. The new provisions at § 922(d) (sale of a firearm to a "prohibited person") and § 922(g) (transporting, possession, and receipt of a firearm by a "prohibited person") affect Application Note 6 of §2K2.1, which defines "prohibited person". This part of the amendment conforms Application Note 6 of §2K2.1 to the new statutory provisions.

The second part of this amendment increases the base offense level for a defendant who is convicted under 18 U.S.C. § 922(d), which prohibits the transfer of a firearm to a prohibited person. Specifically, this part amends the two alternative base offense levels that pertain to prohibited persons in the firearms guideline in order to make those offense levels applicable to the person who transfers the firearm to the prohibited person. A person who is convicted under 18 U.S.C. § 922(d) has been shown beyond a reasonable doubt either to have known, or to have had reasonable cause to believe, that the transferee was a prohibited person.

The third part of this amendment makes two technical and conforming changes in Application Note 12 of §2K2.1. First, the amendment corrects statutory references to 18 U.S.C. § 924(j) and (k), which were added as a result of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, 108 Stat. 1796 (1994). In the Economic Espionage Act of 1996, Pub. L. 104–294, 110 Stat. 3488 (1996), Congress again amended 18 U.S.C. § 924 and redesignated the provisions as subsections (l) and (m). The amendment conforms Application Note 12 to that redesignation. Second, the amendment corrects the misplacement of the reference to 26 U.S.C. § 5861(g) and (h).

Effective Date: The effective date of this amendment is November 1, 1998.

579. **Amendment:** The Commentary to §2J1.6 captioned "Application Notes" is amended in Note 3 in the first paragraph by striking "3D1.2" and inserting "3D1.1"; and by striking the second paragraph in its entirety as follows:

> "Otherwise, in the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense; and the failure to appear count and the count(s) for the underlying offense are grouped together under §3D1.2(c). Note that although 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, it does require that any sentence of imprisonment on a failure to appear count be imposed consecutively to any other sentence of imprisonment. Therefore, in such cases, the combined sentence must be constructed to provide a 'total punishment' that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, where the combined applicable guideline range for both counts is 30-37 months and the court determines a 'total punishment' of 36 months is appropriate, a sentence of thirty months for the underlying offense plus a consecutive six months sentence for the failure to appear count would satisfy these requirements.",

and inserting the following as the new second paragraph:

> "In the case of a conviction on both the underlying offense and the failure to appear,

the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense, and the failure to appear count and the count or counts for the underlying offense are grouped together under §3D1.2(c). (Note that 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, although if a sentence of imprisonment on the failure to appear count is imposed, the statute requires that the sentence be imposed to run consecutively to any other sentence of imprisonment. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1-3D1.5 apply. See §3D1.1(b), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a 'total punishment' that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, if the combined applicable guideline range for both counts is 30-37 months and the court determines that a 'total punishment' of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the failure to appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive, failure to appear conduct has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. § 3146(b)(2).)".

The Commentary to §2J1.6 captioned "Application Notes" is amended by redesignating Note 4 as Note 5; and by inserting the following as new Note 4:

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

The Commentary to §2P1.2 captioned "Application Notes" is amended in Note 2 by striking " as amended," after "18 U.S.C. § 1791(c),"; and by inserting "by the inmate" after "served".

The Commentary to §2P1.2 captioned "Application Notes" is amended in Note 2 by inserting before the first paragraph the following:

"In a case in which the defendant is convicted of the underlying offense and an offense involving providing or possessing a controlled substance in prison, group the offenses together under §3D1.2(c). (Note that 18 U.S.C. § 1791(b) does not require a sentence of imprisonment, although if a sentence of imprisonment is imposed on a count involving providing or possessing a controlled substance in prison, section 1791(c) requires that the sentence be imposed to run consecutively to any other sentence of imprisonment for the controlled substance. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1-3D1.5 apply. See §3D1.1(b), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a 'total punishment' that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and

18 U.S.C. § 1791(c). For example, if the combined applicable guideline range for both counts 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 a consecutive six months' sentence for the providing or possessing a controlled substance in prison count would satisfy these requirements.".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 6 by striking "Where" and inserting "If"; and by striking "where" both places it appears and inserting "if".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 7 in the first sentence by striking "Where" and inserting "If"; by striking "both of the" and inserting "both of an"; by inserting "(e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally))" after "obstruction offense" the first place it appears; and by striking "the underlying" the first place it appears and inserting "an underlying".

Section 3D1.1(b) is amended by striking the first sentence in its entirety as follows:

"Any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of §§3D1.2-3D1.5.",

and inserting the following:

"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.".

The Commentary to §3D1.1 captioned "Application Note" is amended by striking Note 1 in its entirety as follows:

"1. Counts for which a statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. Convictions on such counts are not used in the determination of a combined offense level under this Part, but may affect the offense level for other counts. A conviction for 18 U.S.C. § 924(c) (use of firearm in commission of a crime of violence) provides a common example. In the case of a conviction under 18 U.S.C. § 924(c), the specific offense characteristic for weapon use in the primary offense is to be disregarded to avoid double counting. See Commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). Example: The defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together, and the offense level for the bank robbery count is computed without application of an enhancement for weapon possession or use. The mandatory five-year sentence on the weapon-use count runs consecutively, as required by law. See §5G1.2(a).",

and inserting the following:

"1. Subsection (b) applies if a 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. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory term of five years to run consecutively). The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). However, a count covered by subsection (b) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under §2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c), the mandatory five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. See §5G1.2(a).

Unless specifically instructed, subsection (b) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (i.e., the statute does not otherwise require a term of imprisonment to be imposed). See, e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 924(a)(4) (regarding penalty for 18 U.S.C. § 922(q) (possession or discharge of a firearm in a school zone)); 18 U.S.C. § 1791(c) (penalty for providing or possessing a controlled substance in prison). Accordingly, the multiple count rules set out under this Part do apply to a count of conviction under this type of statute.".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 1 in the third sentence by striking "mandates imposition of a consecutive sentence" and inserting "(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"; and by inserting "; id., comment. (n.1)" after "§3D1.1(b)".

Section 5G1.2(a) is amended by striking "mandates a consecutive sentence" and inserting "(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"; and by inserting "by that statute" after "determined".

The Commentary to §5G1.2 is amended in the last paragraph by striking the first three sentences as follows:

"Counts for which a statute mandates a consecutive sentence, such as counts charging the use of a firearm in a violent crime (18 U.S.C. § 924(c)) are treated separately. The sentence imposed on such a count is the sentence indicated for the particular offense of conviction. That sentence then runs consecutively to the sentences imposed on the other counts.",

and inserting the following:

> "Subsection (a) applies if a 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. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory term of five years to run consecutively to any other term of imprisonment). The term of years to be imposed consecutively is determined by the statute of conviction, and is independent of a guideline sentence on any other count.".

The Commentary to §5G1.2 is amended in the last paragraph in the fourth sentence by inserting ", e.g.," after "See"; and by adding at the end the following new sentence:

> "Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.".

Reason for Amendment: The purpose of this amendment is to clarify how several guideline provisions, including those on grouping multiple counts of conviction, work together to ensure an incremental, consecutive penalty for a failure to appear count. This amendment addresses a circuit conflict regarding whether the guideline procedure of grouping the failure to appear count of conviction with the count of conviction for the underlying offense violates the statutory mandate of imposing a consecutive sentence. Compare United States v. Agoro, 996 F.2d 1288 (1st Cir. 1993) (grouping rules apply), and United States v. Flores, No. 93-3771, 1994 WL 163766 (6th Cir. May 2, 1994) (unpublished) (same), with United States v. Packer, 70 F.3d 357 (5th Cir. 1995) (grouping rules defeat statutory purposes of 18 U.S.C. § 3146), cert. denied, 117 S. Ct. 75 (1996). The amendment maintains the current grouping rules for failure to appear and obstruction of justice, but addresses internal inconsistencies among different guidelines and explains how the guideline provisions work together to ensure an incremental, consecutive penalty for the failure to appear count. Specifically, the amendment (1) more clearly distinguishes between statutes that require imposition of a consecutive term of imprisonment only if imprisonment is imposed (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1791(b), (c) (Penalty for providing or possessing contraband in prison)), and statutes that require both a minimum term of imprisonment and a consecutive sentence (e.g., 18 U.S.C. § 924(c) (Use of a firearm in relation to crime of violence or drug trafficking offense)); (2) states that the method outlined for determining a sentence for failure to appear and similar statutes ensures an incremental, consecutive punishment; (3) adds an upward departure provision if offense conduct involves multiple obstructive acts; (4) makes conforming changes in §2P1.2 (Providing or Possessing Contraband in Prison) because the relevant statute, 18 U.S.C. § 1791, is similar to 18 U.S.C. § 3146; and (5) makes conforming changes in §§3C1.1, 3D1.1, 3D1.2, and 5G1.2.

Effective Date: The effective date of this amendment is November 1, 1998.

580. **Amendment:** The Commentary to §3B1.3 captioned "Application Notes" is amended in the first paragraph of Note 1 in the third sentence by striking “enhancement” and inserting “adjustment”; by inserting "public or private" after "position of"; in the fourth sentence by striking "would apply" and inserting "applies"; and in the last sentence by striking "would"

and inserting "does.".

The Commentary to §3B1.3 captioned "Application Notes" is amended by redesignating Note 2 as Note 3; and by inserting the following as new Note 2:

> "2. This adjustment also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not. For example, the adjustment applies in the case of a defendant who (A) perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker; or (B) perpetrates a fraud by representing falsely to a patient or employer that the defendant is a licensed physician. In making the misrepresentation, the defendant assumes a position of trust, relative to the victim, that provides the defendant with the same opportunity to commit a difficult-to-detect crime that the defendant would have had if the position were held legitimately.".

The Commentary to §3B1.3 captioned "Background" is amended by inserting after the first sentence the following:

> "The adjustment also applies to persons who provide sufficient indicia to the victim that they legitimately hold a position of public or private trust when, in fact, they do not.".

Reason for Amendment: The purpose of this amendment is to establish that the two-level increase for abuse of a position of trust applies to a defendant who is an imposter, as well as to a person who legitimately holds and abuses a position of trust. This amendment resolves a circuit conflict on that issue. Compare United States v. Gill, 99 F.3d 484 (1st Cir. 1996) (adjustment applied to defendant who posed as licensed psychologist), and United States v. Queen, 4 F.3d 925 (10th Cir. 1993) (adjustment applied to defendant who posed as financial broker), cert. denied, 510 U.S. 1182 (1994), with United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994) (defendant who poses as physician does not occupy a position of trust). The amendment adopts the majority appellate view and provides that the abuse of position of trust adjustment applies to an imposter who pretends to hold a position of trust when in fact he does not. The Commission has determined that, particularly from the perspective of the crime victim, an imposter who falsely assumes and takes advantage of a position of trust is as culpable and deserving of increased punishment as is a defendant who abuses an actual position of trust.

Effective Date: The effective date of this amendment is November 1, 1998

581. **Amendment:** Section 3C1.1 is amended by inserting "(A)" after "If"; by inserting "the course of" after "during"; and by inserting "of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense" after "instant offense".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 2 by striking "enhancement" each place it appears, and inserting "adjustment"; in the second sentence by striking "Note 3" and inserting "Note 4"; in the third sentence by striking "Note 4" and inserting "Note 5"; and in the fourth sentence by striking "Notes 3 and 4" and inserting

"Notes 4 and 5".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4 in the first paragraph by striking "Note 7" and inserting "Note 8".

The Commentary to §3C1.1 captioned "Application Notes" is amended by redesignating Notes 1 through 8, as Notes 2 through 9, respectively; and by inserting the following as new Note 1:

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

Reason for Amendment: The purpose of this amendment is to clarify what the term "instant offense" means in the obstruction of justice guideline, §3C1.1. This amendment resolves a circuit conflict on the issue of whether the adjustment applies to obstructions that occur in cases closely related to the defendant's case or only those specifically related to the offense of which the defendant convicted. Compare United States v. Powell, 113 F.3d 464 (3d Cir.) (adjustment applies if defendant attempts to impede the prosecution of a co-defendant who is charged with the same offense for which defendant was convicted), cert. denied, 118 S. Ct. 454 (1997), United States v. Walker, 119 F.3d 403 (6th Cir.) (same), cert. denied, 118 S. Ct. 643 (1997), United States v. Acuna, 9 F.3d 1442 (9th Cir. 1993) (adjustment applies if defendant attempts to obstruct justice in a case closely related to his own), and United States v. Bernaugh, 969 F.2d 858 (10th Cir. 1992) (adjustment applies when defendant testifies falsely at his own hearing about co-defendants' roles in the offense), with United States v. Perdomo, 927 F.2d 111 (2d Cir. 1991) (cannot apply adjustment based on obstructive conduct outside the scope of charged offense), and United States v. Partee, 31 F.3d 529 (7th Cir. 1994) (same). The amendment, which adopts the majority view, instructs that the obstruction must relate either to the defendant's offense of conviction (including any relevant conduct) or to a closely related case. The amendment also clarifies the temporal element of the obstruction guideline (i.e., that the obstructive conduct must occur during the investigation, prosecution, or sentencing of the defendant's offense of conviction).

Effective Date: The effective date of this amendment is November 1, 1998.

582. **Amendment:** The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4 (redesignated as Note 5 by Amendment 581, see supra) in the first sentence of the first paragraph by striking "enhancement" and inserting "adjustment"; and by inserting "or affect the determination of whether other guideline adjustments apply (e.g., §3E1.1 (Acceptance of Responsibility))" after "guideline range"; in the second sentence by striking "enhancement" and inserting "adjustment"; in subdivision (d) by striking the period at the end and inserting a semicolon; and by adding at the end the following new subdivision:

> "(e) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under §3E1.1 (Acceptance of Responsibility).".

Reason for Amendment: The purpose of this amendment is to establish that lying to a probation officer about drug use while released on bail does not warrant an obstruction of justice adjustment under §3C1.1. This amendment resolves a circuit conflict on that issue. Compare United States v. Belletiere, 971 F.2d 961 (3d Cir. 1992) (lying about drug use is not obstructive conduct that impedes government's investigation of instant offense), and United States v. Thompson, 944 F.2d 1331 (7th Cir. 1991) (same), cert. denied, 502 U.S. 1097 (1992), with United States v. Garcia, 20 F.3d 670 (6th Cir. 1994) (falsely denying drug use, while not outcome-determinative, is relevant), cert. denied, 513 U.S. 1159 (1995). The amendment, which adopts the majority view, excludes from application of §3C1.1 a defendant's denial of drug use while on pre-trial release, although the amendment provides that such conduct may be relevant in determining the application of other guidelines, such as §3E1.1 (Acceptance of Responsibility).

Effective Date: The effective date of this amendment is November 1, 1998.

583. Amendment: Section 5K2.13 is amended by striking the text in its entirety as follows:

> "If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.",

and inserting:

> "A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.
>
> Commentary
>
> Application Note:
>
> 1. For purposes of this policy statement—
>
> 'Significantly reduced mental capacity' means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.".

Reason for Amendment: The purpose of this amendment is to allow (except under certain

circumstances) a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity. This amendment addresses a circuit conflict regarding whether the diminished capacity departure is precluded if the defendant committed a "crime of violence" as that term is defined in the career offender guideline. Compare United States v. Poff, 926 F.2d 588 (7th Cir.) (en banc) (definition of "non-violent offense" necessarily excludes a crime of violence), cert. denied, 502 U.S. 827 (1991), United States v. Maddalena, 893 F.2d 815 (6th Cir. 1989) (same), United States v. Mayotte, 76 F.3d 887 (8th Cir. 1996) (same), United States v. Borrayo, 898 F.2d 91 (9th Cir. 1989) (same), and United States v. Dailey, 24 F.3d 1323 (11th Cir. 1994) (same), with United States v. Chatman, 986 F.2d 1446 (D.C. Cir. 1993) (court must consider all the facts and circumstances to determine whether offense was non-violent; terms are not mutually exclusive), United States v. Weddle, 30 F.3d 532 (4th Cir. 1994) (same), and United States v. Askari, 140 F. 3d 536 (3d Cir. 1998) (en banc) ("non-violent offenses" are those that do not involve a reasonable perception that force against persons may be used in committing the offense), abrogating United States v. Rosen, 896 F.2d 789 (3d Cir. 1990) (non-violent offense means the opposite of crime of violence). The amendment replaces the current policy statement with a new provision that essentially represents a compromise approach to the circuit conflict. The new policy statement allows a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity, except under the following three circumstances: (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. The amendment also adds an application note that defines "significantly reduced mental capacity" in accord with the decision in United States v. McBroom, 124 F.3d 533 (3d Cir. 1997). The McBroom court concluded that "significantly reduced mental capacity" included both cognitive impairments (i.e., an inability to understand the wrongfulness of the conduct or to exercise the power of reason) and volitional impairments (i.e., an inability to control behavior that the person knows is wrongful). The application note specifically includes both types of impairments in the definition of "significantly reduced mental capacity".

Effective Date: The effective date of this amendment is November 1, 1998.

584. Amendment: Section 5B1.3(d) is amended by adding at the end the following new subdivision:

"(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable -- a condition ordering deportation by a United States district court or a United States magistrate judge.".

Section 5D1.3(d) is amended by adding at the end the following new subdivision:

"(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable -- a condition ordering deportation by a United States district court or a United States magistrate judge.".

Section 5D1.3(e)(5) is amended by striking "to provide just punishment for the offense,".

Section 5B1.3(c) is amended by inserting "(Policy Statement)" before "The following".

Section 5B1.3(d) is amended by inserting "(Policy Statement)" before "The following".

Section 5B1.3(e) is amended in the title by adding "(Policy Statement)" at the end.

Section 5D1.3(c) is amended by inserting "(Policy Statement)" before "The following".

Section 5D1.3(d) is amended by inserting "(Policy Statement)" before "The following".

Section 5D1.3(e) is amended in the title by adding "(Policy Statement)" at the end.

Reason for Amendment: The purpose of this amendment is to make several technical and conforming changes to the guidelines relating to conditions of probation and supervised release. The amendment has three parts. First, the amendment adds to §§5B1.3 and 5D1.3 a condition of probation and supervised release regarding deportation, in response to section 374 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L 104–208, 110 Stat. 3009 (1996). That section amended 18 U.S.C. § 3563(b) to add a new discretionary condition of probation with respect to deportation. Second, this amendment deletes the reference in the supervised release guideline to "just punishment" as a reason for the imposition of curfew as a condition of supervised release. The need to provide "just punishment" is not included in 18 U.S.C. § 3583(c) as a permissible factor to be considered in imposing a term of supervised release. Third, this amendment amends the guidelines pertaining to conditions of probation and supervised release to indicate that discretionary (as opposed to mandatory) conditions are advisory policy statements of the Commission, not binding guidelines.

Effective Date: The effective date of this amendment is November 1, 1998.

585. Amendment: Section 5K2.0 is amended in the first paragraph in the first sentence by inserting a comma after "3553(b)"; by striking "guideline" and inserting "guidelines"; in the second sentence by striking "guidelines" and inserting "guideline range"; in the third sentence by striking "controlling" after "The"; by striking "can only be made by the courts" and inserting "rests with the sentencing court on a case-specific basis"; in the last sentence by inserting "determining" after "consideration in"; by striking "guidelines" the second place it appears and inserting "guideline range"; by striking "guideline level" and inserting "weight"; by inserting "under the guidelines" after "factor"; and by inserting before the period at the end "or excessive".

Section 5K2.0 is amended in the last paragraph by striking "An" and inserting "Finally, an"; by striking "not ordinarily relevant" and inserting ", in the Commission's view, 'not ordinarily relevant'"; and by striking "in a way that is important to the statutory purposes of sentencing".

The Commentary to §5K2.0 is amended by inserting before the first paragraph the following:

> " The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. Koon v. United States, 116 S. Ct. 2035 (1996). Furthermore, '[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District Courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.' Id. at 2046-47.".

Reason for Amendment: The purpose of this amendment is to reference specifically in the general departure policy statement the United States Supreme Court's decision in United States v. Koon, 116 S. Ct. 2035 (1996). This amendment (1) incorporates the principal holding and key analytical points from the Koon decision into the general departure policy statement, §5K2.0; (2) deletes language inconsistent with the holding of Koon; and (3) makes minor, non-substantive changes that improve the precision of the language of §5K2.0.

Effective Date: The effective date of this amendment is November 1, 1998.

586. Amendment: Section 2B3.2(b) is amended in subdivision (2) by striking "(b)(6)" and inserting "(b)(7)".

The Commentary to §2K1.3 captioned "Application Note" is amended in Note 2 by striking " subsections (1) and (2)" and inserting " subsection (a), subsection (b)".

The Commentary to §2K2.1 captioned "Application Notes " is amended in Note 5 in the first sentence by striking " subsections (1) and (2)" and inserting "subsection (a), subsection (b)".

The Commentary to §6A1.3 is amended in the third paragraph by striking "117 U.S." after "Watts," both places it appears and inserting "117 S. Ct.".

Reason for Amendment: This amendment corrects technical errors in §§2B3.1, 2K2.1, and 6A1.3.

Effective Date: The effective date of this amendment is November 1, 1998.

587. Amendment: Section 2F1.1(b), as amended by Amendment 577, is further amended by striking subdivision (3) and all that follows through the end of the subsection as follows:

"(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(4) If the offense involved (A) the conscious or reckless risk of serious bodily injury, or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(5) (A) If the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) if a substantial part of a fraudulent scheme was committed from outside the United States; or (C) if the offense otherwise involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(6) If the offense --

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

(7) If the offense was committed through mass-marketing, increase by 2 levels.";

and inserting the following:

"(3) If the offense was committed through mass-marketing, increase by 2 levels.

(4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(5) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from

outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(6) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(7) If the offense --

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.".

The Commentary to §2F1.1 captioned "Application Notes ", as amended by Amendment 577, is further amended by striking Application Note 14 and all that follows through the end of the Application Notes as follows:

"14. For purposes of subsection (b)(5)(B), 'United States' means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

For purposes of subsection (b)(5)(C), 'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.

15. 'Financial institution,' as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'any health, medical, or hospital insurance association,' as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate

business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

16. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

17. 'The defendant derived more than $1,000,000 in gross receipts from the offense,' as used in subsection (b)(7)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000. 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

18. If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the 'continuing financial crimes enterprise.'

19. If subsection (b)(7)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved 'more than minimal planning.'

20. 'Mass-marketing,' as used in subsection (b)(7), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.",

and inserting the following:

"15. For purposes of subsection (b)(5)(B), 'United States' means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

For purposes of subsection (b)(5)(C), 'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore

bank accounts also ordinarily would indicate sophisticated means.

The enhancement for sophisticated means under subsection (b)(5)(C) requires conduct that is significantly more complex or intricate than the conduct that may form the basis for an enhancement for more than minimal planning under subsection (b)(2)(A).

If the conduct that forms the basis for an enhancement under subsection (b)(5) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.

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

17. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

18. 'The defendant derived more than $1,000,000 in gross receipts from the offense,' as used in subsection (b)(7)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000. 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

19. If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the 'continuing financial crimes enterprise.'

20. If subsection (b)(7)(A) or (B) applies, there shall be a rebuttable

presumption that the offense involved 'more than minimal planning.'".

The Commentary to §2F1.1 captioned "Application Notes ", as amended by Amendment 577, is further amended by redesignating Notes 3 through 13 as Notes 4 through 14, respectively; and by inserting after Note 2 the following new Note 3:

"3. 'Mass-marketing,' as used in subsection (b)(3), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 1 by striking "§2F1.1(b)(3)" and inserting "§2F1.1(b)(4)"; in redesignated Note 5 (formerly Note 4), by striking "(b)(3)(A)" and inserting "(b)(4)(A)"; and in redesignated Note 6 (formerly Note 5), by striking "(b)(3)(B)" and inserting "(b)(4)(B)".

The Commentary to §2F1.1 captioned " Background " is amended by inserting after the fifth paragraph the following new paragraph:

" Subsection (b)(5) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105-184.".

Section 3A1.1 is amended by striking subsection (b) in its entirety as follows:

"(b) If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.",

and inserting:

"(b) (1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.

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

The Commentary to §3A1.1 captioned "Application Notes " is amended in Note 2 in the first paragraph by striking "'victim' includes any person" before "who is" and inserting "'vulnerable victim' means a person (A)"; and by inserting after "(Relevant Conduct)" the following:

"; and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct ".

The Commentary to §3A1.1 captioned "Application Notes" is amended in Note 2 in the second paragraph by striking "where" each place it appears and inserting "in which".

The Commentary to §3A1.1 captioned "Application Notes" is amended in Note 2 in the third paragraph by striking "offense guideline specifically incorporates this factor" and inserting "factor that makes the person a vulnerable victim is incorporated in the offense guideline".

The Commentary to §3A1.1 captioned "Background" is amended by adding at the end the following additional paragraph:

" Subsection (b)(2) implements, in a broader form, the instruction to the Commission in section 6(c)(3) of Public Law 105-184.".

The Commentary to §2B5.1 captioned "Application Notes" is amended in Note 1 by inserting "United States " before "Virgin Islands ".

Reason for Amendment: This amendment implements, in a broader form, the directives to the Commission in section 6 of the Telemarketing Fraud Prevention Act of 1998, Pub. L. 105–184 ("the Act").

The Act directs the Commission to provide for "substantially increased penalties" for telemarketing frauds. It also more specifically requires that the guidelines provide "an additional appropriate sentencing enhancement, if the offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States," and "an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims, including but not limited to [telemarketing fraud victims over age 55], are affected by a fraudulent scheme or schemes."

This amendment responds to the directives by building upon the amendments to the fraud guideline, §2F1.1, that were submitted to Congress on May 1, 1998. (See amendment 577, supra.) Those amendments added a specific offense characteristic for "mass-marketing," which is defined to include telemarketing, and a specific offense characteristic for sophisticated concealment.

This amendment broadens the "sophisticated concealment" enhancement to cover "sophisticated means" of executing or concealing a fraud offense. In addition, the amendment increases the enhancement under the vulnerable victim guideline, §3A1.1, for offenses that impact a large number of vulnerable victims.

This amendment also makes a conforming amendment to §2B5.1 in the definition of "United States".

In designing enhancements that may apply more broadly than the Act's above-stated directives minimally require, the Commission acts consistently with other directives in the Act (e.g., section 6(c)(4) (requiring the Commission to ensure that its implementing amendments are reasonably consistent with other relevant directives to the Commission and other parts of the sentencing guidelines)) and with its basic mandate in sections 991 and 994 of title 28, United States Code (e.g., 28 U.S.C. § 991(b)(1)(B)) (requiring sentencing policies that avoid unwarranted disparities among similarly situated defendants)).

Effective Date: The effective date of this amendment is November 1, 1998.

588. Amendment: The Commentary to §2C1.4 captioned "Background" is amended by striking the last sentence as follows:

" Both offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.".

The Commentary to §2J1.1 captioned "Application Notes" is amended in Note 2 in the third sentence by inserting "(a)(1) and to any offense under 18 U.S.C. § 228(a)(2) and (3)" after "228"; and in the fourth sentence by inserting "(a)(1)" after "228".

Reason for Amendment: This is a two-part amendment. First, this amendment amends the commentary in the contempt guideline, §2J1.1, pertaining to offenses under 18 U.S.C. § 228 involving the willful failure to pay court-ordered child support. The commentary notes that the contempt guideline applies to second and subsequent offenses under 18 U.S.C. § 228 because a first offense is a Class B misdemeanor not covered by the guidelines.

However, in the Deadbeat Parents Punishment Act of 1998, Pub. L. 105–187, Congress amended 18 U.S.C. § 228 to add two new violations of that section (found at 18 U.S.C. § 228(a)(2) and (3)) and to make even the first offense under those new violations a felony that would be subject to the guidelines. Accordingly, the commentary in the contempt guideline is amended to reflect that it is only the first offense under a violation of 18 U.S.C. § 228(a)(1) that is not covered by the guideline.

Second, this amendment updates and corrects the background commentary of §2C1.4, the guideline that covers offenses involving unlawful compensation for federal employees and bank officials. Currently the background commentary states that 18 U.S.C. § 209 (involving the unlawful supplementation of the salary of various federal employees) and 18 U.S.C. §1909 (prohibiting bank examiners from performing any service for compensation for banks or bank officials) both are misdemeanors for which the maximum term of imprisonment is one year. In fact, however, as a result of enacted legislation, the maximum term of imprisonment for violations of 18 U.S.C. § 209 is now five years if the conduct is willful.

The amendment deletes the sentence of the commentary that describes the maximum term of imprisonment for these offenses.

Effective Date: The effective date of this amendment is November 1, 1998.

589. Amendment: Appendix A (Statutory Index) is amended in the line referenced to "18 U.S.C. § 924(i)" by striking " 2A1.1, 2A1.2" and inserting "2K2.1";

by striking:

"18 U.S.C. § 924(j)-(n) 2K2.1",

and inserting:

"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 by inserting, after the line referenced to "18 U.S.C. § 2252" the following new line:

"18 U.S.C. § 2252A 2G2.2, 2G2.4".

Reason for Amendment: This amendment updates the Statutory Index by adding a reference to a recently created offense (pertaining to the use of a computer to commit certain child pornography offenses) and by correcting the references to a number of firearms offenses in response to congressional redesignations of those offenses.

Specifically, Congress recently enacted 18 U.S.C. § 2252A, which makes it unlawful to traffic in, receive, or possess child pornography, including by computer. The amendment references this offense to §2G2.2 (trafficking in child pornography) and §2G2.4 (possession of child pornography).

In addition, in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, and the Economic Espionage Act of 1996, Pub. L. 104-294, Congress redesignated a number of firearms provisions in 18 U.S.C. § 924. The amendment changes the references in the Statutory Index to a number of these offenses in response to the congressional redesignations.

Effective Date: The effective date of this amendment is November 1, 1998.

590. Amendment: Chapter Two, Part B, Subpart 5 is amended by striking §2B5.3 in its entirety as follows:

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

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

(1) If the retail value of the infringing items exceeded $2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

Commentary

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

Application Note:

1. 'Infringing items' means the items that violate the copyright or trademark laws (not the legitimate items that are infringed upon).

Background: This guideline treats copyright and trademark violations much like fraud. Note

that the enhancement is based on the value of the infringing items, which will generally exceed the loss or gain due to the offense.

The Electronic Communications Act of 1986 prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.".

A replacement guideline with accompanying commentary is inserted as §2B5.3 (Criminal Infringement of Copyright or Trademark).

Reason for Amendment: This amendment is in response to section 2(g) of the No Electronic Theft (NET) Act of 1997, Pub. L. 105–147 ("the Act"). The Act directs the Commission to ensure that the applicable guideline range for intellectual property offenses (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2320 of title 18, United States Code) is "sufficiently stringent to deter such a crime." It also more specifically requires that the guidelines "provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed."

The amendment responds to the directives, first, by making changes to the monetary calculation found in the copyright and trademark infringement guideline, §2B5.3. In addition, the amendment makes a number of other modifications to the infringement guideline, including the addition of several mitigating and aggravating factors, as further means of providing just and proportionate punishment while also seeking to achieve sufficient deterrence.

The monetary calculation in §2B5.3(b)(1), similar to the loss enhancement in the theft and fraud guidelines, serves as an approximation of the pecuniary harm caused by the offense and is a principal factor in determining the offense level for intellectual property offenses. Prior to this amendment, the monetary calculation for all intellectual property crimes was based on the retail value of the infringing item multiplied by the quantity of infringing items. In response to the directive, the Commission refashioned this enhancement so as to use the retail value of the infringed item, multiplied by the number of infringing items, as a means of approximating the pecuniary harm for cases in which that calculation is believed most likely to provide a reasonable estimate of the resulting harm. Use of that calculation is believed to provide a reasonable approximation for those classes of infringement cases in which it is highly likely that the sale of an infringing item results in a displaced sale of the legitimate, infringed item. The amendment also requires that the retail value of the infringed item, multiplied by the number of infringing items, be used in certain other cases for reasons of practicality.

However, based upon a review of cases sentenced under the former §2B5.3 over two years, the Commission further determined that using the above formula likely would overstate substantially the pecuniary harm caused to copyright and trademark owners in some cases currently sentenced under the guideline. For those cases, a one-to-one correlation between the sale of infringing items and the displaced sale of legitimate, infringed items is unlikely because the inferior quality of the infringing item and/or the greatly discounted price at which it is sold suggests that many purchasers of infringing items would not, or could not, have purchased the infringed item in the absence of the availability of the infringing item.

The Commission therefore determined that, for these latter classes of cases (referred to in Application Note 2(B)), the retail value of the infringing item, multiplied by the number of those items, provides a more reasonable approximation of lost revenues to the copyright or trademark owner, and hence, of the pecuniary harm resulting from the offense.

This amendment also increases the base offense level from level 6 to level 8. The two-level increase in the base offense level brings the infringement guideline more in line with offense levels that would pertain under the fraud guideline, §2F1.1, assuming applicability under that guideline of the two-level enhancement for more than minimal planning. Based on a review of cases sentenced under the infringement guideline, if a more than minimal planning enhancement did exist in that guideline, it would apply in the vast majority of such cases because they involve this kind of aggravating conduct. Rather than provide a separate enhancement within the revised guideline for "more than minimal planning" conduct, the Commission determined that the infringement guideline should incorporate this type of conduct into the base offense level.

This amendment also provides an enhancement of two levels, and a minimum offense level of level 12, if the offense involved the manufacture, importation, or uploading of infringing items. The Commission determined that defendants who engage in such conduct are more culpable than other intellectual property offenders because they place infringing items into the stream of commerce, thereby enabling others to infringe the copyright or trademark. A review of cases sentenced under the guideline indicated applicability of this enhancement to approximately two-thirds of the cases.

This amendment also provides a two-level downward adjustment (but not less than offense level 8) if the offense was not committed for commercial advantage or private financial gain. This adjustment reflects the fact that the Act establishes lower statutory penalties for offenses that were not committed for commercial advantage or private financial gain.

This amendment also provides an enhancement of two levels, and a minimum offense level of level 13, if the offense involved the conscious or reckless risk of serious bodily injury or possession of a dangerous weapon in connection with the offense. Testimony received by the Commission indicated that the conscious or reckless risk of serious bodily injury may occur in some cases involving counterfeit consumer products. 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.
The amendment also contains an application note expressly providing that the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply if the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item. As stated in the background commentary to §3B1.3, persons who use such a special skill to facilitate or commit a crime generally are viewed as more culpable.

Finally, this amendment contains two encouraged upward departure provisions. The Commission received public comment that indicated that infringement may cause substantial harm to the reputation of the copyright or trademark owner that is not accounted for in the monetary calculation. Public comment also indicated that some copyright and trademark offenses are committed in connection with, or in furtherance of, the criminal activities of certain organized crime enterprises. The amendment invites the court to consider an appropriate upward departure if either of these aggravating circumstances are present.

Effective Date: The effective date of this amendment is May 1, 2000.

591. Amendment: Section 1B1.1 is amended by striking subsection (a) in its entirety and inserting:

> "(a) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See §1B1.2.".

Section 1B1.2(a) is amended by striking "most" each place it appears; by striking "Provided, however" and inserting "However"; and by adding at the end the following:

> "Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced in the Statutory Index for the offense of conviction. If the offense involved a conspiracy, attempt, or solicitation, refer to §2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, use the most analogous guideline. See §2X5.1 (Other Offenses). The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. See §1B1.9 (Class B or C Misdemeanors and Infractions).".

The Commentary to §1B1.2 captioned "Application Notes" is amended by striking the first paragraph of Note 1 and inserting the following:

> "This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). The court is to use the Chapter Two guideline section referenced in the Statutory Index (Appendix A) for the offense of conviction. However, (A) in the case of a plea agreement containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the Chapter Two offense guideline section applicable to the stipulated offense is to be used; and (B) for statutory provisions not listed in the Statutory Index, the most analogous guideline, determined pursuant to §2X5.1 (Other Offenses), is to be used.
>
> In the case of a particular statute that proscribes only a single type of criminal conduct, the offense of conviction and the conduct proscribed by the statute will coincide, and the Statutory Index will specify only one offense guideline for that offense of conviction. In the case of a particular statute that proscribes a variety of conduct that might constitute the subject of different offense guidelines, the Statutory Index may specify more than one offense guideline for that particular statute, and the court will determine which of the referenced guideline sections is most appropriate for the offense conduct charged in the count of which the defendant was convicted. If the offense involved a conspiracy, attempt, or solicitation, refer to §2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, the most analogous guideline is to be used. See §2X5.1 (Other Offenses).".

The Commentary to §1B1.2 captioned "Application Notes" is amended by striking Note 3

in its entirety; and by redesignating Notes 4 and 5 as Notes 3 and 4, respectively.

The Commentary to §2D1.2 captioned "Application Note" is amended in Note 1 by striking "Where" and inserting the following:

> "This guideline applies only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual (including an attempt or conspiracy to commit such a violation) or in a case in which the defendant stipulated to such a statutory violation. See §1B1.2(a). In a case involving such a conviction but in which".

Appendix A (Statutory Index) is amended by striking the entire text of the "Introduction" and inserting the following:

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

The Commentary to §2H1.1 captioned "Application Notes" is amended in Note 1 in the second paragraph by striking "Application Note 5" and inserting "Application Note 4".

Reason for Amendment: This amendment addresses a circuit conflict regarding whether the enhanced penalties in §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only in a case in which the defendant was convicted of an offense referenced to that guideline or, alternatively, in any case in which the defendant's relevant conduct included drug sales in a protected location or involving a protected individual. Compare United States v. Chandler, 125 F.3d 892, 897-98 (5th Cir. 1997) ("First, utilizing the Statutory Index located in Appendix A, the court determines the offense guideline section 'most applicable to the offense of conviction.'" Once the appropriate guideline is identified, a court can take relevant conduct into account only as it relates to factors set forth in that guideline); United States v. Locklear, 24 F.3d 641 (4th Cir. 1994) (finding that §2D1.2 does not apply to convictions under 21 U.S.C. § 841 based on the fact that the commentary to §2D1.2 lists as the "Statutory Provisions" to which it is applicable 21 U.S.C. §§ 859, 860, and 861, but not § 841. "[S]ection 2D1.2 is intended not to identify a specific offense characteristic which would, where applicable, increase the offense level over the base level assigned by §2D1.1, but rather to define the base offense level for violations of 21 U.S.C. §§ 859, 860 and 861."); United States v. Saavedra, 148 F.3d 1311 (11th Cir. 1998) (defendant's uncharged but relevant conduct is actually irrelevant to determining the sentencing guideline applicable to the defendant's offense; such conduct is properly considered only after the applicable guideline has been selected when the court is analyzing the various sentencing considerations within the guideline chosen, such as the base offense level, specific offense characteristics, and any cross references), with United States v. Clay, 117 F.3d 317 (6th Cir.), cert. denied, 118 S. Ct. 395 (1997) (applying §2D1.2 to defendant convicted only of possession with intent to distribute under 21 U.S.C. § 841 but not convicted of any statute referenced to §2D1.2 based on underlying facts indicating defendant involved a juvenile in drug sales); United States v. Oppedahl, 998 F.2d 584 (8th Cir. 1993) (applying §2D1.2 to defendant convicted of conspiracy to distribute and possess

with intent to distribute based on fact that defendant's relevant conduct involved distribution within 1,000 feet of a school); United States v. Robles, 814 F. Supp. 1249 (E.D. Pa), aff'd (unpub.), 8 F.3d 814 (3d Cir. 1993) (looking to relevant conduct to determine appropriate guideline).

In promulgating this amendment, the Commission also was aware of case law that raises a similar issue regarding selection of a Chapter Two (Offense Conduct) guideline, different from that referenced in the Statutory Index (Appendix A), based on factors other than the conduct charged in the offense of conviction. See United States v. Smith, 186 F.3d 290 (3d Cir. 1999) (determining that §2F1.1 (Fraud and Deceit) was most appropriate guideline rather than the listed guideline of §2S1.1 (Laundering of Monetary Instruments)); United States v. Brunson, 882 F. 2d 151, 157 (5th Cir. 1989) ("It is not completely clear to us under what circumstances the Commission contemplated deviation from the suggested guidelines for an 'atypical' case.").

The amendment modifies §§1B1.1(a), 1B1.2(a), and the Statutory Index's introductory commentary to clarify the inter-relationship among these provisions. The clarification is intended to emphasize that the sentencing court must apply the offense guideline referenced in the Statutory Index for the statute of conviction unless the case falls within the limited "stipulation" exception set forth in §1B1.2(a). Therefore, in order for the enhanced penalties in §2D1.2 to apply, the defendant must be convicted of an offense referenced to §2D1.2, rather than simply have engaged in conduct described by that guideline. Furthermore, the amendment deletes Application Note 3 of §1B1.2 (Applicable Guidelines), which provided that in many instances it would be appropriate for the court to consider the actual conduct of the offender, even if such conduct did not constitute an element of the offense. This application note describes a consideration that is more appropriate when applying §1B1.3 (Relevant Conduct), and its current placement in §1B1.2 apparently has caused confusion in applying that guideline's principles to determine the offense conduct guideline in Chapter Two most appropriate for the offense of conviction. In particular, the note has been used by some courts to permit a court to decline to use the offense guideline referenced in the Statutory Index in cases that were allegedly "atypical" or "outside the heartland." See United States v. Smith, supra.

Effective Date: The effective date of this amendment is November 1, 2000.

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

> "(6) If, to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or if, to facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, the offense involved (A) the knowing misrepresentation of a participant's identity; or (B) the use of a computer or an Internet-access device, increase by 2 levels.".

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

> "'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).".

The Commentary to §2A3.1 captioned "Application Notes" is amended in Note 1 by inserting after "the base offense level under subsection (a)." the following paragraph:

> "'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. 'Child pornography' has the meaning given that term in 18 U.S.C. § 2256(8).".

The Commentary to §2A3.1 captioned "Application Notes" is amended by redesignating Notes 4 through 6 as Notes 5 through 7, respectively; and by inserting after Note 3 the following:

> "4. The enhancement in subsection (b)(6)(A) 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)(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 (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.
>
> 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.".

Chapter Two, Part A, Subpart 3 is amended by striking §2A3.2 in its entirety and inserting the following:

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

(a) Base Offense Level:

(1) 18, if the offense involved a violation of chapter 117 of title 18, United States Code; or

(2) 15, otherwise.

(b) Specific Offense Characteristics

(1) If the victim was in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(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 3 levels.

(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, §2A3.1 shall apply, regardless of the 'consent' of the victim.

Commentary

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

Application Notes:

1. For purposes of this guideline—

   '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).

   '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.

2. If the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography, an upward departure may be warranted. See Chapter Five, Part K (Departures).

3. Subsection (b)(1) 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.

4. 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).

5. 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.

6. 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.

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

8. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.

Background: This section applies to offenses involving the criminal sexual abuse of an individual who had not attained the age of 16 years. While this section applies

to consensual sexual acts prosecuted under 18 U.S.C. § 2243(a) that would be lawful but for the age of the victim, it also applies to cases, prosecuted under 18 U.S.C. § 2243(a) or chapter 117 of title 18, United States Code, in which a participant took active measure(s) to unduly influence the victim to engage in prohibited sexual conduct and, thus, the voluntariness of the victim's behavior was compromised. A two-level enhancement is provided in subsection (b)(2) for such cases. It is assumed that at least a four-year age difference exists between the victim and the defendant, as specified in 18 U.S.C. § 2243(a). A two-level enhancement is provided in subsection (b)(1) for a defendant who victimizes a minor under his supervision or care. However, if the victim had not attained the age of 12 years, §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) will apply, regardless of the 'consent' of the victim.".

Section 2A3.3 is amended by inserting after subsection (a) the following:

"(b) Specific Offense Characteristics

(1) 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.

(2) 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.".

The Commentary to §2A3.3 captioned "Application Notes" is amended by striking Note 1 in its entirety and inserting the following:

"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).

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

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

by redesignating Note 2 as Note 4; and by inserting after Note 1 the following:

"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.".

Section 2A3.4(b) is amended by adding at the end the following:

"(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.".

Section 2A3.4(c)(2) is amended by inserting "Under the Age of Sixteen Years" before "(Statutory Rape)".

The Commentary to §2A3.4 captioned "Application Notes" is amended by redesignating Note 5 as Note 8; by redesignating Notes 1 through 4 as Notes 2 through 5, respectively; by inserting before redesignated Note 2 (formerly Note 1) the following:

"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).

'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 by adding after redesignated Note 5 (formerly Note 4), the following:

"6. The enhancement in subsection (b)(4) 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)(4) 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) 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) 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.

7. 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.".

Chapter Two, Part G, Subpart One is amended by striking the text of the title to Subpart One in its entirety and inserting the following:

"PROMOTING PROSTITUTION OR PROHIBITED SEXUAL CONDUCT";

and by striking §2G1.1 in its entirety and inserting the following:

"§2G1.1. Promoting Prostitution 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) prostitution; and (B) the use of physical force, or coercion by threats or drugs or in any manner, 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 prostitution; or

(B) a participant otherwise unduly influenced a minor to engage in prostitution,
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 prostitution; 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 prostitution, 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 prostitution 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. §§ 2421, 2422, 2423(a), 2425.

Application Notes:

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 §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 prostitution' means persuading, inducing, enticing, or coercing a person to engage in prostitution, or to travel to engage in, prostitution.

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

2. Subsection (b)(1) provides an enhancement for physical force, or coercion, that occurs as part of a prostitution 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 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 prostitution 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, prostitution 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 prostitution 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 prostitution. 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 prostitution. 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 prostitution. 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 prostitution; 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 kidnaping (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 kidnaping (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 prostitution, 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).

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).".

Section 2G2.1(b) is amended by striking subdivision (3) in its entirety and inserting the following:

"(3) If, for the purpose of producing sexually explicit material, the offense involved (A) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage sexually explicit conduct; or (B) the use of a computer or an Internet-access device to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by 2 levels.".

The Commentary to §2G2.1 captioned "Application Notes" is amended by redesignating Notes 1 through 3 as Notes 2 through 4, respectively; by inserting before redesignated Note 2 (formerly Note 1) the following:

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

and by adding at the end the following:

"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.".

Section 2G2.2(b) is amended by striking subdivision (2) in its entirety and inserting the following:

"(2) (Apply the Greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) 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.".

The Commentary to §2G2.2 captioned "Application Notes" is amended by striking Note 1 in its entirety and inserting the following:

"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.".

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

"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.".

Section 2G3.1 is amended in the title by adding at the end "; Transferring Obscene Matter to a Minor".

Section 2G3.1(b) is amended by striking subdivision (1) in its entirety and inserting the following:

"(1) (Apply the Greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) 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.".

The Commentary to §2G3.1 captioned "Statutory Provisions" is amended by inserting ", 1470" after "1466".

The Commentary to §2G3.1 captioned "Application Note" is amended by striking Note 1 in its entirety and inserting the following:

"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). ".

The Commentary to §2G3.2 captioned "Background" is amended by inserting "; Transferring Obscene Matter to a Minor" after "Transporting Obscene Matter".

Appendix A (Statutory Index) is amended by inserting after the line referenced to "18 U.S.C. § 1468" the following new line:

"18 U.S.C. § 1470 2G3.1";

and by inserting after the line referenced to "18 U.S.C. § 2423(b)" the following new line:

"18 U.S.C. § 2425 2G1.1".

Reason for Amendment: This is a six-part amendment. The amendment is promulgated primarily in response to the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314 (the "Act"), which contained several directives to the Commission.

First, the amendment addresses the Act's directives to provide enhancements to the guidelines covering aggravated sexual abuse, sexual abuse, and sexual abuse of a minor if (1) the defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a minor to engage in any prohibited sexual activity; and (2) the defendant knowingly misrepresented the defendant's actual identity with the intent to persuade, induce, entice, coerce, or facilitate the transport of a minor to engage in any

prohibited sexual conduct. The legislative history of the Act indicates congressional intent to ensure that persons who misrepresent themselves to a minor, or use computers or Internet-access devices to locate and gain access to a minor, are severely punished.

In response to these directives, the amendment provides separate, cumulative two-level enhancements in the sexual abuse guidelines, §§2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), 2A3.3 (Criminal Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact), and in §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) for (1) the use of a computer or Internet-access device with the intent to persuade, induce, entice, coerce, or facilitate the transport of a minor to engage in any prohibited sexual conduct; and (2) misrepresentation of a criminally responsible person's identity with such an intent. The Commission has determined that, for offenses sentenced under these guidelines, the use of a computer or Internet-access device and the misrepresentation of identity represent separate, additional harms and increase the culpability of a defendant or criminal participant who engages, or attempts to engage, in such conduct. With respect to §§2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material), the amendment treats these two types of aggravating conduct as alternative triggers for one enhancement. In these guidelines, the substantially higher base offense levels and other specific offense characteristics provide alternative guideline mechanisms to account, at least in part, for these harms and the defendant's increased culpability. Accordingly, the Commission determined that, in these guidelines, a single, two-level increase for the use of a computer or misrepresentation adequately addresses the increased seriousness of these offenses.

Second, this amendment responds to the directive in the Act to provide a sentencing enhancement for offenses under chapter 117 of title 18, United States Code (relating to the transportation of minors for illegal sexual activity), while ensuring that the sentences, guidelines, and policy statements for offenders convicted of such offenses are appropriately severe and reasonably consistent with the other relevant directives and the relevant existing guidelines. In furtherance of this directive, the Commission initiated a comprehensive examination of §§2A3.2 and 2G1.1, the guidelines under which most cases prosecuted under such chapter are sentenced. The Commission intends to continue its comprehensive review of these guidelines and other guidelines that cover chapter 117 offenses in the next amendment cycle.

The amendment implements the directive to provide an enhancement for chapter 117 offenses, in part, through the enhancements provided in §§2A3.2 and 2G1.1 for misrepresentation of identity and use of a computer to facilitate such offenses. In addition, the amendment provides an alternative basis for a sentencing enhancement if a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct. Despite the fact that §2A3.2 nominally applies to consensual sexual acts with a person who had not attained the age of 16 years, Commission data indicated that many of the cases sentenced under §2A3.2, directly or via a cross reference from §2G1.1, involve some aspect of undue influence over the victim on the part of the defendant or other criminally responsible person. Analysis of these cases revealed conduct such as coercion, enticement, or other forms of undue influence by the defendant that compromised the voluntariness of the victim's behavior and, accordingly, increased the defendant's culpability for the crime. This prong of the new enhancement is designed to allow courts to consider closely the facts of the individual case. Furthermore, a rebuttable presumption is created that the offense involved

undue influence if a participant was at least 10 years older than the victim. Data reviewed by the Commission suggested that such a presumption is appropriate because persons who are much older than a minor are frequently in a position to manipulate the minor due to increased knowledge, influence, and resources.

As a result of the Commission's comprehensive assessment of §§2A3.2 and 2G1.1, the amendment also makes several other modifications to these guidelines. The amendment provides, in §2A3.2, an alternative base offense level of level 18 if the offense involved a violation of chapter 117 of title 18, United States Code. This alternative base offense level more fully implements a directive in the Sex Crimes Against Children Prevention Act of 1995, Pub. L. 104–71, to provide at least a three-level increase for offenses under 18 U.S.C. § 2423(a) involving the transportation of minors for prostitution or other prohibited sexual conduct. However, the amendment also provides for a three-level decrease if a defendant receives the higher alternative base offense level of level 18 and none of certain listed aggravating specific offense characteristics apply. This reduction recognizes that not all defendants convicted under chapter 117 have necessarily engaged in a more aggravated form of statutory rape conduct. The amendment also adds several definitions to §2A3.2, including clarifying that "victim" includes an undercover police officer who represents to the perpetrator of the offense that the officer was under the age of 16 years. This change was made to ensure that offenders who are apprehended in an undercover operation are appropriately punished. In §2G1.1, the amendment reallocates, without substantive change, five offense levels from subsection (b)(2) to the base offense level, for offenses involving a minor. Section 2G1.1(b)(1) also is amended to clarify that the offense must have involved prostitution in order for the enhancement for coercion, threats, or drugs to apply. The amendment also clarifies that, in §§2A3.2(c)(1) and 2G1.1(c)(2), the cross reference to §2A3.1 shall apply if the offense involved criminal sexual abuse of a minor under the age of 12 years, regardless of the "consent" of the victim. Review of Commission data indicated that the cross reference to §2A3.1 currently is not being applied in many cases in which the offense conduct suggests it should. In both §§2A3.2 and 2G1.1, the amendment also precludes application of the new enhancement for misrepresentation of identity and/or undue influence if the victim is in the custody, care, or supervisory control of the defendant.

Third, the amendment addresses the directive in the Act to clarify that the term "distribution of pornography" applies to the distribution of pornography for both monetary remuneration and a non-pecuniary interest. In response to the directive, the amendment modifies the enhancement in §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor), relating to the distribution of child pornographic material, as well as a similar enhancement in §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor), relating to the distribution of obscene material. For each of these enhancements, the amendment (1) modifies the definition of "distribution" to mean any act, including production, transportation, and possession with intent to distribute, related to the transfer of the material, regardless of whether it was for pecuniary gain; and (2) provides for varying levels of enhancement depending upon the purpose and audience of the distribution. These varying levels are intended to respond to increased congressional concerns, as indicated in the legislative history of the Act, that pedophiles, including those who use the Internet, are using child pornographic and obscene material to desensitize children to sexual activity, to convince children that sexual activity involving children is normal, and to entice children to engage in sexual activity.

Fourth, the amendment clarifies the meaning of the term "item" in subsection (b)(2) of

§2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct). That subsection provides a two-level enhancement if the offense involved possession of ten or more items of child pornography. The amendment adopts the holding of all circuits that have addressed the matter that a computer file qualifies as an item for purposes of the enhancement. The amendment also provides for an invited upward departure if the offense involves a large number of visual depictions of child pornography, regardless of the number of "items" involved. This provision invites courts to depart upward in cases in which a particular item, such as a book or a computer file, contains an unusually large number of pornographic images involving children.

Fifth, the amendment addresses the new offense of transferring obscene matter to a minor, codified at 18 U.S.C. § 1470, by referencing the offense in the Statutory Index (Appendix A) to §2G3.1.

Sixth, the amendment addresses the new offense of prohibiting the knowing transmittal of identifying information about minors for criminal sexual purposes, codified at 18 U.S.C. § 2425, by referencing the new offense in the Statutory Index to §2G1.1.

Effective Date: The effective date of this amendment is November 1, 2000.

593. **Amendment**: Section 2B5.3, effective May 1, 2000 (see Amendment 590, supra), is repromulgated, with minor editorial changes, as follows:

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

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) If the infringement amount exceeded $2,000, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount.

(2) If the offense involved the manufacture, importation, or uploading of infringing items, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(3) If the offense was not committed for commercial advantage or private financial gain, decrease by 2 levels, but the resulting offense level shall be not less than level 8.

(4) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

'Uploading' means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item.

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

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

(i) The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item.

(ii) The retail price of the infringing item is not less than 75% of the retail price of the infringed item.

(iii) The retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding.

(iv) The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511. (In a case involving such an offense, the 'retail value of the infringed item' is the price the user of the transmission would have paid to lawfully receive that transmission, and the 'infringed item' is the satellite transmission rather than the intercepting device.)

(v) The retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.

(B) Use of Retail Value of Infringing Item.—The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. § 2319A.

(C) Retail Value Defined.—For purposes of this Application Note, the 'retail value' of an infringed item or an infringing item is the retail price of that item in the market in which it is sold.

(D) Determination of Infringement Amount in Cases Involving a Variety of Infringing Items.—In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B) of this Application Note. For example, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and obviously inferior counterfeit handbags, the infringement amount, for purposes of subsection (b)(1), is the sum of the infringement amount calculated with respect to the counterfeit videotapes under subdivision (A)(i) (i.e., the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under subdivision (B) (i.e., the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).

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.

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

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

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

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

Background: This guideline treats copyright and trademark violations much like theft and fraud. Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guidelines, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act of 1997, Pub. L. 105–147, by using the retail value of the infringed item, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be inappropriate. In these types of cases, use of the retail value of the infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.

Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.".

Reason for Amendment: This amendment is in response to section 2(g) of the No Electronic Theft (NET) Act of 1997, Pub. L. 105–147 ("the Act"). The Act directs the Commission to ensure that the applicable guideline range for intellectual property offenses (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2320 of title 18, United States Code) is "sufficiently stringent to deter such a crime." It also more specifically requires that the guidelines "provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed."

The amendment responds to the directives by making changes to the monetary calculation found in §2B5.3 (Criminal Infringement of Copyright or Trademark). In addition, the amendment makes a number of other modifications to the infringement guideline, including the addition of several mitigating and aggravating factors, as further means of providing just and proportionate punishment while also seeking to achieve sufficient deterrence.

The monetary calculation in §2B5.3(b)(1), similar to the loss enhancement in the theft and fraud guidelines, serves as an approximation of the pecuniary harm caused by the offense and is a principal factor in determining the offense level for intellectual property offenses. Prior to this amendment, the monetary calculation for all intellectual property crimes was

based on the retail value of the infringing item multiplied by the quantity of infringing items. In response to the directive, the Commission refashioned this enhancement so as to use the retail value of the infringed item, multiplied by the number of infringing items, as a means of approximating the pecuniary harm for cases in which that calculation is believed most likely to provide a reasonable estimate of the resulting harm. Use of that calculation is believed to provide a reasonable approximation for those classes of infringement cases in which it is highly likely that the sale of an infringing item results in a displaced sale of the legitimate, infringed item. The amendment also requires that the retail value of the infringed item, multiplied by the number of infringing items, be used in certain other cases for reasons of practicality.

However, based upon a review of cases sentenced under the former §2B5.3 over two years, the Commission further determined that using the above formula likely would overstate substantially the pecuniary harm caused to copyright and trademark owners in some cases currently sentenced under the guideline. For those cases, a one-to-one correlation between the sale of infringing items and the displaced sale of legitimate, infringed items is unlikely because the inferior quality of the infringing item and/or the greatly discounted price at which it is sold suggests that many purchasers of infringing items would not, or could not, have purchased the infringed item in the absence of the availability of the infringing item. The Commission therefore determined that, for these latter classes of cases (referred to in Application Note 2(B)), the retail value of the infringing item, multiplied by the number of those items, provides a more reasonable approximation of lost revenues to the copyright or trademark owner, and hence, of the pecuniary harm resulting from the offense.

This amendment also increases the base offense level from level 6 to level 8. The two-level increase in the base offense level brings the infringement guideline more in line with offense levels that would pertain under §2F1.1 (Fraud and Deceit), assuming applicability under that guideline of the two-level enhancement for more than minimal planning. Based on a review of cases sentenced under the infringement guideline, if a more than minimal planning enhancement did exist in that guideline, it would apply in the vast majority of such cases because they involve this kind of aggravating conduct. Rather than provide a separate enhancement within the revised guideline for "more than minimal planning" conduct, the Commission determined that the infringement guideline should incorporate this type of conduct into the base offense level.

This amendment also provides an enhancement of two levels, and a minimum offense level of level 12, if the offense involved the manufacture, importation, or uploading of infringing items. The Commission determined that defendants who engage in such conduct are more culpable than other intellectual property offenders because they place infringing items into the stream of commerce, thereby enabling others to infringe the copyright or trademark. A review of cases sentenced under the guideline indicated applicability of this enhancement to approximately two-thirds of the cases.

This amendment also provides a two-level downward adjustment (but to a resulting offense level that is not less than offense level 8) if the offense was not committed for commercial advantage or private financial gain. This adjustment reflects the fact that the Act establishes lower statutory penalties for offenses that were not committed for commercial advantage or private financial gain.

This amendment also provides an enhancement of two levels, and a minimum offense level

of level 13, if the offense involved the conscious or reckless risk of serious bodily injury or possession of a dangerous weapon in connection with the offense. Testimony received by the Commission indicated that the conscious or reckless risk of serious bodily injury may occur in some cases involving counterfeit consumer products. 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.
The amendment also contains an application note expressly providing that the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill) shall apply if the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item. As stated in the background commentary to §3B1.3, persons who use such a special skill to facilitate or commit a crime generally are viewed as more culpable.

Finally, this amendment contains two encouraged upward departure provisions. The Commission received public comment that indicated that infringement may cause substantial harm to the reputation of the copyright or trademark owner that is not accounted for in the monetary calculation. Public comment also indicated that some copyright and trademark offenses are committed in connection with, or in furtherance of, the criminal activities of certain organized crime enterprises. The amendment invites the court to consider an appropriate upward departure if either of these aggravating circumstances are present.

Pursuant to the emergency amendment authority of the Act, this amendment previously was promulgated as a temporary measure effective May 1, 2000. (See Amendment 590, supra).

Effective Date: The effective date of this amendment is November 1, 2000.

594. **Amendment:** Section 2D1.1(c)(1) is amended by striking "3 KG or more" before "of Methamphetamine (actual)" and inserting "1.5 KG or more"; and by striking "3 KG or more" before "of 'Ice'" and inserting "1.5 KG or more".

Section 2D1.1(c)(2) is amended by striking "at least 1 KG but less than 3 KG" before "of Methamphetamine (actual)" and inserting "at least 500 G but less than 1.5 KG"; and by striking "at least 1 KG but less than 3 KG" before "of 'Ice'" and inserting "at least 500 G but less than 1.5 KG".

Section 2D1.1(c)(3) is amended by striking "at least 300 G but less than 1 KG" before "of Methamphetamine (actual)" and inserting "at least 150 G but less than 500 G"; and by striking "at least 300 G but less than 1 KG" before "of 'Ice'" and inserting "at least 150 G but less than 500 G".

Section 2D1.1(c)(4) is amended by striking "at least 100 G but less than 300 G" before "of Methamphetamine (actual)" and inserting "at least 50 G but less than 150 G"; and by striking "at least 100 G but less than 300 G" before "of 'Ice'" and inserting "at least 50 G but less than 150 G".

Section 2D1.1(c)(5) is amended by striking "at least 70 G but less than 100 G" before "of Methamphetamine (actual)" and inserting "at least 35 G but less than 50 G"; and by striking "at least 70 G but less than 100 G" before "of 'Ice'" and inserting "at least 35 G but less than 50 G".

Section 2D1.1(c)(6) is amended by striking "at least 40 G but less than 70 G" before "of Methamphetamine (actual)" and inserting "at least 20 G but less than 35 G"; and by striking

"at least 40 G but less than 70 G" before "of 'Ice'" and inserting "at least 20 G but less than 35 G".

Section 2D1.1(c)(7) is amended by striking "at least 10 G but less than 40 G" before "of Methamphetamine (actual)" and inserting "at least 5 G but less than 20 G"; and by striking "at least 10 G but less than 40 G" before "of 'Ice'" and inserting "at least 5 G but less than 20 G".

Section 2D1.1(c)(8) is amended by striking "at least 8 G but less than 10 G" before "of Methamphetamine (actual)" and inserting "at least 4 G but less than 5 G"; and by striking "at least 8 G but less than 10 G" before "of 'Ice'" and inserting "at least 4 G but less than 5 G".

Section 2D1.1(c)(9) is amended by striking "at least 6 G but less than 8 G" before "of Methamphetamine (actual)" and inserting "at least 3 G but less than 4 G"; and by striking "at least 6 G but less than 8 G" before "of 'Ice'" and inserting "at least 3 G but less than 4 G".

Section 2D1.1(c)(10) is amended by striking "at least 4 G but less than 6 G" before "of Methamphetamine (actual)" and inserting "at least 2 G but less than 3 G"; and by striking "at least 4 G but less than 6 G" before "of 'Ice'" and inserting "at least 2 G but less than 3 G".

Section 2D1.1(c)(11) is amended by striking "at least 2 G but less than 4 G" before "of Methamphetamine (actual)" and inserting "at least 1 G but less than 2 G"; and by striking "at least 2 G but less than 4 G" before "of 'Ice'" and inserting "at least 1 G but less than 2 G".

Section 2D1.1(c)(12) is amended by striking "at least 1 G but less than 2 G" before "of Methamphetamine (actual)" and inserting "at least 500 MG but less than 1 G"; and by striking "at least 1 G but less than 2 G" before "of 'Ice'" and inserting "at least 500 MG but less than 1 G".

Section 2D1.1(c)(13) is amended by striking "at least 500 MG but less than 1 G" before "of Methamphetamine (actual)" and inserting "at least 250 MG but less than 500 MG"; and by striking "at least 500 MG but less than 1 G" before "of 'Ice'" and inserting "at least 250 MG but less than 500 MG".

Section 2D1.1(c)(14) is amended by striking "less than 500 MG" before "of Methamphetamine (actual)" and inserting "less than 250 MG"; and by striking "less than 500 MG" before "of 'Ice'" and inserting "less than 250 MG".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the "Drug Equivalency Tables" captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)" in the line referenced to "Methamphetamine (Actual)" by striking "10 kg" and inserting "20 kg"; and in the line referenced to "Ice" by striking "10 kg" and inserting "20 kg".

Reason for Amendment: This amendment responds to statutory changes to the quantity of methamphetamine substance triggering mandatory minimum penalties, as prescribed in the Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. 105–277 (the

"Act"). This amendment conforms methamphetamine (actual) penalties, as specified in the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking), to the more stringent mandatory minimums established by the Act. In taking this action, the Commission follows the approach set forth in the original guidelines for the other principal controlled substances for which mandatory minimum penalties have been established by Congress. No change was made in the guideline penalties for methamphetamine mixture offenses because those penalties already corresponded to the mandatory minimum penalties as amended by the Act. See USSC Guidelines Manual Appendix C, Amendment 555, effective November 1, 1997.

Effective Date: The effective date of this amendment is November 1, 2000.

595. Amendment: Sections 2B5.1, 2F1.1, and 3A1.1, effective November 1, 1998 (see Amendment 587, supra), are repromulgated without change.

Reason for Amendment: This amendment implements, in a broader form, the directives to the Commission in section 6 of the Telemarketing Fraud Prevention Act of 1998, Pub. L. 105–184 ("the Act").

The Act directs the Commission to provide for "substantially increased penalties" for telemarketing frauds. It also more specifically requires that the guidelines provide "an additional appropriate sentencing enhancement, if the offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States," and "an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims, including but not limited to [telemarketing fraud victims over age 55], are affected by a fraudulent scheme or schemes."

This amendment responds to the directives by building upon the amendments to the fraud guideline, §2F1.1 (Fraud and Deceit), that were submitted to Congress on May 1, 1998. (See Amendment 577, supra). Those amendments added a specific offense characteristic for "mass-marketing," which is defined to include telemarketing, and a specific offense characteristic for sophisticated concealment.

This amendment broadens the "sophisticated concealment" enhancement to cover "sophisticated means" of executing or concealing a fraud offense. In addition, the amendment increases the enhancement under §3A1.1 (Hate Crime Motivation or Vulnerable Victim), for offenses that impact a large number of vulnerable victims.

This amendment also makes a conforming amendment to §2B5.1 in the definition of "United States".

In designing enhancements that may apply more broadly than the Act's above-stated directives minimally require, the Commission acts consistently with other directives in the Act (e.g., section 6(c)(4) (requiring the Commission to ensure that its implementing amendments are reasonably consistent with other relevant directives to the Commission and other parts of the sentencing guidelines)) and with its basic mandate in sections 991 and 994 of title 28, United States Code (e.g., 28 U.S.C. § 991(b)(1)(B)) (requiring sentencing policies that avoid unwarranted disparities among similarly situated defendants)).

Pursuant to the emergency amendment authority of the Act, this amendment previously was promulgated as a temporary measure effective November 1, 1998. (See Amendment 587, supra).

Effective Date: The effective date of this amendment is November 1, 2000.

596. Amendment: The Commentary to §2B1.1 captioned "Application Notes" is amended by striking Note 4 in its entirety; by redesignating Notes 5 through 16 as Notes 4 through 15, respectively; and in Note 2 by striking the second paragraph in its entirety and inserting the following:

"If the offense involved making a fraudulent loan or credit card application, or other unlawful conduct involving a loan, a counterfeit access device, or an unauthorized access device, the loss is to be determined in accordance with the Commentary to §2F1.1 (Fraud and Deceit). For example, in accordance with Application Note 17 of the Commentary to §2F1.1, in a case involving an unauthorized access device (such as a stolen credit card), loss includes any unauthorized charge(s) made with the access device. In such a case, the loss shall be not less than $500 per unauthorized access device. For purposes of this application note, 'counterfeit access device' and 'unauthorized access device' have the meaning given those terms in 18 U.S.C. § 1029(e)(2) and (e)(3), respectively.".

Section 2F1.1, as amended by Amendment 595 (see supra), is further amended by redesignating subsections (b)(5) through (b)(7) as subsections (b)(6) through (b)(8), respectively; and by inserting after subsection (b)(4) the following:

"(5) If the offense involved—

(A) the possession or use of any device-making equipment;

(B) the production or trafficking of any unauthorized access device or counterfeit access device; or

(C) (i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from another means of identification or obtained by the use of another means of identification,

increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.".

The Commentary to §2F1.1 captioned "Application Notes", as amended by Amendment 595 (see supra), is further amended in Note 12 in the first sentence by striking "fraudulent identification documents and"; by striking the second sentence in its entirety; in the third sentence, by striking "the case of an offense involving false identification documents or access devices," and inserting "such a case,"; and by adding at the end the following paragraph:

"Offenses involving identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this

guideline. If the primary purpose of the offense was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than §2F1.1.".

The Commentary to §2F1.1 captioned "Application Notes", as amended by Amendment 595 (see supra), is further amended by redesignating Notes 15 through 20 as Notes 18 through 23, respectively; and by inserting after Note 14 the following:

"15. For purposes of subsection (b)(5)—

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

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

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

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

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

16. Subsection (b)(5)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

Examples of conduct to which this subsection should apply are as follows:

(A) A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of

identification that has been obtained unlawfully.

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

Examples of conduct to which subsection (b)(5)(C)(i) should not apply are as follows:

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

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

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

In a case involving unlawfully produced or unlawfully obtained means of identification, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense. Examples may include the following:

(A) The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.

(B) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in the individual's name.

(C) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.

17. In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device. In any such case, loss shall be not less than $500 per access device. However, if the unauthorized access

device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this application note, 'counterfeit access device' and 'unauthorized access device' have the meaning given those terms in Application Note 15.".

The Commentary to §2F1.1 captioned "Application Notes", as amended by Amendment 595 (see supra), is further amended in redesignated Note 18 (formerly Note 15) by striking "(b)(5)" each place it appears and inserting "(b)(6)".

The Commentary to §2F1.1 captioned "Application Notes", as amended by Amendment 595 (see supra), is further amended in redesignated Note 21 (formerly Note 18), by striking "(b)(7)" and inserting "(b)(8)".

The Commentary to §2F1.1 captioned "Application Notes", as amended by Amendment 595 (see supra), is further amended by striking redesignated Note 23 (formerly Note 20), in its entirety and inserting the following:

"23. If subsection (b)(5), subsection (b)(8)(A), or subsection (b)(8)(B) applies, there shall be a rebuttable presumption that the offense also involved more than minimal planning for purposes of subsection (b)(2).

If the conduct that forms the basis for an enhancement under subsection (b)(5) is the only conduct that forms the basis of an enhancement under subsection (b)(6), do not apply an enhancement under subsection (b)(6).".

The Commentary to §2F1.1 captioned "Background", as amended by Amendment 595 (see supra), is further amended by striking the sixth paragraph and all that follows through the end of the "Background" and inserting the following:

" Subsections (b)(5)(A) and(B) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.

Subsection (b)(5)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as 'affirmative identity theft' or 'breeding,' in which a defendant uses another individual's name, social security number, or some other form of identification (the 'means of identification') to 'breed' (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines 'means of identification,' the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part, because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were 'bred' (i.e., produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been 'stolen.' Generally, the victim does not become

aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

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

Subsection (b)(7)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)(8)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)(8)(B) implements the instruction to the Commission in section 2507 of Public Law 101–647.

Subsection (c) implements the instruction to the Commission in section 805(c) of Public Law 104–132.".

Reason for Amendment: This is a five-part amendment. First, this amendment provides a two-level increase and a minimum offense level of level 12 for offenses involving (1) the possession or use of equipment that is used to manufacture access devices; (2) the production of, or trafficking in, unauthorized and counterfeit access devices, such as stolen credit cards and cloned wireless telephones; or (3) affirmative identity theft (i.e., unlawfully producing from any means of identification any other means of identification). Affirmative identity theft, referred to in the research and analysis conducted by the Commission as the "breeding" of identification means, will result in an enhanced penalty in any case in which there is a transfer or use of another person's means of identification unlawfully to produce or "breed" additional means of identification, or in which there is the possession of five or more means of identification that were unlawfully produced.

Second, this amendment provides a rebuttable presumption that the offense involved more than minimal planning, and it contains a rule to avoid "double counting" between the existing enhancement for "sophisticated means" based on the same conduct.

Third, the amendment provides a revised minimum loss rule for offenses involving counterfeit or unauthorized access devices. Specifically, this rule requires that a minimum loss amount of $500 per access device be used when calculating the loss involved in the offense. However, for offenses that involve only the possession, and not the use, of a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (e.g., an ESN/MIN pair used to obtain telecommunications service in a wireless telephone), the rule provides a minimum loss amount of $100 per unused means.

Fourth, this amendment provides an encouraged upward departure if the offense level does

not adequately reflect the seriousness of the offense conduct. Examples of cases in which a departure may be warranted include those in which (1) an identity theft caused substantial harm to the victim's reputation or credit record; (2) an individual is arrested, or is denied a job, because of a misidentification that results from an identity theft; or (3) a defendant essentially assumed the victim's identity.

Fifth, this amendment incorporates the statutory definitions of 18 U.S.C. §§ 1028 and 1029, although it also broadens the definitions of "counterfeit access device" and "device-making equipment" for guideline purposes.

This amendment responds to the directives to the Commission contained in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Pub. L. 105–318(b)(1) ("ITADA") and section 2 of the Wireless Telephone Protection Act, Pub. L. 105–172 ("WTPA"). For the reasons discussed below and because of the overlap in some of the statutory definitions in the ITADA and the WTPA (particularly "access device," "telecommunication identifying information," and "means of identification"), enhancements have been consolidated into a single guideline amendment.

The ITADA and the WTPA directed the Commission to "review and amend the Federal sentencing guidelines and the policy statements of the Commission" to provide appropriate punishment for identity theft offenses under 18 U.S.C. § 1028 and for offenses under 18 U.S.C. § 1029 related to the cloning of wireless telephones.

The WTPA directed the Commission to review, among other factors, "the range of conduct covered by" cloning offenses. Although cloned telephones may be possessed and used in connection with a variety of offenses, the Commission determined that the possession or use of a cloned phone does not necessarily increase the seriousness of the underlying offense. However, the Commission decided that offenders who manufacture or distribute cloned telephones are more culpable than offenders who only possess them. Accordingly, the new enhancements at §2F1.1(b)(5)(A) and (B) recognize that such offenders warrant greater punishment. However, to ensure that the guidelines apply consistently to similarly serious conduct regardless of the technology employed, this amendment provides for a broader enhancement that applies to the manufacture or distribution of any access device, including a cloned telephone.

The ITADA directed the Commission to assess certain specific factors in its consideration of appropriate penalties for identity theft, including: the number of victims; the harm to a victim's reputation and inconvenience caused by the offense; the number of means of identification, identification documents, or false identification documents involved in the offense; the range of offense conduct; and, the adequacy of the value of loss to an individual victim as a measure for establishing penalties.

In conducting research pursuant to the ITADA, the Commission learned that identity theft, as defined broadly under the new statutory provisions at 18 U.S.C. §§ 1028(a)(7) and 1028(d)(3), occurs along a continuum of offense conduct. The most basic type of identity theft occurs when a thief steals a wallet and uses a stolen credit card to make a purchase or forges a signature to cash a stolen check. However, after analyzing the legislative history of the ITADA and Commission data, the Commission determined that the more aggravated and sophisticated forms of identity theft, about which Congress seemed particularly concerned, should be the focus of enhanced punishment under the guidelines. Such offense

conduct, which generally occurs within the context of financial and credit account take-overs, involves affirmative activity to generate or "breed" another level of identification means without the knowledge of the individual victim whose identification means are misused, purloined, or "taken over". This activity is considered more sophisticated because of the additional steps the perpetrator takes to "breed" additional means of identification in order to conceal and continue the fraudulent conduct. Such sophisticated conduct makes detection by both the individual and institutional victims much more difficult. It also has the potential to increase harm, both monetary and non-monetary, to the individual victims (about whom Congress was particularly concerned in enacting the ITADA), and can result in substantial disruption of record-keeping by governmental agencies and private financial institutions upon which the stream of commerce depends. Thus, the Commission determined that this aggravated offense conduct, in contrast to the most basic forms of identity theft, merits enhanced punishment.

Accordingly, amended section §2F1.1(b)(5)(C) recognizes that the conduct of generating or "breeding" identification means warrants substantial additional penalties. The minimum offense level of level 12 accounts for the fact that the defendant in an identity theft case typically has exclusive control over the "bred" means of identification, making it difficult for the individual victim to detect that the victim's identity has been stolen until substantial harms (e.g., a damaged credit rating) have occurred. The minimum offense level also accounts for the non-monetary harms associated with identity theft (e.g., harm to reputation or credit rating), which typically are difficult to quantify. However, for cases in which the nature and scope of the harm to an individual victim is so egregious that the two-level enhancement and minimum offense level provide insufficient punishment, the amendment invites an upward departure.

The WTPA directed the Commission to review "the extent to which the value of the loss caused by the offenses. . . is an adequate measure for establishing penalties. . . ." The amendment provides a minimum loss rule in §2F1.1 that extends to all access devices, not just to cloned wireless telephones. In so doing, similar fraud cases will be treated similarly regardless of the technology or type of access device used in the offense. Additionally, the Commission's research and data supported increasing the minimum loss amount, previously provided only in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), from $100 to $500 per access device. However, the data were insufficient to support using this increased amount in cases that involve only the possession, and not the use, of means of telecommunications access that identify a specific telecommunications instrument or account (e.g., ESN/MIN pairs of wireless telephones). (An example of such a case is a defendant who possesses a list of ESN/MIN pairs but has not used any of those pairs to clone wireless telephones.) For such cases, the Commission decided that the minimum loss amount should be $100 per unused means.

Effective Date: The effective date of this amendment is November 1, 2000.

597. Amendment: Section 2F1.1(b), as amended by Amendment 595 (see supra), is further amended in subdivision (4) by striking "; or" after "agency" and inserting a semicolon; by inserting "a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; or (C) a" after "(B)"; and by inserting "prior, specific" before "judicial".

The Commentary to §2F1.1 captioned "Application Notes", as amended by Amendment 595 (see supra), is further amended by striking Note 6 in its entirety and inserting the following:

"6. Subsection (b)(4)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).

If the conduct that forms the basis for an enhancement under (b)(4)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.".

The Commentary to §2F1.1 captioned "Background", as amended by Amendment 595 (see supra), is further amended by striking the fourth sentence of the fourth paragraph and inserting the following:

"The commission of a fraud in the course of a bankruptcy proceeding subjects the defendant to an enhanced sentence because that fraudulent conduct undermines the bankruptcy process as well as harms others with an interest in the bankruptcy estate.".

Reason for Amendment: The amendment was prompted by the circuit conflict regarding whether the enhancement in §2F1.1 (Fraud and Deceit) for "violation of any judicial or administrative order, injunction, decree, or process" applies to false statements made during bankruptcy proceedings. Compare United States v. Saacks, 131 F.3d 540 (5th Cir. 1997) (bankruptcy fraud implicates the violation of a judicial or administrative order or process within the meaning of the enhancement; United States v. Michalek, 54 F.3d 325 (7th Cir. 1995) (bankruptcy fraud is a "special procedure"; it is a violation of a specific adjudicatory process); United States v. Lloyd, 947 F.2d 339 (8th Cir. 1991) (knowing concealment of assets in bankruptcy fraud violates "judicial process"); United States v. Welch, 103 F.3d 906 (9th Cir. 1996) (same); United States v. Messner, 107 F.3d 1448 (10th Cir. 1997) (same); United States v. Bellew, 35 F.3d 518 (11th Cir. 1994) (knowing concealment of assets during bankruptcy proceedings qualifies as a violation of a "judicial order"), with United States v. Shadduck, 112 F.3d 523 (1st Cir. 1997) (falsely filling out bankruptcy forms does not violate judicial process since the debtor is not accorded a position of trust). See also United States v. Carrozella, 105 F. 3d 796 (2d Cir. 1997) (district court erred in enhancing the sentence for violation of judicial process in the case of a defendant who filed false accounts in probate court).

The majority of circuits have held that the current enhancement applies to a defendant who

conceals assets in a bankruptcy case because the conduct violates a judicial order or violates judicial process. Commission data indicate that, in fiscal year 1998, 41 defendants received an increase for either "violation of a judicial order . . . or misrepresentation of a charitable organization." The data did not distinguish between the two parts of the enhancement.

This amendment creates a separate and distinct basis for a two-level enhancement under the fraud guideline for a misrepresentation or false statement made in the course of a bankruptcy proceeding. Additionally, the existing enhancement and its accompanying commentary are modified to make clear that, in order for the enhancement to apply in a fraud case not involving a bankruptcy proceeding, there must be a false statement in violation of a specific, prior order. Therefore, any case involving a bankruptcy fraud will result in a two-level enhancement, but in the case of a non-bankruptcy fraud, the enhancement will apply only if a defendant was given prior notice of a particular action. The Commission has decided to treat bankruptcy fraud more severely because of its adverse impact on the bankruptcy judicial process and because of the additional harm and seriousness involved in such conduct. See United States v. Saacks, 131 F.3d 540, 543 (5th Cir. 1997) (noting that bankruptcy fraud is more serious than "the most pedestrian federal fraud offense").

Effective Date: The effective date of this amendment is November 1, 2000.

598. Amendment: Section 2K2.4 is amended by striking subsection (a) in its entirety and inserting the following:

"(a) If the defendant, whether or not convicted of another crime, was convicted of violating:

(1) Section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute.

(2) Section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute.".

The Commentary to §2K2.4 captioned "Application Notes" is amended by striking Note 1 in its entirety and inserting the following:

"1. Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Subsection (a) reflects this distinction. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 844(h) is the term required by the statute, and the guideline sentence for a defendant convicted under 18 U.S.C. § 924(c) or § 929(a) is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 844(h), 924(c), and 929(a) requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

A sentence above the minimum term required by 18 U.S.C. § 924(c) or

§ 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history, particularly in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense and has at least two prior felony convictions for a crime of violence or a controlled substance offense that would have resulted in application of §4B1.1 (Career Offender) if that guideline applied to these offenses. See Application Note 3.".

The Commentary to §2K2.4 captioned "Background" is amended by striking the first sentence in its entirety and inserting the following:

"Section 844(h) of title 18, United States Code, provides a mandatory term of imprisonment. Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment. A sentence imposed pursuant to any of these statutes must be imposed to run consecutively to any other term of imprisonment.".

The Commentary to §3D1.1 captioned "Application Note" is amended in Note 1 in the second sentence by striking "mandatory term of five years" and inserting "mandatory minimum terms of imprisonment, based on the conduct involved,"; and in the seventh sentence by inserting "minimum" after "mandatory".

The Commentary to §5G1.2 is amended in the second sentence of the last paragraph by striking "mandatory term of five years" and inserting "mandatory minimum terms of imprisonment, based on the conduct involved,".

Reason for Amendment: This amendment revises §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to (1) clarify how the minimum, consecutive terms of imprisonment mandated by the statutes indexed to this guideline should be treated for purposes of guideline application; and (2) specify guideline sentences, for all statutes indexed to §2K2.4, that comply with the Commission's mandate in 28 U.S.C. § 994(b)(2) (requiring guideline sentencing ranges in which the maximum shall not exceed the minimum by more than the greater of 25 percent or six months). The Act to Throttle the Criminal Use of Guns, Pub. L. 105–386, changed the penalty provisions in 18 U.S.C. § 924(c) from fixed terms of years to ranges of "not less than" various terms of years. This effectively establishes mandatory minimum terms of imprisonment with implicit maximum terms of life. Section 929(a) of title 18, United States Code, contains similar provisions. Section 2K2.4 continues to provide that, in both cases, the term of imprisonment imposed under the statute should be determined independently of the usual guideline application rules and the sentence imposed should run consecutively to any other term of imprisonment. See §5G1.2(a). However, §2K2.4 previously stated that the term of imprisonment was that "required by statute." Because two of the statutes indexed to the guideline now provide for terms of a range of years, questions arose as to whether any sentence within the statutorily authorized range complied with the guidelines.

The amendment clarifies that the guideline sentence is the minimum term required by the statute of conviction, that a term greater than this minimum is an upward departure and should be imposed using the normal standards and procedures that apply to departures from the guideline range, and that such upward departures are invited under certain circumstances. See 18 U.S.C. § 3553(b). For example, career offenders who are convicted both of an

offense under 18 U.S.C. § 924(c) and of an underlying crime of violence or drug trafficking typically will receive lengthy guideline sentences. This amendment modifies Application Note 1 of §2K2.4 to encourage an upward departure in the unusual circumstance in which an offender is convicted only of 18 U.S.C. § 924(c) and would have qualified as a career offender if that guideline applied to such convictions, or in other unusual circumstances in which the sentence in a particular case does not adequately reflect the seriousness of the defendant's criminal history. Because 18 U.S.C. § 844(h) still provides for fixed terms of imprisonment, the amendment differentiates it from the two statutes that provide for terms of a range of years.

The amendment also contains technical and conforming changes: §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction) are revised to reflect a change to the penalty provision of 18 U.S.C. § 924(c).

Effective Date: The effective date of this amendment is November 1, 2000.

599. **Amendment:** The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 2 in the second paragraph by striking "paragraph" after "preceding" and inserting "paragraphs"; and by striking the first paragraph in its entirety and inserting the following:

> "If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.
>
> If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under §2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or §2K2.1(b)(5) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under

§2K2.1(b)(5) would not apply.".

The Commentary to §2K2.4 captioned "Application Notes", as amended by Amendment 600 (see supra), is further amended in Note 5 (formerly Note 4) in the third sentence by inserting "brandishing," after "possession,".

The Commentary to §2K2.4 captioned "Background" is amended in the second sentence by inserting "brandishing," after "use,".

Reason for Amendment: This amendment expands the commentary in Application Note 2 of §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to clarify under what circumstances defendants sentenced for violations of 18 U.S.C. § 924(c) in conjunction with convictions for other offenses may receive weapon enhancements contained in the guidelines for those other offenses. The amendment directs that no guideline weapon enhancement should be applied when determining the sentence for the crime of violence or drug trafficking offense underlying the 18 U.S.C. § 924(c) conviction, nor for any conduct with respect to that offense for which the defendant is accountable under §1B1.3 (Relevant Conduct). Guideline weapon enhancements may be applied, however, when determining the sentence for counts of conviction outside the scope of relevant conduct for the underlying offense (e.g., a conviction for a second armed bank robbery for which no 18 U.S.C. § 924(c) conviction was obtained).

For similar reasons, this amendment also expands the application note to clarify that offenders who receive a sentence under §2K2.4 should not receive enhancements under §2K1.3(b)(3) (pertaining to explosive material connected with another offense), or §2K2.1(b)(5) (pertaining to firearms or ammunition possessed, used, or transferred in connection with another offense) with respect to any weapon, ammunition, or explosive connected to the offense underlying the count of conviction sentenced under §2K2.4.

The purposes of this amendment are to (1) avoid unwarranted disparity and duplicative punishment; and (2) conform application of guideline weapon enhancements with general guideline principles. The relevant application note to §2K2.4 previously stated that if a sentence was imposed under §2K2.4 in conjunction with a sentence for "an underlying offense," no weapon enhancement should be applied with respect to the guideline for the underlying offense. Some courts interpreted "underlying offense" narrowly to mean only the "crime of violence" or "drug trafficking offense" that forms the basis for the 18 U.S.C. § 924(c) conviction. See, e.g., United States v. Flennory,145 F.3d 1264, 1268-69 (11th Cir. 1998), cert. denied, 119 S.Ct. 1130 (1999). But see United States v. Smith, 196 F.3d 676, 679-82 (6th Cir. 1999) (a conviction under 18 U.S.C. § 922(g) qualifies as an "underlying offense," and thus, application of the enhancement in §2K2.1(b)(5) was impermissible double-counting). In other cases, offenders have received both the mandated statutory penalty and a guideline weapon enhancement in circumstances in which the guidelines generally would require a single weapon enhancement. See United States v. Gonzalez, 183 F.3d 1315, 1325-26 (11th Cir.), cert. denied, 120 S.Ct. 996 (2000) (both statutory and guideline increases may be imposed if defendant and accomplice used different weapons as part of a joint undertaking); United States v. Willett, 90 F.3d 404, 407-08 (9th Cir. 1996) (not double counting to apply both increases for separate weapons possessed by defendant). But see United States v. Knobloch, 131 F.3d 366, 372 (3d Cir. 1996) (error to apply guideline enhancement in addition to statutory penalty "even if the section 924(c)(1)

sentence is for a different weapon than the weapon upon which the enhancement is predicated.").

The amendment clarifies application of the commentary, consistent with the definition of "offense" found in §1B1.1 (Application Note 1(*l*)) and with general guideline principles. It addresses disparate application arising from conflicting interpretations of the current guideline in different courts, and is intended to avoid the duplicative punishment that results when sentences are increased under both the statutes and the guidelines for substantially the same harm.

Finally, Application Notes 2 and 4 and the Background Commentary of §2K2.4 are revised to reflect changes to 18 U.S.C. § 924(c), made by the Act to Throttle the Criminal Use of Guns, Pub. L. 105–386, with respect to "brandishing" a firearm.

Effective Date: The effective date of this amendment is November 1, 2000.

600. Amendment: The Commentary to §2K2.4 captioned "Application Notes" is amended by redesignating Notes 3 and 4 as Notes 4 and 5, respectively; and by inserting after Note 2 the following:

> "3. Do not apply Chapter Three (Adjustments) and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of these 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).".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 by striking "Possessing a firearm during and in relation to a crime of violence" and all that follows through the end of the first sentence and inserting the following:

"A prior conviction for violating 18 U.S.C. § 924(c) or § 929(a) is a 'prior felony conviction' for purposes of applying §4B1.1 (Career Offender) if the prior offense of conviction established that the underlying offense was a 'crime of violence' or 'controlled substance offense.'".

The Commentary to §4B1.2 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. The guideline sentence for a conviction under 18 U.S.C. § 924(c) or § 929(a) is determined only by the statute and is imposed independently of any other sentence. See §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), 3D1.1 (Procedure for Determining Offense Level on Multiple Counts), and subsection (a) of §5G1.2 (Sentencing on Multiple Counts of Conviction). Accordingly, do not apply this guideline if the only offense of conviction is for violating 18 U.S.C. § 924(c) or § 929(a). For provisions pertaining to an upward departure from the guideline sentence for a conviction under 18 U.S.C. § 924(c) or § 929(a), see Application Note 1 of §2K2.4.".

Reason for Amendment: This amendment revises §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 4B1.2 (Definitions of Terms Used in Section 4B1.1) to clarify guideline application for offenders convicted under 18 U.S.C. §§ 924(c) and 929(a) who might also qualify as career offenders under the rules and definitions provided in §§4B1.1 (Career Offender) and 4B1.2. This amendment preserves the status quo as it existed prior to the statutory changes to 18 U.S.C. § 924(c), made by the Act to Throttle the Criminal Use of Guns, Pub. L. 105–386, that established a statutory maximum of life for all violations of the statute.

This amendment adds a new Application Note 3 to §2K2.4 directing courts not to apply Chapter Three (Adjustments) or Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under §2K2.4. This effectively prohibits the use of 18 U.S.C. § 924(c) convictions either to trigger application of the career offender guideline, §4B1.1, or to determine the appropriate offense level under that guideline. Application Note 1 of §4B1.2 also is amended to clarify, however, that prior convictions for violating 18 U.S.C. § 924(c) will continue to qualify as "prior felony convictions" under the career offender guideline in most circumstances.

Effective Date: The effective date of this amendment is November 1, 2000.

601. Amendment: The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(c) by striking "that the weapon was pointed or waved about, or displayed in a threatening manner." and inserting the following:

> "that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.".

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1 by striking subdivision (d) in its entirety and inserting the following:

> "(d) 'Dangerous weapon' means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (e.g. a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).".

Section 2A3.1(b)(1) is amended by striking "(including, but not limited to, the use or display of any dangerous weapon)".

The Commentary to §2A3.1 captioned "Application Notes" is amended in Note 1 by striking "where any dangerous weapon was used," and inserting "if any dangerous weapon was used or"; and by striking ", or displayed to intimidate the victim".

Section 2B3.1(b)(2) is amended by striking "displayed," each place it appears.

The Commentary to §2B3.1 captioned "Application Notes" is amended by striking Note 2 in its entirety and inserting the following:

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

Section 2B3.2(b)(3) is amended by striking "displayed," each place it appears.

Section 2E2.1(b)(1)(C) is amended by striking ", displayed".

Reason for Amendment: This amendment conforms the guideline definition of "brandish" found at Application Note 1(c) of §1B1.1 (Application Instructions) to a statutory definition, which was added by the Act to Throttle the Criminal Use of Guns, Pub. L. 105–386, and is codified at 18 U.S.C. § 924(c)(4). The purposes of this amendment are to (1) avoid confusion that can be caused by different guideline and statutory definitions of identical terms; and (2) increase punishment in some circumstances for persons who "make the presence of the weapon known to another person, in order to intimidate that person," regardless of whether the weapon is visible. As was the case prior to this amendment, the guideline definition of "brandish" applies to all dangerous weapons and not only to firearms.

The definition of "dangerous weapon" in Application Note 1(d) of §1B1.1 also is amended to clarify under what circumstances an object that is not an actual, dangerous weapon should be treated as one for purposes of guideline application. The amendment is in accord with the decisions in United States v. Shores, 966 F.2d 1383 (11th Cir. 1992) (toy gun carried but never used by a defendant qualifies as a dangerous weapon because of its potential, if it were used, to arouse fear in victims and dangerous reactions by police or security personnel) and United States v. Dixon, 982 F.2d 116 (3rd Cir. 1992) (hand wrapped in a towel qualifies as a dangerous weapon if the defendant's actions created the impression that the defendant possessed a dangerous weapon).

The amendment also deletes the term "displayed" wherever it appears in the Guidelines Manual in an enhancement with "brandished." Because "brandished" applies in any case in which "all or part of the weapon was displayed," the Commission determined the inclusion of "displayed" in these enhancements is redundant. This part of the amendment is not intended to make a substantive change in the guidelines.

Effective Date: The effective date of this amendment is November 1, 2000.

602. **Amendment:** Chapter One, Part A, Subpart 4(b) is amended 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)".

Chapter Five, Part K, Subpart 2, is amended by inserting at the end the following:

"§5K2.19. Post-Sentencing Rehabilitative Efforts (Policy Statement)

Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. § 3583(e)(1).)

Commentary

Background: The Commission has determined that post-sentencing rehabilitative measures should not provide a basis for downward departure when resentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those who gain the opportunity to be resentenced de novo.".

Reason for Amendment: This amendment was prompted by the circuit conflict regarding whether sentencing courts may consider an offender's post-offense rehabilitative efforts while in prison or on probation as a basis for downward departure at resentencing following an appeal. Compare United States v. Rhodes, 145 F.3d 1375, 1379 (D.C. Cir. 1998) (post-conviction rehabilitation is not a prohibited factor and, therefore, sentencing courts may consider it as a possible ground for downward departure at resentencing); United States v. Bradstreet, 207 F.3d 76 (1st Cir. 2000); United States v. Core, 125 F.3d 74, 75 (2d Cir. 1997) ("We find nothing in the pertinent statutes or the Sentencing Guidelines that prevents a sentencing judge from considering post-conviction rehabilitation in prison as a basis for departure if resentencing becomes necessary.") cert. denied, 118 S. Ct. 735 (1998); United States v. Sally,116 F.3d 76, 80 (3d Cir. 1997) (holding that "post-offense rehabilitations efforts, including those which occur post-conviction, may constitute a sufficient factor warranting a downward departure"); United States v. Rudolph, 190 F.3d 720, 723 (6th Cir. 1999); United States v. Green, 152 F.3d 1202, 1207 (9th Cir. 1998) (same), with United States v. Sims, 174 F.3d 911 (8th Cir. 1999) (district court lacks authority at resentencing following an appeal to depart on ground of post-conviction rehabilitation which occurred after the original sentencing; refuses to extend holding regarding departures for post-offense rehabilitation to conduct that occurs in prison; departure based on post-conviction conduct infringes on statutory authority of the Bureau of Prisons to grant good-time credits). In Sims, the Eighth Circuit concluded that a rule allowing a departure at resentencing based on post-sentencing rehabilitation would result in unwarranted disparity because resentencing would be a fortuitous event benefitting only some defendants; would reinstate a parole-like system; and would interfere with the authority of the Bureau of Prisons to award good-time credits. See Sims, 174 F.3d at 912-13; Rhodes, 145 F.3d at 1384 (Silberman, J., dissenting).

The Commission determined that post-sentencing rehabilitative efforts should not provide a basis for a downward departure when resentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with policies established by Congress under the Sentencing Reform Act, including the provisions of 18 U.S.C. § 3624(b) for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those few who gain the opportunity to be resentenced de novo, while others, whose rehabilitative efforts may have been more substantial, could not benefit simply

because they chose not to appeal or appealed unsuccessfully. Additionally, prohibition on downward departure for post-sentencing rehabilitative efforts is consistent with Commission policies expressed in §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range). This amendment does not restrict departures based on extraordinary post-offense rehabilitative efforts prior to sentencing. Such departures have been allowed by every circuit that has ruled on the matter post-Koon. See e.g., United States v. Brock, 108 F.3d 31 (4th Cir. 1997).

Effective Date: The effective date of this amendment is November 1, 2000.

603. Amendment: Chapter One, Part A, Subpart 4(d) is amended 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.)".

Chapter Five, Part K, Subpart 2, as amended by Amendment 602 (see supra), is further amended by adding at the end the following:

> "§5K2.20. Aberrant Behavior (Policy Statement)
>
> A sentence below the applicable guideline range may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior. However, the court may not depart below the guideline range on this basis if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood); or (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter Four.
>
> Commentary
>
> Application Notes:
>
> 1. For purposes of this policy statement—
>
> 'Aberrant behavior' means a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life.
>
> 'Dangerous weapon,' 'firearm,' 'otherwise used,' and 'serious bodily injury' have the meaning given those terms in the Commentary to

§1B1.1(Application Instructions).

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

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

Reason for Amendment: This amendment responds to a circuit conflict regarding whether, for purposes of downward departure from the guideline range, a "single act of aberrant behavior" (Chapter One, Part A, Subpart 4(d)) includes multiple acts occurring over a period of time. Compare United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996) (Sentencing Commission intended the word "single" to refer to the crime committed; therefore, "single acts of aberrant behavior" include multiple acts leading up to the commission of the crime; the district court should review the totality of circumstances); Zecevic v. United States Parole Commission, 163 F.3d 731 (2d Cir. 1998) (aberrant behavior is conduct which constitutes a short-lived departure from an otherwise law-abiding life, and the best test is the totality of the circumstances); United States v. Takai, 941 F.2d 738 (9th Cir. 1991) ("single act" refers to the particular action that is criminal, even though a whole series of acts lead up to the commission of the crime); United States v. Pena, 930 F.2d 1486 (10th Cir. 1991) (aberrational nature of the defendant's conduct and other circumstances justified departure), with United States v. Marcello, 13 F.3d 752 (3d Cir. 1994) (single act of aberrant behavior requires a spontaneous, thoughtless, single act involving lack of planning); United States v. Glick, 946 F.2d 335 (4th Cir. 1991) (conduct over a ten-week period involving a number of actions and extensive planning was not "single act of aberrant behavior"); United States v. Williams, 974 F.2d 25 (5th Cir. 1992) (a single act of aberrant behavior is generally spontaneous or thoughtless); United States v. Carey, 895 F.2d 318 (7th Cir. 1990) (single act of aberrant behavior contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning); United States v. Garlich, 951 F.2d 161 (8th Cir. 1991) (fraud spanning one year and several transactions was not a "single act of aberrant behavior"); United States v. Withrow, 85 F.3d 527 (11th Cir. 1996) (a single act of aberrant behavior is not established unless the defendant is a first-time offender and the crime was a thoughtless act rather than one that was the result of substantial planning); United States v. Dyce, 78 F.3d 610 (D.C. Cir.), amd. on reh. 91 F.3d 1462 (D.C. Cir. 1996) (same).

This amendment addresses the circuit conflict but does not adopt in toto either the majority or minority circuit view on this issue. As a threshold matter, this amendment provides that the departure is available only in an extraordinary case. However, the amendment defines and describes "aberrant behavior" more flexibly than the interpretation of existing guideline language followed by the majority of circuits that have allowed a departure for aberrant behavior only in a case involving a single act that was spontaneous and seemingly thoughtless. The Commission concluded that this application of the current language in

Chapter One is overly restrictive and may preclude departures for aberrant behavior in circumstances in which such a departure might be warranted. For this reason, the Commission attempted to slightly relax the "single act" rule in some respects, and provide guidance and limitations regarding what can be considered aberrant behavior. At the same time, the Commission also chose not to adopt the "totality of circumstances" approach endorsed by the minority of circuits, concluding that the latter approach is overly broad and vague. The Commission anticipates that this compromise amendment will not broadly expand departures for aberrant behavior.

The amendment creates a new policy statement and accompanying commentary in Chapter Five, Part K (Departures) that sets forth the parameters of conduct and criminal history that the Commission believes appropriately may warrant departure as "aberrant behavior." The policy statement provides, in pertinent part, that "'aberrant behavior' means a single criminal occurrence or single criminal transaction." The Commission intends that the phrases "single criminal occurrence" and "single criminal transaction" will be somewhat broader than "single act", but will be limited in potential applicability to offenses (1) committed without significant planning; (2) of limited duration; and (3) that represent a marked deviation by the defendant from an otherwise law-abiding life. For offense conduct to be considered for departure as aberrant behavior, the offense conduct must, at a minimum, have these characteristics. The Commission chose these characteristics after reviewing case law and public comment that indicated some support for the appropriateness of these factors.

The policy statement places significant restrictions on the type of offense and the criminal history of the offender that can be considered for this departure. The restrictions on the type of offense that can qualify reflect a Commission concern that certain offense conduct is so serious that a departure premised on a finding of aberrant behavior should not be available to those offenders who engage in such conduct. Similarly, the restrictions on criminal history reflect a Commission view that defendants with significant prior criminal records should not qualify for a departure premised on the aberrant nature of their current conduct.

The Commission recognizes that a number of other factors may have some relevance in evaluating the appropriateness of a departure based on aberrant behavior. Some of the relevant factors identified in the case law and public comment are listed in an application note.

Effective Date: The effective date of this amendment is November 1, 2000.

604. Amendment: The Commentary to §1B1.4 captioned "Background" is amended by striking:

> ". For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines.",

and inserting:

> "in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines.

For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for sentencing above the guideline range.".

Chapter Five, Part K, Subpart 2, as amended by Amendment 603 (see supra), is further amended by adding at the end the following:

"§5K2.21. Dismissed and Uncharged Conduct (Policy Statement)

The court may increase the sentence above the guideline range to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.".

Section 6B1.2(a) is amended in the second paragraph by striking "Provided, that" and inserting "However,".

The Commentary to §6B1.2 is amended in the fourth paragraph by adding at the end the following:

"Section 5K2.21 (Dismissed and Uncharged Conduct) addresses the use, as a basis for upward departure, of conduct underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement.".

Reason for Amendment: This amendment addresses the circuit conflict regarding whether a court can base an upward departure on conduct that was dismissed or not charged as part of a plea agreement in the case. According to the majority of circuits, the sentencing court, in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, may consider without limitation any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See §1B1.4 (Information to be Used in Imposing Sentence) and 18 U.S.C. § 3661. These courts hold that §6B1.2 (Standards for Acceptance of Plea Agreements) does not prohibit a court from considering conduct underlying counts dismissed pursuant to a plea agreement. The minority circuit view holds that a departure based on conduct uncharged or dismissed in the context of a plea agreement is inappropriate. Courts holding the minority view emphasize the need to protect the expectations of the parties to the plea agreement. Compare United States v. Figaro, 935 F.2d 4 (1st Cir. 1991) (allowing upward departure based on uncharged conduct); United States v. Kim, 896 F.2d 678 (2d Cir. 1990) (allowing upward departure based on related conduct that formed the basis of dismissed counts and based on prior similar misconduct not resulting in conviction); United States v. Baird, 109 F.3d 856 (3d Cir.), cert. denied, 118 S. Ct. 243 (1997) (allowing upward departure based on dismissed counts if the conduct underlying the dismissed counts is related to the offense of conviction conduct) (citing United States v. Watts, 519 U.S. 148 (1997)); United States v. Barber, 119 F.2d 276, 283-84 (4th Cir. 1997) (en banc); United States v. Cross, 121 F.3d 234 (6th Cir. 1997) (allowing upward departure based on dismissed

conduct) (citing Watts); United States v. Ashburn, 38 F.3d 803 (5th Cir. 1994) (allowing upward departure based on dismissed conduct); United States v. Big Medicine, 73 F.3d 994 (10th Cir. 1995) (allowing departure based on uncharged conduct), with United States v. Ruffin, 997 F.2d 343 (7th Cir. 1993) (error to depart based on counts dismissed as part of plea agreement); United States v. Harris, 70 F.3d 1001 (8th Cir. 1995) (same); United States v. Lawton, 193 F.3d 1087 (9th Cir. 1999) (court may not accept plea bargain and later consider dismissed charges for upward departure in sentencing).

This amendment allows courts to consider for upward departure purposes aggravating conduct that is dismissed or not charged in connection with a plea agreement. This approach is consistent with the principles that underlie §1B1.4 and 18 U.S.C. § 3661 and preserves flexibility for the sentencing judge to impose an appropriate sentence within the context of a charge-reduction plea agreement.

Effective Date: The effective date of this amendment is November 1, 2000.

605. Amendment: Section 2B5.1(b)(2) is amended by inserting "level" after "increase to".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 20 by striking "Under subsection (b)(5), the enhancement" and inserting "Subsection (b)(5)"; by striking "under this subsection" and inserting "under subsection (b)(5)"; by striking "§5B1.3" and inserting "§§5B1.3"; and by striking "§" before "5D1.3".

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

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

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

"8. Subsection (b)(3) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(3) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).".

Section 2D1.12(b) is amended by striking "Characteristic" and inserting "Characteristics"; and by adding at the end the following:

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

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

"3. Subsection (b)(2) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(2) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).".

The Commentary to §2K2.1 captioned "Statutory Provisions" is amended by striking "(e), (f), (g), (h), (j)-(n)" and inserting "(e)-(i), (k)-(o)".

Section 5B1.3(a) is amended by striking the asterisk after "Conditions"; in subdivision (8) by striking the period after "§ 3563(a))" and inserting a semi-colon; and by adding at the end the following:

"(9) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.";

Section 5B1.3 is amended by striking the footnote at the end in its entirety as follows:

"*Note: Effective one year after November 26, 1997, section 3563(a) of Title 18, United States Code, was amended (by section 115 of Pub. L. 105–119) to add the following new mandatory condition of probation:

(9) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (as amended by section 115 of Pub. L. 105–119) shall report the address where the defendant will reside and any subsequent change of

residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.".

Section 5D1.3(a) is amended by striking the asterisk after "Conditions"; in subdivision (6) by striking the period after "§ 3013" and inserting a semi-colon; and by adding at the end the following:

"(7) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.";

Section 5D1.3 is amended by striking the footnote at the end in its entirety as follows:

"*Note: Effective one year after November 26, 1997, section 3583(a) of Title 18, United States Code, was amended (by section 115 of Pub. L. 105–119) to add the following new mandatory condition of supervised release:

(7) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (as amended by section 115 of Pub. L. 105–119) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.".

Reason for Amendment: This four-part amendment makes various technical and conforming changes.

First, the amendment corrects a typographical error in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) by inserting a missing word in subsection (b)(2).

Second, the amendment corrects an omission that was made during prior, final deliberations by the Commission on amendments to implement the Comprehensive Methamphetamine Control Act of 1996 (the "Act"), Pub. L. 104–237. Specifically, the amendment amends §§2D1.11 and 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment) to add an enhancement for environmental damage associated with methamphetamine offenses. The Commission previously had intended to amend these guidelines in this manner, but due to a technical oversight, the final amendment did not implement that intent.

The Act directed the Commission to determine whether the guidelines adequately punish environmental violations occurring in connection with precursor chemical offenses under 21 U.S.C. § 841(d) and (g) (sentenced under §2D1.11), and manufacturing equipment offenses under 21 U.S.C. § 843(a)(6) and (7) (sentenced under §2D1.12). On February 25, 1997, the Commission published two options to provide an increase for environmental damage associated with the manufacture of methamphetamine, the first by a specific offense characteristic, the second by an invited upward departure. See 62 Fed. Reg. 8487 (proposed

Feb. 25, 1997). Both options proposed to make amendments to §§2D1.11, 2D1.12, and 2D1.13. Additionally, although the directive did not address manufacturing offenses under 21 U.S.C. § 841(a), the Commission elected to use its broader guideline promulgation authority under 28 U.S.C. § 994(a) to ensure that environmental violations occurring in connection with this more frequently occurring offense were treated similarly. Accordingly, the published options also included amendments to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking).

The published options were revised prior to final action by the Commission. However, in the revision that was presented to the Commission for promulgation in late April 1997, amendments to §§2D1.11 and 2D1.12 mistakenly were omitted from the option to provide a specific offense characteristic, although that revision did refer to §§2D1.11 and 2D1.12 in the synopsis and included amendments to these guidelines in the upward departure option. (The revision did not include any amendments to guideline §2D1.13, covering record-keeping offenses, because, upon further examination, it seemed unlikely that offenses sentenced under this guideline would involve environmental damage.) Accordingly, when the Commission voted to adopt the option providing the specific offense characteristic for §§2D1.1, 2D1.11, and 2D1.12, the vote effectively was limited to what was before the Commission, i.e., an environmental damage enhancement for §2D1.1 only. This amendment corrects that error and makes minor, conforming changes to the relevant application note in §2D1.1.

Third, the amendment updates the Statutory Provisions of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition) to conform to statutory re-designations made to 18 U.S.C. § 924 (and already conformed in Appendix A (Statutory Index)).

Finally, the amendment updates §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release). Effective November 26, 1998, 18 U.S.C. §§ 3563(a) and 3583(a) were amended to add a new mandatory condition of probation and supervised release requiring a person convicted of a sexual offense described in 18 U.S.C. § 4042(c)(4) (enumerating several sex offenses) to report to the probation officer the person's address and any subsequent change of address, and to register as a sex offender in the state in which the person resides. See section 115 of Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (Pub. L. 105–119). Because the effective date of this change was later than the effective date of the last issued Guidelines Manual (November 1, 1998), the Commission did not amend §§5B1.3 and 5D1.3 to reflect the new condition. However, the Commission did provide a footnote in each guideline setting forth the new condition and alerting the user as to the date on which the condition became effective. This amendment includes the sex offender condition as a specific mandatory condition of probation and supervised release in both guidelines rather than in a footnote.

Effective Date: The effective date of this amendment is November 1, 2000.

606. **Amendment:** Section 2D1.11(d) is amended in subdivision (9) by striking "At least 1.44 G but less than 1.92 KG of Isosafrole;" and inserting "At least 1.44 KG but less than 1.92 KG of Isosafrole;"; and by striking "At least 1.44 G but less than 1.92 KG of Safrole;" and inserting "At least 1.44 KG but less than 1.92 KG of Safrole;".

Section 2D1.11(d) is amended in subdivision (10) by striking "Less than 1.44 G" before "of Isosafrole;" and inserting "Less than 1.44 KG"; and by striking "Less than 1.44 G" before "of Safrole;" and inserting "Less than 1.44 KG".

Reason for Amendment: The amendment corrects a typographical error in the Chemical Quantity Table in §2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical) regarding certain quantities of Isosafrole and Safrole by changing those quantities from grams to kilograms.

Effective Date: The effective date of this amendment is November 1, 2000.

607. **Amendment:** Section 1B1.10(c) is amended by striking "and 516." and inserting "516, 591, 599, and 606.".

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.

Effective Date: The effective date of this amendment is November 1, 2000.

608. **Amendment:** Section 2D1.1(b)(5) is amended by striking the comma after "substance" and inserting a semicolon.

Section 2D1.1(b) is amended by redesignating subdivision (6) as subdivision (7); and by inserting after subdivision (5) the following:

"(6) (Apply the greater):

(A) 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 subsection (b)(6)(B); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

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

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 20 by inserting "Hazardous or Toxic Substances.—" before "Subsection (b)(5)".

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

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

(A) Factors to Consider.—In determining, for purposes of subsection (b)(6), whether the offense created a substantial risk of harm to

human life or the environment, the court may consider factors such as the following:

(i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.

(ii) The manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances.

(iii) The duration of the offense, or the extent of the manufacturing operation.

(iv) The location of the amphetamine or methamphetamine laboratory (e.g., in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm.

(B) Definitions.—For purposes of subsection (b)(6)(B):

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

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

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

" Subsection (b)(5) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsection (b)(6) implements the instruction to the Commission in section 102 of Public Law 106–878.".

Section 2D1.10 is amended by inserting after subsection (a) the following:

"(b) Specific Offense Characteristic

(1) (Apply the greater):

(A) If the offense involved the manufacture of amphetamine or methamphetamine, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by

6 levels. If the resulting offense level is less than level 30, increase to level 30.".

The Commentary to §2D1.10 is amended by adding at the end the following:

"Application Note:

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

(A) Factors to Consider.— In determining, for purposes of subsection (b)(1)(B), whether the offense created a substantial risk of harm to the life of a minor or an incompetent, the court may consider factors such as the following:

(i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored.

(ii) The manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances.

(iii) The duration of the offense, or the extent of the manufacturing operation.

(iv) The location of the amphetamine or methamphetamine laboratory (e.g., in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm.

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

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

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

Background: Subsection (b)(1) implements the instruction to the Commission in section 102 of Public Law 106–878.".

Reason for Amendment: This amendment addresses the directive in section 102 (the "substantial risk directive") of the Methamphetamine and Club Drug Anti-Proliferation Act of 2000 (the "Act"), Pub. L. 106–878.

The Act requires the Commission to promulgate amendments under emergency amendment authority. Although the Act generally provides that the Commission shall promulgate various amendments "as soon as practicable," the substantial risk directive specifically

requires that the amendment implementing the directive shall apply "to any offense occurring on or after the date that is 60 days after the date of the enactment" of the Act.

The directive instructs the Commission to amend the federal sentencing guidelines with respect to any offense relating to the manufacture, attempt to manufacture, or conspiracy to manufacture amphetamine or methamphetamine in (1) the Controlled Substances Act (21 U.S.C. § 801 et seq.); (2) the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.); or (3) the Maritime Drug Law Enforcement Act (46 U.S.C. App. § 1901 et seq.).

The Act requires the Commission, in carrying out the substantial risk directive, to provide the following enhancements—

> (A) if the offense created a substantial risk of harm to human life (other than a life described in subparagraph (B)) or the environment, increase the base offense level for the offense—
>
> > (i) by not less than 3 offense levels above the applicable level in effect on the date of the enactment of this Act; or
> >
> > (ii) if the resulting base offense level after an increase under clause (i) would be less than level 27, to not less than level 27; or
>
> (B) if the offense created a substantial risk of harm to the life of a minor or incompetent, increase the base offense level for the offense—
>
> > (i) by not less than 6 offense levels above the applicable level in effect on the date of the enactment of this Act; or
> >
> > (ii) if the resulting base offense level after an increase under clause (i) would be less than level 30, to not less than level 30.

The pertinent aspects of this amendment are as follows:

(1) Guidelines Amended.—The amendment provides new enhancements in §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) and 2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance) that also apply in the case of an attempt or a conspiracy to manufacture amphetamine or methamphetamine. The amendment does not amend §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) or §2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation or Prohibited Flask or Equipment). Although offenses that involve the manufacture of amphetamine or methamphetamine also are referenced in Appendix (A) (Statutory Index) to §§2D1.11 and 2D1.12, the cross reference in these guidelines, which applies if the offense involved the manufacture of a controlled substance, will result in application of §2D1.1 and accordingly, the new enhancements.

(2) Structure.—The basic structure of the amendment to §§2D1.1 and 2D1.10 tracks the structure of the directive. Accordingly, in §2D1.1, the amendment provides a three-level increase and a minimum offense level of level 27 if the offense (A) involved the manufacture of amphetamine or methamphetamine; and (B) created a substantial risk of either harm to human life or the environment. For offenses that created a substantial risk of harm to the life

of a minor or an incompetent, the amendment provides a six-level increase and a minimum offense level of 30.

However, the structure of the amendment in §2D1.10 differs from that in §2D1.1 with respect to the first prong of the enhancement (regarding substantial risk of harm to human life or to the environment). Specifically, the amendment provides a three-level increase and a minimum offense level of level 27 if the offense involved the manufacture of amphetamine or methamphetamine without making application of the enhancement dependent upon whether the offense also involved a substantial risk of either harm to human life or the environment. Consideration of whether the offense involved a substantial risk of harm to human life is unnecessary because §2D1.10 applies only to convictions under 21 U.S.C. § 858, and the creation of a substantial risk of harm to human life is an element of a § 858 offense. Therefore, the base offense level already takes into account the substantial risk of harm to human life. Consideration of whether the offense involved a substantial risk of harm to the environment is unnecessary because the directive predicated application of the enhancement on substantial risk of harm either to human life or to the environment, and the creation of a substantial risk of harm to human life is necessarily present because it is an element of the offense.

(3) Determining "Substantial Risk of Harm".—Neither the directive nor any statutory provision defines "substantial risk of harm". Based on an analysis of relevant case law that interpreted "substantial risk of harm", the amendment provides commentary setting forth factors that may be relevant in determining whether a particular offense created a substantial risk of harm.

(4) Definitions.—The definition of "incompetent" is modeled after several state statutes, which proved useful for purposes of this amendment.

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

Effective Date: The effective date of this amendment is December 16, 2000.

609. **Amendment:** The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned "LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*" in the line referenced to "MDA" by striking "50 gm" and inserting "500 gm"; in the line referenced to "MDMA" by striking "35 gm" and inserting "500 gm"; in the line referenced "MDEA" by striking "30 gm" and inserting "500 gm"; and by inserting "1 gm of Paramethoxymethamphetamine/PMA = 500 gm of marihuana" after the line referenced to "MDEA".

Reason for Amendment: This amendment addresses the directive in the Ecstasy Anti-Proliferation Act of 2000 (the "Act"), section 3664 of Pub. L. 106–310, which instructs the Commission to provide, under emergency amendment authority, increased penalties for the manufacture, importation, exportation, or trafficking of Ecstasy. The directive specifically requires the Commission to increase the base offense level for 3,4-Methylenedioxymethamphetamine (MDMA), 3,4-Methylenedioxyamphetamine (MDA), 3,4-Methylenedioxy-N-ethylamphetamine (MDEA), Paramethoxymethamphetamine (PMA), and any other controlled substance that is marketed as Ecstasy and that has either a chemical structure similar to MDMA or an effect on the central nervous system substantially similar

to or greater than MDMA.

The amendment addresses the directive by amending the Drug Equivalency Table in §2D1.1, Application Note 10, to increase substantially the marihuana equivalencies for the specified controlled substances, which has the effect of substantially increasing the penalties for offenses involving Ecstasy. The new penalties for Ecstasy trafficking provide penalties which, gram for gram, are more severe than those for powder cocaine. Currently under the Drug Equivalency Table, one gram of powder cocaine has a marihuana equivalency of 200 grams. This amendment sets the marihuana equivalency for one gram of Ecstasy at 500 grams.

There are a combination of reasons why the Commission has substantially increased the penalties in response to the congressional directive. Much evidence received by the Commission indicated that Ecstasy: (1) has powerful pharmacological effects; (2) has the capacity to cause lasting physical harms, including brain damage; and (3) is being abused by rapidly increasing numbers of teenagers and young adults. Indeed, the market for Ecstasy is overwhelmingly comprised of people under the age of 25 years.

Before voting to promulgate this amendment, the Commission considered whether the penalty levels for Ecstasy should be set at the same levels as for heroin (i.e., one gram of heroin has a marihuana equivalency of 1000 grams) and decided that somewhat lesser penalties were appropriate for Ecstasy for a number of reasons: (1) the potential for addiction is greater with heroin; (2) heroin distribution often involves violence while, at this time, violence is not reported in Ecstasy markets; (3) because it is a narcotic and is often injected, the risk of death from overdose is much greater from heroin; and (4) because heroin is often injected, there are more secondary health consequences, such as infections and the transmission of the human immunodeficiency virus (HIV) and hepatitis.

Finally, based on information regarding Ecstasy trafficking patterns, the penalty levels chosen are appropriate and sufficient to target serious and high-level traffickers and to provide appropriate punishment, deterrence, and incentives for cooperation. The penalty levels chosen for Ecstasy offenses provide five year sentences for serious traffickers (those whose relevant conduct involved at least 800 pills) and ten year sentences for high-level traffickers (those whose relevant conduct involved at least 8,000 pills).

Effective Date: The effective date of this amendment is May 1, 2001.

610. Amendment: Section 2D1.1(c)(1) is amended by inserting after the fifth entry the following:

"15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual);".

Section 2D1.1(c)(2) is amended by inserting after the fifth entry the following:

"At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);".

Section 2D1.1(c)(3) is amended by inserting after the fifth entry the following:

"At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G

of Amphetamine (actual);".

Section 2D1.1(c)(4) is amended by inserting after the fifth entry the following:

"At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);".

Section 2D1.1(c)(5) is amended by inserting after the fifth entry the following:

"At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);".

Section 2D1.1(c)(6) is amended by inserting after the fifth entry the following:

"At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);".

Section 2D1.1(c)(7) is amended by inserting after the fifth entry the following:

"At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);".

Section 2D1.1(c)(8) is amended by inserting after the fifth entry the following:

"At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);".

Section 2D1.1(c)(9) is amended by inserting after the fifth entry the following:

"At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);".

Section 2D1.1(c)(10) is amended by inserting after the fifth entry the following:

"At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);".

Section 2D1.1(c)(11) is amended by inserting after the fifth entry the following:

"At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);".

Section 2D1.1(c)(12) is amended by inserting after the fifth entry the following:

"At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);".

Section 2D1.1(c)(13) is amended by inserting after the fifth entry the following:

"At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG

of Amphetamine (actual);".

Section 2D1.1(c)(14) is amended by inserting after the fifth entry the following:

"Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);".

Section 2D1.1(c) is amended in Note (B) of the "Notes to Drug Quantity Table" by inserting ", 'Amphetamine (actual)'," after "terms 'PCP (actual)'"; by inserting ", amphetamine," after "substance containing PCP"; and by inserting ", amphetamine (actual)," after "weight of the PCP (actual)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 9 by inserting ", amphetamine," after "PCP".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*" by striking "200 gm" after "1 gm of Amphetamine =" and inserting "2 kg"; and by inserting "1 gm of Amphetamine (Actual) = 20 kg of marihuana" after the line referenced to "Amphetamine".

Reason for Amendment: This emergency amendment implements the directive in the Methamphetamine Anti-Proliferation Act of 2000, section 3611 of Pub. L. 106–310 (the "Act"), which directs the Commission to provide, under emergency amendment authority, increased guideline penalties for amphetamine such that those penalties are comparable to the base offense level for methamphetamine.

This amendment revises §2D1.1 to include amphetamine in the Drug Quantity Table. This amendment also treats amphetamine and methamphetamine identically, at a 1:1 ratio (i.e., the same quantities of amphetamine and methamphetamine would result in the same base offense level) because of the similarities of the two substances. Specifically, amphetamine and methamphetamine (1) chemically are similar; (2) are produced by a similar method and are trafficked in a similar manner; (3) share similar methods of use; (4) affect the same parts of the brain; and (5) have similar intoxicating effects. The amendment also distinguishes between pure amphetamine (i.e., amphetamine (actual)) and amphetamine mixture in the same manner, and at the same quantities, as pure methamphetamine (i.e., methamphetamine (actual)) and methamphetamine mixture, respectively. The amendment reflects the view that the 1:1 ratio is appropriate given the seriousness of these two controlled substances.

Effective Date: The effective date of this amendment is May 1, 2001.

611. **Amendment:** Section 2D1.11 is amended by striking subsection (d), captioned "Chemical Quantity Table*" and by striking the Notes that follow subsection (d), captioned "*Notes" as follows:

" (d) CHEMICAL QUANTITY TABLE*

Listed Chemicals and Quantity	Base Offense Level
(1) List I Chemicals 17.8 KG or more of Benzaldehyde;	Level 30

20 KG or more of Benzyl Cyanide;
20 KG or more of Ephedrine;
200 G or more of Ergonovine;
400 G or more of Ergotamine;
20 KG or more of Ethylamine;
44 KG or more of Hydriodic Acid;
320 KG or more of Isosafrole;
4 KG or more of Methylamine;
500 KG or more of N-Methylephedrine;
500 KG or more of N-Methylpseudoephedrine;
12.6 KG or more of Nitroethane;
200 KG or more of Norpseudoephedrine;
20 KG or more of Phenylacetic Acid;
200 KG or more of Phenylpropanolamine;
10 KG or more of Piperidine;
320 KG or more of Piperonal;
1.6 KG or more of Propionic Anhydride;
20 KG or more of Pseudoephedrine;
320 KG or more of Safrole;
400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;

(2) List I Chemicals Level 28

At least 5.3 KG but less than 17.8 KG of Benzaldehyde;
At least 6 KG but less than 20 KG of Benzyl Cyanide;
At least 6 KG but less than 20 KG of Ephedrine;
At least 60 G but less than 200 G of Ergonovine;
At least 120 G but less than 400 G of Ergotamine;
At least 6 KG but less than 20 KG of Ethylamine;
At least 13.2 KG but less than 44 KG of Hydriodic Acid;
At least 96 KG but less than 320 KG of Isosafrole;
At least 1.2 KG but less than 4 KG of Methylamine;
At least 150 KG but less than 500 KG of N-Methylephedrine;
At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;
At least 3.8 KG but less than 12.6 KG of Nitroethane;
At least 60 KG but less than 200 KG of Norpseudoephedrine;
At least 6 KG but less than 20 KG of Phenylacetic Acid;
At least 60 KG but less than 200 KG of Phenylpropanolamine;
At least 3 KG but less than 10 KG of Piperidine;
At least 96 KG but less than 320 KG of Piperonal;
At least 480 G but less than 1.6 KG of Propionic Anhydride;
At least 6 KG but less than 20 KG of Pseudoephedrine;
At least 96 KG but less than 320 KG of Safrole;
At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
11 KG or more of Acetic Anhydride;
1175 KG or more of Acetone;
20 KG or more of Benzyl Chloride;
1075 KG or more of Ethyl Ether;

1200 KG or more of Methyl Ethyl Ketone;
10 KG or more of Potassium Permanganate;
1300 KG or more of Toluene.

(3) List I Chemicals Level 26

At least 1.8 KG but less than 5.3 KG of Benzaldehyde;
At least 2 KG but less than 6 KG of Benzyl Cyanide;
At least 2 KG but less than 6 KG of Ephedrine;
At least 20 G but less than 60 G of Ergonovine;
At least 40 G but less than 120 G of Ergotamine;
At least 2 KG but less than 6 KG of Ethylamine;
At least 4.4 KG but less than 13.2 KG of Hydriodic Acid;
At least 32 KG but less than 96 KG of Isosafrole;
At least 400 G but less than 1.2 KG of Methylamine;
At least 50 KG but less than 150 KG of N-Methylephedrine;
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;
At least 1.3 KG but less than 3.8 KG of Nitroethane;
At least 20 KG but less than 60 KG of Norpseudoephedrine;
At least 2 KG but less than 6 KG of Phenylacetic Acid;
At least 20 KG but less than 60 KG of Phenylpropanolamine;
At least 1 KG but less than 3 KG of Piperidine;
At least 32 KG but less than 96 KG of Piperonal;
At least 160 G but less than 480 G of Propionic Anhydride;
At least 2 KG but less than 6 KG of Pseudoephedrine;
At least 32 KG but less than 96 KG of Safrole;
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

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

(4) List I Chemicals Level 24

At least 1.2 KG but less than 1.8 KG of Benzaldehyde;
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;
At least 1.4 KG but less than 2 KG of Ephedrine;
At least 14 G but less than 20 G of Ergonovine;
At least 28 G but less than 40 G of Ergotamine;
At least 1.4 KG but less than 2 KG of Ethylamine;
At least 3.08 KG but less than 4.4 KG of Hydriodic Acid;
At least 22.4 KG but less than 32 KG of Isosafrole;
At least 280 G but less than 400 G of Methylamine;
At least 35 KG but less than 50 KG of N-Methylephedrine;
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;
At least 879 G but less than 1.3 KG of Nitroethane;

At least 14 KG but less than 20 KG of Norpseudoephedrine;
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;
At least 14 KG but less than 20 KG of Phenylpropanolamine;
At least 700 G but less than 1 KG of Piperidine;
At least 22.4 KG but less than 32 KG of Piperonal;
At least 112 G but less than 160 G of Propionic Anhydride;
At least 1.4 KG but less than 2 KG of Pseudoephedrine;
At least 22.4 KG but less than 32 KG of Safrole;
At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 1.1 KG but less than 3.3 KG of Acetic Anhydride;
At least 117.5 KG but less than 352.5 KG of Acetone;
At least 2 KG but less than 6 KG of Benzyl Chloride;
At least 107.5 KG but less than 322.5 KG of Ethyl Ether;
At least 120 KG but less than 360 KG of Methyl Ethyl Ketone;
At least 1 KG but less than 3 KG of Potassium Permanganate;
At least 130 KG but less than 390 KG of Toluene.

(5) List I Chemicals Level 22
At least 712 G but less than 1.2 KG of Benzaldehyde;
At least 800 G but less than 1.4 KG of Benzyl Cyanide;
At least 800 G but less than 1.4 KG of Ephedrine;
At least 8 G but less than 14 G of Ergonovine;
At least 16 G but less than 28 G of Ergotamine;
At least 800 G but less than 1.4 KG of Ethylamine;
At least 1.76 KG but less than 3.08 KG of Hydriodic Acid;
At least 12.8 KG but less than 22.4 KG of Isosafrole;
At least 160 G but less than 280 G of Methylamine;
At least 20 KG but less than 35 KG of N-Methylephedrine;
At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;
At least 503 G but less than 879 G of Nitroethane;
At least 8 KG but less than 14 KG of Norpseudoephedrine;
At least 800 G but less than 1.4 KG of Phenylacetic Acid;
At least 8 KG but less than 14 KG of Phenylpropanolamine;
At least 400 G but less than 700 G of Piperidine;
At least 12.8 KG but less than 22.4 KG of Piperonal;
At least 64 G but less than 112 G of Propionic Anhydride;
At least 800 G but less than 1.4 KG of Pseudoephedrine;
At least 12.8 KG but less than 22.4 KG of Safrole;
At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 726 G but less than 1.1 KG of Acetic Anhydride;
At least 82.25 KG but less than 117.5 KG of Acetone;
At least 1.4 KG but less than 2 KG of Benzyl Chloride;
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;
At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;

At least 700 G but less than 1 KG of Potassium Permanganate;
At least 91 KG but less than 130 KG of Toluene.

(6) List I Chemicals Level 20

At least 178 G but less than 712 G of Benzaldehyde;
At least 200 G but less than 800 G of Benzyl Cyanide;
At least 200 G but less than 800 G of Ephedrine;
At least 2 G but less than 8 G of Ergonovine;
At least 4 G but less than 16 G of Ergotamine;
At least 200 G but less than 800 G of Ethylamine;
At least 440 G but less than 1.76 KG of Hydriodic Acid;
At least 3.2 KG but less than 12.8 KG of Isosafrole;
At least 40 G but less than 160 G of Methylamine;
At least 5 KG but less than 20 KG of N-Methylephedrine;
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;
At least 126 G but less than 503 G of Nitroethane;
At least 2 KG but less than 8 KG of Norpseudoephedrine;
At least 200 G but less than 800 G of Phenylacetic Acid;
At least 2 KG but less than 8 KG of Phenylpropanolamine;
At least 100 G but less than 400 G of Piperidine;
At least 3.2 KG but less than 12.8 KG of Piperonal;
At least 16 G but less than 64 G of Propionic Anhydride;
At least 200 G but less than 800 G of Pseudoephedrine;
At least 3.2 KG but less than 12.8 KG of Safrole;
At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

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

(7) List I Chemicals Level 18

At least 142 G but less than 178 G of Benzaldehyde;
At least 160 G but less than 200 G of Benzyl Cyanide;
At least 160 G but less than 200 G of Ephedrine;
At least 1.6 G but less than 2 G of Ergonovine;
At least 3.2 G but less than 4 G of Ergotamine;
At least 160 G but less than 200 G of Ethylamine;
At least 352 G but less than 440 G of Hydriodic Acid;
At least 2.56 KG but less than 3.2 KG of Isosafrole;
At least 32 G but less than 40 G of Methylamine;
At least 4 KG but less than 5 KG of N-Methylephedrine;
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;
At least 100 G but less than 126 G of Nitroethane;
At least 1.6 KG but less than 2 KG of Norpseudoephedrine;

At least 160 G but less than 200 G of Phenylacetic Acid;
At least 1.6 KG but less than 2 KG of Phenylpropanolamine;
At least 80 G but less than 100 G of Piperidine;
At least 2.56 KG but less than 3.2 KG of Piperonal;
At least 12.8 G but less than 16 G of Propionic Anhydride;
At least 160 G but less than 200 G of Pseudoephedrine;
At least 2.56 KG but less than 3.2 KG of Safrole;
At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

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

(8) List I Chemicals Level 16
3.6 KG or more of Anthranilic Acid;
At least 107 G but less than 142 G of Benzaldehyde;
At least 120 G but less than 160 G of Benzyl Cyanide;
At least 120 G but less than 160 G of Ephedrine;
At least 1.2 G but less than 1.6 G of Ergonovine;
At least 2.4 G but less than 3.2 G of Ergotamine;
At least 120 G but less than 160 G of Ethylamine;
At least 264 G but less than 352 G of Hydriodic Acid;
At least 1.92 KG but less than 2.56 KG of Isosafrole;
At least 24 G but less than 32 G of Methylamine;
4.8 KG or more of N-Acetylanthranilic Acid;
At least 3 KG but less than 4 KG of N-Methylephedrine;
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;
At least 75 G but less than 100 G of Nitroethane;
At least 1.2 KG but less than 1.6 KG of Norpseudoephedrine;
At least 120 G but less than 160 G of Phenylacetic Acid;
At least 1.2 KG but less than 1.6 KG of Phenylpropanolamine;
At least 60 G but less than 80 G of Piperidine;
At least 1.92 KG but less than 2.56 KG of Piperonal;
At least 9.6 G but less than 12.8 G of Propionic Anhydride;
At least 120 G but less than 160 G of Pseudoephedrine;
At least 1.92 KG but less than 2.56 KG of Safrole;
At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 88 G but less than 110 G of Acetic Anhydride;
At least 9.4 KG but less than 11.75 KG of Acetone;
At least 160 G but less than 200 G of Benzyl Chloride;
At least 8.6 KG but less than 10.75 KG of Ethyl Ether;

At least 9.6 KG but less than 12 KG of Methyl Ethyl Ketone;
At least 80 G but less than 100 G of Potassium Permanganate;
At least 10.4 KG but less than 13 KG of Toluene.

(9) List I Chemicals Level 14

At least 2.7 KG but less than 3.6 KG of Anthranilic Acid;
At least 71.2 G but less than 107 G of Benzaldehyde;
At least 80 G but less than 120 G of Benzyl Cyanide;
At least 80 G but less than 120 G of Ephedrine;
At least 800 MG but less than 1.2 G of Ergonovine;
At least 1.6 G but less than 2.4 G of Ergotamine;
At least 80 G but less than 120 G of Ethylamine;
At least 176 G but less than 264 G of Hydriodic Acid;
At least 1.44 KG but less than 1.92 KG of Isosafrole;
At least 16 G but less than 24 G of Methylamine;
At least 3.6 KG but less than 4.8 KG of N-Acetylanthranilic Acid;
At least 2.25 KG but less than 3 KG of N-Methylephedrine;
At least 2.25 KG but less than 3 KG of N-Methylpseudoephedrine;
At least 56.25 G but less than 75 G of Nitroethane;
At least 800 G but less than 1.2 KG of Norpseudoephedrine;
At least 80 G but less than 120 G of Phenylacetic Acid;
At least 800 G but less than 1.2 KG of Phenylpropanolamine;
At least 40 G but less than 60 G of Piperidine;
At least 1.44 KG but less than 1.92 KG of Piperonal;
At least 7.2 G but less than 9.6 G of Propionic Anhydride;
At least 80 G but less than 120 G of Pseudoephedrine;
At least 1.44 KG but less than 1.92 KG of Safrole;
At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

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

(10) List I Chemicals Level 12

Less than 2.7 KG of Anthranilic Acid;
Less than 71.2 G of Benzaldehyde;
Less than 80 G of Benzyl Cyanide;
Less than 80 G of Ephedrine;
Less than 800 MG of Ergonovine;
Less than 1.6 G of Ergotamine;
Less than 80 G of Ethylamine;
Less than 176 G of Hydriodic Acid;
Less than 1.44 KG of Isosafrole;
Less than 16 G of Methylamine;

Less than 3.6 KG of N-Acetylanthranilic Acid;
Less than 2.25 KG of N-Methylephedrine;
Less than 2.25 KG of N-Methylpseudoephedrine;
Less than 56.25 G of Nitroethane;
Less than 800 G of Norpseudoephedrine;
Less than 80 G of Phenylacetic Acid;
Less than 800 G of Phenylpropanolamine;
Less than 40 G of Piperidine;
Less than 1.44 KG of Piperonal;
Less than 7.2 G of Propionic Anhydride;
Less than 80 G of Pseudoephedrine;
Less than 1.44 KG of Safrole;
Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

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

---

*Notes:

(A) The List I Chemical Equivalency Table provides a method for combining different precursor chemicals to obtain a single offense level. In a case involving two or more list I chemicals used to manufacture different controlled substances or to manufacture one controlled substance by different manufacturing processes, convert each to its ephedrine equivalency from the table below, add the quantities, and use the Chemical Quantity Table to determine the base offense level. In a case involving two or more list I chemicals used together to manufacture a controlled substance in the same manufacturing process, use the quantity of the single list I chemical that results in the greatest base offense level.

(B) If more than one list II chemical is involved, use the single list II chemical resulting in the greatest offense level.

(C) If both list I and list II chemicals are involved, use the offense level determined under (A) or (B) above, whichever is greater.

(D) In a case involving ephedrine tablets, use the weight of the ephedrine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

(E) LIST I CHEMICAL EQUIVALENCY TABLE

1 gm of Anthranilic Acid* =	0.033 gm of Ephedrine
1 gm of Benzaldehyde** =	1.124 gm of Ephedrine

1 gm of Benzyl Cyanide =	1 gm of Ephedrine
1 gm of Ergonovine =	100 gm of Ephedrine
1 gm of Ergotamine =	50 gm of Ephedrine
1 gm of Ethylamine** =	1 gm of Ephedrine
1 gm of Hydriodic Acid** =	0.4545 gm of Ephedrine
1 gm of Isosafrole =	0.0625 gm of Ephedrine
1 gm of Methylamine =	5 gm of Ephedrine
1 gm of N-Acetylanthranilic Acid* =	0.025 gm of Ephedrine
1 gm of N-Methylephedrine** =	0.04 gm of Ephedrine
1 gm of N-Methylpseudoephedrine** =	0.04 gm of Ephedrine
1 gm of Nitroethane** =	1.592 gm of Ephedrine
1 gm of Norpseudoephedrine** =	0.1 gm of Ephedrine
1 gm of Phenylacetic Acid =	1 gm of Ephedrine
1 gm of Phenylpropanolamine** =	0.1 gm of Ephedrine
1 gm of Piperidine =	2 gm of Ephedrine
1 gm of Piperonal =	0.0625 gm of Ephedrine
1 gm of Propionic Anhydride =	12.5 gm of Ephedrine
1 gm of Pseudoephedrine** =	1 gm of Ephedrine
1 gm of Safrole =	0.0625 gm of Ephedrine
1 gm of 3,4-Methylenedioxyphenyl-2-propanone** =	0.05 gm of Ephedrine

* The ephedrine equivalency for anthranilic acid or N-acetylanthranilic acid, or both, shall not exceed 159.99 grams of ephedrine.

**In cases involving (A) hydriodic acid and one of the following: ephedrine, N-methylephedrine, N-methylpseudoephedrine, norpseudoephedrine, phenylpropanolamine, or pseudoephedrine; or (B) ethylamine and 3,4-methylenedioxyphenyl-2-propanone; or (C) benzaldehyde and nitroethane, calculate the offense level for each separately and use the quantity that results in the greater offense level.".

and inserting the following:

"(d)(1) EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE QUANTITY TABLE*
(Methamphetamine and Amphetamine Precursor Chemicals)

	Quantity	Base Offense Level
(1)	3 KG or more of Ephedrine; 3 KG or more of Phenylpropanolamine; 3 KG or More of Pseudoephedrine.	Level 38
(2)	At least 1 KG but less than 3 KG of Ephedrine; At least 1 KG but less than 3 KG of Phenylpropanolamine; At least 1 KG but less than 3 KG of Pseudoephedrine.	Level 36
(3)	At least 300 G but less than 1 KG of Ephedrine; At least 300 G but less than 1 KG of Phenylpropanolamine;	Level 34

	At least 300 G but less than 1 KG of Pseudoephedrine.	
(4)	At least 100 G but less than 300 G of Ephedrine; At least 100 G but less than 300 G of Phenylpropanolamine; At least 100 G but less than 300 G of Pseudoephedrine.	Level 32
(5)	At least 70 G but less than 100 G of Ephedrine; At least 70 G but less than 100 G of Phenylpropanolamine; At least 70 G but less than 100 G of Pseuodoephedrine.	Level 30
(6)	At least 40 G but less than 70 G of Ephedrine; At least 40 G but less than 70 G of Phenylpropanolamine; At least 40 G but less than 70 G of Pseudoephedrine.	Level 28
(7)	At least 10 G but less than 40 G of Ephedrine; At least 10 G but less than 40 G of Phenylpropanolamine; At least 10 G but less than 40 G of Pseudoephedrine.	Level 26
(8)	At least 8 G but less than 10 G of Ephedrine; At least 8 G but less than 10 G of Phenylpropanolamine; At least 8 G but less than 10 G of Pseudoephedrine.	Level 24
(9)	At least 6 G but less than 8 G of Ephedrine; At least 6 G but less than 8 G of Phenylpropanolamine; At least 6 G but less than 8 G of Pseudoephedrine.	Level 22
(10)	At least 4 G but less than 6 G of Ephedrine; At least 4 G but less than 6 G of Phenylpropanolamine; At least 4 G but less than 6 G of Pseudoephedrine.	Level 20
(11)	At least 2 G but less than 4 G of Ephedrine; At least 2 G but less than 4 G of Phenylpropanolamine; At least 2 G but less than 4 G of Pseudoephedrine.	Level 18
(12)	At least 1 G but less than 2 G of Ephedrine; At least 1 G but less than 2 G of Phenylpropanolamine; At least 1 G but less than 2 G of Pseudoephedrine.	Level 16
(13)	At least 500 MG but less than 1 G of Ephedrine; At least 500 MG but less than 1 G of Phenylpropanolamine; At least 500 MG but less than 1 G of Pseudoephedrine.	Level 14
(14)	Less than 500 MG of Ephedrine; Less than 500 MG of Phenylpropanolamine; Less than 500 MG of Pseudoephedrine.	Level 12

(d)(2) CHEMICAL QUANTITY TABLE*
(All Other Precursor Chemicals)

Listed Chemicals and Quantity		Base Offense Level
(1)	List I Chemicals 890 G or more of Benzaldehyde; 20 KG or more of Benzyl Cyanide; 200 G or more of Ergonovine; 400 G or more of Ergotamine; 20 KG or more of Ethylamine; 2.2 KG or more of Hydriodic Acid; 320 KG or more of Isosafrole; 200 G or more of Methylamine; 500 KG or more of N-Methylephedrine; 500 KG or more of N-Methylpseudoephedrine; 625 G or more of Nitroethane; 10 KG or more of Norpseudoephedrine; 20 KG or more of Phenylacetic Acid; 10 KG or more of Piperidine; 320 KG or more of Piperonal; 1.6 KG or more of Propionic Anhydride; 320 KG or more of Safrole; 400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone.	Level 30
(2)	List I Chemicals At least 267 G but less than 890 G of Benzaldehyde; At least 6 KG but less than 20 KG of Benzyl Cyanide; At least 60 G but less than 200 G of Ergonovine; At least 120 G but less than 400 G of Ergotamine; At least 6 KG but less than 20 KG of Ethylamine; At least 660 G but less than 2.2 KG of Hydriodic Acid; At least 96 KG but less than 320 KG of Isosafrole; At least 60 G but less than 200 G of Methylamine; At least 150 KG but less than 500 KG of N-Methylephedrine; At least 150 KG but less than 500 KG of N-Methylpseudoephedrine; At least 187.5 G but less than 625 G of Nitroethane; At least 3 KG but less than 10 KG of Norpseudoephedrine; At least 6 KG but less than 20 KG of Phenylacetic Acid; At least 3 KG but less than 10 KG of Piperidine; At least 96 KG but less than 320 KG of Piperonal; At least 480 G but less than 1.6 KG of Propionic Anhydride; At least 96 KG but less than 320 KG of Safrole; At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone; List II Chemicals 11 KG or more of Acetic Anhydride; 1175 KG or more of Acetone; 20 KG or more of Benzyl Chloride; 1075 KG or more of Ethyl Ether; 1200 KG or more of Methyl Ethyl Ketone; 10 KG or more of Potassium Permanganate;	Level 28

1300 KG or more of Toluene.

(3) List I Chemicals Level 26

At least 89 G but less than 267 G of Benzaldehyde;
At least 2 KG but less than 6 KG of Benzyl Cyanide;
At least 20 G but less than 60 G of Ergonovine;
At least 40 G but less than 120 G of Ergotamine;
At least 2 KG but less than 6 KG of Ethylamine;
At least 220 G but less than 660 G of Hydriodic Acid;
At least 32 KG but less than 96 KG of Isosafrole;
At least 20 G but less than 60 G of Methylamine;
At least 50 KG but less than 150 KG of N-Methylephedrine;
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;
At least 62.5 G but less than 187.5 G of Nitroethane;
At least 1 KG but less than 3 KG of Norpseudoephedrine;
At least 2 KG but less than 6 KG of Phenylacetic Acid;
At least 1 KG but less than 3 KG of Piperidine;
At least 32 KG but less than 96 KG of Piperonal;
At least 160 G but less than 480 G of Propionic Anhydride;
At least 32 KG but less than 96 KG of Safrole;
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

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

(4) List I Chemicals Level 24

At least 62.3 G but less than 89 G of Benzaldehyde;
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;
At least 14 G but less than 20 G of Ergonovine;
At least 28 G but less than 40 G of Ergotamine;
At least 1.4 KG but less than 2 KG of Ethylamine;
At least 154 G but less than 220 G of Hydriodic Acid;
At least 22.4 KG but less than 32 KG of Isosafrole;
At least 14 G but less than 20 G of Methylamine;
At least 35 KG but less than 50 KG of N-Methylephedrine;
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;
At least 43.8 G but less than 62.5 G of Nitroethane;
At least 700 G but less than 1 KG of Norpseudoephedrine;
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;
At least 700 G but less than 1 KG of Piperidine;
At least 22.4 KG but less than 32 KG of Piperonal;
At least 112 G but less than 160 G of Propionic Anhydride;
At least 22.4 KG but less than 32 KG of Safrole;

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

List II Chemicals
At least 1.1 KG but less than 3.3 KG of Acetic Anhydride;
At least 117.5 KG but less than 352.5 KG of Acetone;
At least 2 KG but less than 6 KG of Benzyl Chloride;
At least 107.5 KG but less than 322.5 KG of Ethyl Ether;
At least 120 KG but less than 360 KG of Methyl Ethyl Ketone;
At least 1 KG but less than 3 KG of Potassium Permanganate;
At least 130 KG but less than 390 KG of Toluene.

(5) List I Chemicals Level 22
At least 35.6 G but less than 62.3 G of Benzaldehyde;
At least 800 G but less than 1.4 KG of Benzyl Cyanide;
At least 8 G but less than 14 G of Ergonovine;
At least 16 G but less than 28 G of Ergotamine;
At least 800 G but less than 1.4 KG of Ethylamine;
At least 88 G but less than 154 G of Hydriodic Acid;
At least 12.8 KG but less than 22.4 KG of Isosafrole;
At least 8 G but less than 14 G of Methylamine;
At least 20 KG but less than 35 KG of N-Methylephedrine;
At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;
At least 25 G but less than 43.8 G of Nitroethane;
At least 400 G but less than 700 G of Norpseudoephedrine;
At least 800 G but less than 1.4 KG of Phenylacetic Acid;
At least 400 G but less than 700 G of Piperidine;
At least 12.8 KG but less than 22.4 KG of Piperonal;
At least 64 G but less than 112 G of Propionic Anhydride;
At least 12.8 KG but less than 22.4 KG of Safrole;
At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

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

(6) List I Chemicals Level 20
At least 8.9 G but less than 35.6 G of Benzaldehyde;
At least 200 G but less than 800 G of Benzyl Cyanide;
At least 2 G but less than 8 G of Ergonovine;
At least 4 G but less than 16 G of Ergotamine;
At least 200 G but less than 800 G of Ethylamine;
At least 22 G but less than 88 G of Hydriodic Acid;
At least 3.2 KG but less than 12.8 KG of Isosafrole;

At least 2 G but less than 8 G of Methylamine;
At least 5 KG but less than 20 KG of N-Methylephedrine;
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;
At least 6.3 G but less than 25 G of Nitroethane;
At least 100 G but less than 400 of Norpseudoephedrine;
At least 200 G but less than 800 G of Phenylacetic Acid;
At least 100 G but less than 400 G of Piperidine;
At least 3.2 KG but less than 12.8 KG of Piperonal;
At least 16 G but less than 64 G of Propionic Anhydride;
At least 3.2 KG but less than 12.8 KG of Safrole;
At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

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

(7) List I Chemicals Level 18
At least 7.1 G but less than 8.9 G of Benzaldehyde;
At least 160 G but less than 200 G of Benzyl Cyanide;
At least 1.6 G but less than 2 G of Ergonovine;
At least 3.2 G but less than 4 G of Ergotamine;
At least 160 G but less than 200 G of Ethylamine;
At least 17.6 G but less than 22 G of Hydriodic Acid;
At least 2.56 KG but less than 3.2 KG of Isosafrole;
At least 1.6 G but less than 2 G of Methylamine;
At least 4 KG but less than 5 KG of N-Methylephedrine;
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;
At least 5 G but less than 6.3 G of Nitroethane;
At least 80 G but less than 100 G of Norpseudoephedrine;
At least 160 G but less than 200 G of Phenylacetic Acid;
At least 80 G but less than 100 G of Piperidine;
At least 2.56 KG but less than 3.2 KG of Piperonal;
At least 12.8 G but less than 16 G of Propionic Anhydride;
At least 2.56 KG but less than 3.2 KG of Safrole;
At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals
At least 110 G but less than 440 G of Acetic Anhydride;
At least 11.75 KG but less than 47 KG of Acetone;
At least 200 G but less than 800 G of Benzyl Chloride;
At least 10.75 KG but less than 43 KG of Ethyl Ether;
At least 12 KG but less than 48 KG of Methyl Ethyl Ketone;
At least 100 G but less than 400 G of Potassium Permanganate;

At least 13 KG but less than 52 KG of Toluene.

(8) List I Chemicals Level 16

3.6 KG or more of Anthranilic Acid;
At least 5.3 G but less than 7.1 G of Benzaldehyde;
At least 120 G but less than 160 G of Benzyl Cyanide;
At least 1.2 G but less than 1.6 G of Ergonovine;
At least 2.4 G but less than 3.2 G of Ergotamine;
At least 120 G but less than 160 G of Ethylamine;
At least 13.2 G but less than 17.6 G of Hydriodic Acid;
At least 1.92 KG but less than 2.56 KG of Isosafrole;
At least 1.2 G but less than 1.6 G of Methylamine;
4.8 KG or more of N-Acetylanthranilic Acid;
At least 3 KG but less than 4 KG of N-Methylephedrine;
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;
At least 3.8 G but less than 5 G of Nitroethane;
At least 60 G but less than 80 G of Norpseudoephedrine;
At least 120 G but less than 160 G of Phenylacetic Acid;
At least 60 G but less than 80 G of Piperidine;
At least 1.92 KG but less than 2.56 KG of Piperonal;
At least 9.6 G but less than 12.8 G of Propionic Anhydride;
At least 1.92 KG but less than 2.56 KG of Safrole;
At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

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

(9) List I Chemicals Level 14

At least 2.7 KG but less than 3.6 KG of Anthranilic Acid;
At least 3.6 G but less than 5.3 G of Benzaldehyde;
At least 80 G but less than 120 G of Benzyl Cyanide;
At least 800 MG but less than 1.2 G of Ergonovine;
At least 1.6 G but less than 2.4 G of Ergotamine;
At least 80 G but less than 120 G of Ethylamine;
At least 8.8 G but less than 13.2 G of Hydriodic Acid;
At least 1.44 KG but less than 1.92 KG of Isosafrole;
At least 800 MG but less than 1.2 G of Methylamine;
At least 3.6 KG but less than 4.8 KG of N-Acetylanthranilic Acid;
At least 2.25 KG but less than 3 KG of N-Methylephedrine;
At least 2.25 KG but less than 3 KG of N-Methylpseudoephedrine;
At least 2.5 G but less than 3.8 G of Nitroethane;
At least 40 G but less than 60 G of Norpseudoephedrine;
At least 80 G but less than 120 G of Phenylacetic Acid;

At least 40 G but less than 60 G of Piperidine;
At least 1.44 KG but less than 1.92 KG of Piperonal;
At least 7.2 G but less than 9.6 G of Propionic Anhydride;
At least 1.44 KG but less than 1.92 KG of Safrole;
At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

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

(10) List I Chemicals Level 12
Less than 2.7 KG of Anthranilic Acid;
Less than 3.6 G of Benzaldehyde;
Less than 80 G of Benzyl Cyanide;
Less than 800 MG of Ergonovine;
Less than 1.6 G of Ergotamine;
Less than 80 G of Ethylamine;
Less than 8.8 G of Hydriodic Acid;
Less than 1.44 KG of Isosafrole;
Less than 800 MG of Methylamine;
Less than 3.6 KG of N-Acetylanthranilic Acid;
Less than 2.25 KG of N-Methylephedrine;
Less than 2.25 KG of N-Methylpseudoephedrine;
Less than 2.5 G of Nitroethane;
Less than 40 G of Norpseudoephedrine;
Less than 80 G of Phenylacetic Acid;
Less than 40 G of Piperidine;
Less than 1.44 KG of Piperonal;
Less than 7.2 G of Propionic Anhydride;
Less than 1.44 KG of Safrole;
Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

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

*Notes:

(A) Except as provided in Note (B), to calculate the base offense level in an

offense that involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (i.e., list I or list II) under subsection (d) of this guideline.

(B) To calculate the base offense level in an offense that involves two or more chemicals each of which is set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) aggregate the quantities of all such chemicals, and (ii) determine the base offense level corresponding to the aggregate quantity.

(C) In a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.".

The Commentary to §2D1.11 captioned "Application Notes" is amended by striking Note 4 in its entirety as follows:

"4. When two or more list I chemicals are used together in the same manufacturing process, calculate the offense level for each separately and use the quantity that results in the greatest base offense level. In any other case, the quantities should be added together (using the List I Chemical Equivalency Table) for the purpose of calculating the base offense level.

Examples:

(a) The defendant was in possession of five kilograms of ephedrine and 300 grams of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. Therefore, the base offense level for each listed chemical is calculated separately and the list I chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of 26; 300 grams of hydriodic acid result in a base offense level of 16. In this case, the base offense level would be 26.

(b) The defendant was in possession of five kilograms of ephedrine and two kilograms of phenylacetic acid. Although both of these chemicals are used to manufacture methamphetamine, they are not used together in the same manufacturing process. Therefore, the quantity of phenylacetic acid should be converted to an ephedrine equivalency using the List I Chemical Equivalency Table and then added to the quantity of ephedrine. In this case, the two kilograms of phenylacetic acid convert to two kilograms of ephedrine (see List I Chemical Equivalency Table), resulting in a total equivalency of seven kilograms of ephedrine.",

and inserting the following:

"4. Cases Involving Multiple Chemicals.—

(A) Determining the Base Offense Level for Two or More Chemicals.—Except as provided in subdivision (B), if the offense involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (i.e., list I or list II) under subsections (d) and (e) of this guideline.

Example: The defendant was in possession of five kilograms of ephedrine and 300 grams of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. The base offense level for each chemical is calculated separately and the chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of level 38; 300 grams of hydriodic acid result in a base offense level of level 26. In this case, the base offense level would be level 38.

(B) Determining the Base Offense Level for Offenses involving Ephedrine, Pseudoephedrine, or Phenylpropanolamine.—If the offense involves two or more chemicals each of which is set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) aggregate the quantities of all such chemicals, and (ii) determine the base offense level corresponding to the aggregate quantity.

Example: The defendant was in possession of 80 grams of ephedrine and 50 grams of phenylpropanolamine, an aggregate quantity of 130 grams of such chemicals. The base offense level corresponding to that aggregate quantity is level 32.

(C) Upward Departure.—In a case involving two or more chemicals used to manufacture different controlled substances, or to manufacture one controlled substance by different manufacturing processes, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense.".

The Commentary to §2D1.11 captioned "Application Notes" is amended by striking Notes 5 and 6 in their entirety as follows:

"5. Where there are multiple list II chemicals, all quantities of the same list II chemical are added together for purposes of determining the base offense level. However, quantities of different list II chemicals are not aggregated (see Note B to the Chemical Quantity Table). Thus, where multiple list II chemicals are involved in the offense, the base offense level is determined by using the base offense level for the single list II chemical resulting in the greatest base offense level. For example, in the case of an offense involving seven kilograms of methyl ethyl ketone and eight kilograms of acetone, the

base offense level for the methyl ethyl ketone is 12 and the base offense level for the acetone is 14; therefore, the base offense level is 14.

6. Where both list I chemicals and list II chemicals are involved, use the greater of the base offense level for the list I chemicals or the list II chemicals (see Note C to the Chemical Quantity Table).";

and by redesignating Notes 7 and 8 as Notes 5 and 6, respectively.

The Commentary to §2D1.11 captioned "Background" is amended in the first sentence by inserting "(including ephedrine, pseudoephedrine, and phenylpropanolamine)" after "list I chemicals".

The Commentary to 2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" by inserting after the subdivision captioned "Schedule V Substances*******" the following new subdivision:

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

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

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

Reason for Amendment: This amendment is in response to the three-part directive in section 3651 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310 (the "Act"), regarding enhanced punishment for trafficking in List I chemicals. That section requires the Commission to promulgate an amendment implementing the directive under emergency amendment authority.

First, this amendment provides a new chemical quantity table specifically for ephedrine, pseudoephedrine, and phenylpropanolamine (PPA). The table ties the base offense levels for these chemicals to the base offense levels for methamphetamine (actual) set forth in §2D1.1, assuming a 50 percent actual yield of the controlled substance from the chemicals. (Methamphetamine (actual) is used rather than methamphetamine mixture because ephedrine, pseudoephedrine, and PPA produce methamphetamine (actual)). This yield is based on information provided by the Drug Enforcement Administration (DEA) that the typical yield of these substances for clandestine laboratories is 50 to 75 percent.

This new chemical quantity table has a maximum base offense level of level 38 (as opposed to a maximum base offense level of level 30 for all other precursor chemicals). Providing a maximum base offense level of level 38 complies with the directive to establish penalties for these precursors that "correspond to the quantity of controlled substance that could have reasonably been manufactured using the quantity of ephedrine, phenylpropanolamine, or pseudoephedrine possessed or distributed." Additionally, this adjustment will have an

impact on the relationship between §§2D1.1 and 2D1.11 by eliminating the six-level distinction that currently exists between offenses that involve intent to manufacture methamphetamine and offenses that involve an attempt to manufacture methamphetamine, at least for offenses involving ephedrine, pseudoephedrine, and PPA.

This amendment eliminates the Ephedrine Equivalency Table in §2D1.11 and, in its place, provides an instruction for the court to determine the base offense level in cases involving multiple precursors (other than ephedrine, pseudoephedrine, or PPA) by using the quantity of the single chemical resulting in the greatest offense level. An upward departure is provided for cases in which the offense level does not adequately address the seriousness of the offense.

However, this amendment provides an exception to the rule for offenses that involve a combination of ephedrine, pseudoephedrine, or PPA because these chemicals often are used in the same manufacturing process. In a case that involves two or more of these chemicals, the base offense level will be determined using the total quantity of these chemicals involved. The purpose of this exception is twofold: (1) any of the three primary precursors in the same table can be combined without difficulty; and (2) studies conducted by the DEA indicate that because the manufacturing process for amphetamine and methamphetamine is identical, there are cases in which the different precursors are included in the same batch of drugs. If the chemical is PPA, amphetamine results; and if the chemical is ephedrine, methamphetamine results.

Second, the amendment adds to the Drug Equivalency Tables in §2D1.1 a conversion table for these precursor chemicals, providing for a 50 percent conversion ratio. This is based on data from the DEA that the actual yield from ephedrine, pseudoephedrine, or PPA typically is in the range of 50 to 75 percent. The purpose of this part of the amendment is to achieve the same punishment level (as is achieved by the first part of this amendment) for an offense involving any of these precursor chemicals when such offense involved the manufacture of methamphetamine and, as a result, is sentenced under §2D1.1 pursuant to the cross reference in §2D1.11.

Third, this amendment increases the base offense level for Benzaldehyde, Hydriodic Acid, Methylamine, Nitroethane, and Norpseudoephedrine by re-calibrating these levels to the appropriate quantity of methamphetamine (actual) that could be produced assuming a 50 percent yield of chemical to drug and retaining a cap at level 30. Previously, these chemicals had been linked to methamphetamine (mixture) penalty levels. Based on a study conducted by the DEA, ephedrine and pseudoepehdrine are the primary precursors used to make methamphetamine in the United States. Phenylproponolamine is the primary precursor used to make amphetamine. Unlike the five additional List I chemicals, the chemical structures of ephedrine, pseudoephedrine, and PPA are so similar to the resulting drug (i.e., methamphetamine or amphetamine) that the manufacture of methamphetamine or amphetamine from ephedrine, pseudoephedrine, or PPA is a very simple one-step synthesis which anyone can perform using a variety of chemical reagents. The manufacture of methamphetamine or amphetamine from the five additional List I chemicals is a more complex process which requires a heightened level of expertise.

Effective Date: The effective date of this amendment is May 1, 2001.

612. Amendment: The Commentary to §2G1.1 captioned "Statutory Provisions" is amended by

inserting "1591," before "2421".

The Commentary to §2G1.1 captioned "Application Notes" is amended in Note 2 in the fourth sentence by adding "(B)" after "purposes of subsection (b)(1)".

The Commentary to §2G1.1 captioned "Application Notes" is amended by adding at the end the following:

"12. Upward Departure Provisions.—An upward departure may be warranted in either of the following circumstances:

(A) The defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years.

(B) The offense involved more than 10 victims.".

The Commentary to §2G1.1 captioned "Background" is amended by adding at the end the following paragraph:

"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.".

The Commentary to §2G2.1 captioned "Statutory Provisions" is amended by inserting "1591," before "2251(a)".

The Commentary to §2G2.1 captioned "Application Notes" is amended by adding at the end the following:

"6. Upward Departure Provisions.—An upward departure may be warranted in either of the following circumstances:

(A) The defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years.

(B) The offense involved more than 10 victims.".

Section 2H4.1 is amended by striking subsection (a) in its entirety as follows:

"(a) Base Offense Level: 22",

and inserting the following:

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

(1) 22; or

(2) 18, if the defendant was convicted of an offense under 18 U.S.C.

§ 1592.".

Section 2H4.1(b) is amended by striking subdivision (2) in its entirety as follows:

"(2) If a dangerous weapon was used, increase by 2 levels.",

and inserting the following:

"(2) If (A) a dangerous weapon was used, increase by 4 levels; or (B) a dangerous weapon was brandished, or the use of a dangerous weapon was threatened, increase by 2 levels.".

The Commentary to §2H4.1 captioned "Statutory Provisions" is amended by striking "1588" and inserting "1590, 1592".

The Commentary to §2H4.1 captioned "Application Notes" is amended in Note 1 in the second paragraph by inserting "other" after "that a firearm or"; and by adding after "otherwise used." the following:

"'The use of a dangerous weapon was threatened' means that the use of a dangerous weapon was threatened regardless of whether a dangerous weapon was present.".

Chapter Two, Part H, is amended in Subpart 4 by adding at the end the following:

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

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense involved (i) serious bodily injury, increase by 4 levels; or (ii) bodily injury, increase by 2 levels.

(2) If the defendant committed any part of the instant offense subsequent to sustaining a civil or administrative adjudication for similar misconduct, increase by 2 levels.

Commentary

Statutory Provision: 29 U.S.C. § 1851.

Application Notes:

1. Definitions.—For purposes of subsection (b)(1), '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. Application of Subsection (b)(2).—Section 1851 of title 29, United States Code, covers a wide range of conduct. Accordingly, the enhancement in subsection (b)(2) applies only if the instant offense is similar to previous misconduct that resulted in a civil or administrative adjudication under the provisions of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. § 1801 et. seq.).".

Section 5E1.1(a)(1) is amended by inserting "§ 1593," after "18 U.S.C.".

The Commentary to §5E1.1 captioned "Background" is amended in the first paragraph by inserting "1593," after "18 U.S.C. §§".

Appendix A (Statutory Index) is amended in the line referenced to "18 U.S.C. § 241" by inserting ", 2H4.1" after "2H2.1".

Appendix A (Statutory Index) is amended by inserting after the line referenced to "18 U.S.C. § 1588" the following new lines:

"18 U.S.C. § 1589	2H4.1
18 U.S.C. § 1590	2H4.1
18 U.S.C. § 1591	2G1.1, 2G2.1
18 U.S.C. § 1592	2H4.1".

Appendix A (Statutory Index) is amended by inserting after the line referenced to "29 U.S.C. § 1141" the following:

"29 U.S.C. § 1851	2H4.2".

Reason for Amendment: In promulgating this amendment, the Commission is cognizant of the extraordinarily serious nature of offenses that involve trafficking in human lives. This amendment is in response to the directive found at section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000 (the "Act"), Pub. L. 106–386. The Commission expects to consider further revisions and additions to the specific offense characteristics and punishment levels for these offenses, such as the possibility of providing an alternative base offense level in §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) for convictions under 18 U.S.C. § 1591 involving victims under the age of 14 years.

The directive confers emergency authority on the Commission to amend the federal sentencing guidelines to reflect changes to 18 U.S.C. §§ 1581(a) (Peonage), 1583 (Enticement into Slavery), and 1584 (Sale into Involuntary Servitude). The Commission also is directed to consider how to address four new statutes: 18 U.S.C. §§ 1589 (Forced Labor); 1590 (Trafficking with Respect to Peonage, Involuntary Servitude or Forced Labor); 1591 (Sex Trafficking of Children by Force, Fraud or Coercion); and 1592 (Unlawful Conduct with Respect to Documents in Furtherance of Peonage, Involuntary Servitude or Forced Labor).

Specifically, the Commission is directed to "review and, if appropriate, amend the sentencing guidelines applicable to . . . the trafficking of persons including . . . peonage, involuntary servitude, slave trade offenses, and possession, transfer or sale of false immigration

documents in furtherance of trafficking, and the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act."

The Commission further is directed to "take all appropriate measures to ensure that these sentencing guidelines . . . are sufficiently stringent to deter and adequately reflect the heinous nature of these offenses." The Commission also is directed to "consider providing sentencing enhancements" in cases which involve: (1) a large number of victims; (2) a pattern of continued and flagrant violations; (3) the use or threatened use of a dangerous weapon; or (4) the death or bodily injury of any person.

To address this multi-faceted directive, this amendment makes changes to several existing guidelines and creates a new guideline for criminal violations of the Migrant and Seasonal Agricultural Worker Protection Act. Although the directive instructs the Commission to amend the guidelines applicable to the Fair Labor Standards Act (29 U.S.C. § 201 et. seq.), a criminal violation of the Fair Labor Standards Act is only a Class B misdemeanor. See 29 U.S.C. § 216. Thus, the guidelines are not applicable to those offenses.

The amendment references the new offense at 18 U.S.C. § 1591 to §2G1.1. Section 1591 punishes a defendant who participates in the transporting or harboring of a person, or who benefits from participating in such a venture, with the knowledge that force, fraud, or coercion will be used to cause that person to engage in a commercial sex act or with knowledge that the person is not 18 years old and will be forced to engage in a commercial sex act. Despite the statute's inclusion in a chapter of title 18 devoted mainly to peonage offenses, section 1591 offenses are more analogous to the offenses referenced to the prostitution guideline.

Section 1591 cases alternatively have been referred in Appendix A to §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). This has been done in anticipation that some portion of section 1591 cases will involve children being forced or coerced to engage in commercial sex acts for the purpose of producing pornography. Such offenses, as recognized by the higher base offense level at §2G2.1, are more serious because they both involve specific harm to an individual victim and further an additional criminal purpose, namely, commercial pornography.

The amendment maintains the view that §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) continues to be an appropriate tool for determining sentences for violations of 18 U.S.C. §§ 1581, 1583, and 1584. Section 2H4.1 also is designed to cover offenses under three new statutes, 18 U.S.C. §§ 1589, 1590, and 1592. Section 1589 punishes defendants who provide or obtain the labor or services of another by the use of threats of serious harm or physical restraint against a person, or by a scheme or plan intended to make the person believe that if he or she did not perform the labor or services, he or she would suffer physical restraint or serious harm. This statute also applies to defendants who provide or obtain labor or services of another by abusing or threatening abuse of the law or the legal process. See 18 U.S.C. § 1589.

Section 1590 punishes defendants who harbor, transport, or are otherwise involved in obtaining, a person for labor or services. Section 1592 punishes a defendant who knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person in the course of a violation of § 1581

(peonage), § 1583 (enticement into slavery), § 1584 (sale into involuntary servitude), § 1589 (forced labor), § 1590 (trafficking with respect to these offenses), § 1591 (sex trafficking of children by force, fraud or coercion), or § 1594(a) (attempts to violate these offenses). Section 1592 also punishes a defendant who, with intent to violate § 1581, § 1583, § 1584, § 1589, § 1590, or § 1591, knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person. These statutes prohibit the types of behaviors that have been traditionally sentenced under §2H4.1.

The amendment provides an alternative, less punitive base offense level of level 18 for those who violate 18 U.S.C. § 1592, an offense which limits participation in peonage cases to the destruction or wrongful confiscation of a passport or other immigration document. This alternative, lower base level reflects the lower statutory maximum sentence for § 1592 offenses (i.e., 5 years).

Section 2H4.1(b)(2) has been expanded to provide a 4-level increase if a dangerous weapon was used and a 2-level increase if a dangerous weapon was brandished or its use was threatened. Currently, only actual use of a dangerous weapon is covered. This change reflects the directive to consider an enhancement for the "use or threatened use of a dangerous weapon." The commentary to §2H4.1 is amended to clarify that the threatened use of a dangerous weapon applies regardless of whether a dangerous weapon was actually present.

The amendment also creates a new guideline, §2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act), in response to the directive to amend the guidelines applicable to such offenses. These offenses, which have a statutory maximum sentence of one year imprisonment for first offenses and three years' imprisonment for subsequent offenses, currently are not referred to any specific guideline. The amendment provides a base offense level of level 6 in recognition of the low statutory maximum sentences set for these cases by Congress. Further, these offenses typically involve violations of regulatory provisions. Setting the base offense level at level 6 provides consistency with guidelines for other regulatory offenses. See, e.g., §§2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) and 2N3.1 (Odometer Laws and Regulations). Subsections (b)(1), an enhancement for bodily injury, and (b)(2), an enhancement applicable to defendants who commit the instant offense after previously sustaining a civil penalty for similar misconduct, have been established to respond to the directive that the Commission consider sentencing enhancement for these offense characteristics. This section addresses the Department of Justice's and the Department of Labor's concern regarding prior administrative and civil adjudications.

This amendment also addresses that portion of section 112 of the Act that amends chapter 77 of title 18, United States Code, to provide mandatory restitution for peonage and involuntary servitude offenses. The amendment amends §5E1.1 (Restitution) to include a reference to 18 U.S.C. § 1593 in the guideline provision regarding mandatory restitution.

By enactment of various sentencing enhancements and encouraged upward departures for areas of concern identified by Congress, the Commission has provided for more severe sentences for perpetrators of human trafficking offenses in keeping with the conclusion that the offenses covered by this amendment are both heinous in nature and being committed

with rapidly increasing frequency.

Effective Date: The effective date of this amendment is May 1, 2001.

613. **Amendment:** The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 1 in the third sentence of the first paragraph by inserting "(written or made orally on the record)" after "agreement".

The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 1 by striking the first two sentences of the third paragraph as follows:

> "However, there is a limited exception to this general rule. Where a stipulation that is set forth in a written plea agreement or made between the parties on the record during a plea proceeding specifically establishes facts that prove a more serious offense or offenses than the offense or offenses of conviction, the court is to apply the guideline most applicable to the more serious offense or offenses established.",

and inserting:

> "As set forth in the first paragraph of this note, an exception to this general rule is that if a plea agreement (written or made orally on the record) contains a stipulation that establishes a more serious offense than the offense of conviction, the guideline section applicable to the stipulated offense is to be used. A factual statement or a stipulation contained in a plea agreement (written or made orally on the record) is a stipulation for purposes of subsection (a) only if both the defendant and the government explicitly agree that the factual statement or stipulation is a stipulation for such purposes. However, a factual statement or stipulation made after the plea agreement has been entered, or after any modification to the plea agreement has been made, is not a stipulation for purposes of subsection (a).".

The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 1 in the third paragraph by striking "may be imposed" and inserting "shall be imposed".

The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 1 in the second sentence of the fourth paragraph by striking "cases where" and inserting "a case in which".

Reason for Amendment: This amendment addresses the circuit conflict regarding whether admissions made by a defendant during a guilty plea hearing, without more, can be considered stipulations for purposes of subsection (a) of §1B1.2 (Application Instructions). Compare, e.g., United States v. Nathan, 188 F.3d 190, 201 (3d Cir. 1999) (statements made by defendants during the factual-basis hearing for a plea agreement do not constitute stipulations for the purpose of this enhancement; a statement is a stipulation only if it is part of a defendant's written plea agreement or if both the government and the defendant explicitly agree at a factual-basis hearing that the facts being placed on the record are stipulations that might subject the defendant to §1B1.2(a)); United States v. Saaverda, 148 F.3d 1311 (11th Cir. 1998) (same); United States v. McCall, 915 F.2d 811 (2d Cir. 1990) (same); United States v. Gardner, 940 F.2d 587 (10th Cir. 1991) (requiring a "knowing agreement by the defendant, as part of a plea bargain, that facts supporting a more serious offense occurred and could be presented to the court"); and United States v. Rutter, 897 F.2d

1558, 1561 (10th Cir. 1990) (once the government agrees to a plea bargain without extracting an admission, facts admitted by the defendant can be considered only as relevant conduct in determining appropriate guideline range, not as stipulations under §1B1.2(a)), with United States v. Loos, 165 F.3d 504, 508 (7th Cir. 1998) (the objective behind §1B1.2(a) is best answered by interpreting "stipulations" to mean any acknowledgment by the defendant that the defendant committed the acts that justify use of the more serious guideline, not in the formal agreement); and United States v. Domino, 62 F.3d 716 (5th Cir. 1995) (same).

This amendment represents a narrow approach to the majority view that a factual statement made by the defendant during the plea colloquy must be made as part of the plea agreement in order to be considered a stipulation for purposes of §1B1.2(a). This approach lessens the possibility that the plea agreement will be modified during the course of the plea proceeding without providing the parties, especially the defendant, with notice of the defendant's potential sentencing range.

Effective Date: The effective date of this amendment is November 1, 2001.

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

"1. 'Aggravated assault' means a felonious assault that involved (A) a dangerous weapon with intent to do bodily harm (i.e., not merely to frighten), or (B) serious bodily injury, or (C) an intent to commit another felony.

2. Definitions of 'more than minimal planning,' 'firearm,' 'dangerous weapon,' 'brandished,' 'otherwise used,' 'bodily injury,' 'serious bodily injury," and 'permanent or life-threatening bodily injury,' are found in the Commentary to §1B1.1 (Application Instructions).

3. This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1 (Assault With Intent to Commit Murder). Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse).",

and inserting the following:

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

'Aggravated assault' means a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon; (B) serious bodily injury; or (C) an intent to commit another felony.

'Brandished,' 'bodily injury,' 'firearm,' 'otherwise used,' 'permanent or life-threatening bodily injury,' and 'serious bodily injury,' have the meaning given those terms in §1B1.1 (Application Instructions), Application Note 1.

'Dangerous weapon' has the meaning given that term in §1B1.1, Application Note 1, and includes any instrument that is not ordinarily used as a weapon (e.g., a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury.

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).

3. More than Minimal Planning.—For purposes of subsection (b)(1), 'more than minimal planning' means more planning than is typical for commission of the offense in a simple form. 'More than minimal planning' also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies. For example, waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. By contrast, luring the victim to a specific location or wearing a ski mask to prevent identification would constitute more than minimal planning.".

The Commentary to §2A2.2 captioned "Background" is amended by striking the text of the background as follows:

" This section applies to serious (aggravated) assaults. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1.

There are a number of federal provisions that address varying degrees of assault and battery. The punishments under these statutes differ considerably, even among provisions directed to substantially similar conduct. For example, if the assault is upon certain federal officers 'while engaged in or on account of . . . official duties,' the maximum term of imprisonment under 18 U.S.C. § 111 is three years. If a dangerous weapon is used in the assault on a federal officer, the maximum term of imprisonment is ten years. However, if the same weapon is used to assault a person not otherwise specifically protected, the maximum term of imprisonment under 18 U.S.C. § 113(c) is five years. If the assault results in serious bodily injury, the maximum term of imprisonment under 18 U.S.C. § 113(f) is ten years, unless the injury constitutes maiming by scalding, corrosive, or caustic substances under 18 U.S.C. § 114, in which case the maximum term of imprisonment is twenty years.",

and inserting the following:

" This guideline covers felonious assaults that are more serious than minor assaults because of the presence of an aggravating factor, i.e., serious bodily injury, the involvement of a dangerous weapon with intent to cause bodily injury, or the intent to commit another felony. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder). This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent

to commit murder is covered by §2A2.1. Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

An assault that involves the presence of a dangerous weapon is aggravated in form when the presence of the dangerous weapon is coupled with the intent to cause bodily injury. In such a case, the base offense level and the weapon enhancement in subsection (b)(2) take into account different aspects of the offense, even if application of the base offense level and the weapon enhancement is based on the same conduct.".

Reason for Amendment: This amendment responds to a circuit conflict regarding whether the four-level enhancement in subsection (b)(2)(B) of §2A2.2 (Aggravated Assault) for use of a dangerous weapon during an aggravated assault is impermissible double counting. Compare United States v. Williams, 954 F.2d 204, 205-08 (4th Cir. 1992) (applying the dangerous weapon enhancement under §2A2.2(b)(2)(B) for defendant's use of his chair as a dangerous weapon did not constitute impermissible double counting even though that conduct increased the defendant's offense level twice: first, by triggering the application of the aggravated assault guideline, and second, as the basis for the four-level enhancement for use of a dangerous weapon), with United States v. Hudson, 972 F.2d 504, 506-07 (2d Cir. 1992) (in a case in which the use of an automobile caused the crime to be classified as an aggravated assault, the court may not enhance the base offense level under §2A2.2(b) for use of the same, non-inherently dangerous weapon).

This amendment addresses the circuit conflict by providing in the aggravated assault guideline that (1) both the base offense level of level 15 and the weapon use enhancement in subsection (b)(2) shall apply to aggravated assaults that involve a dangerous weapon with intent to cause bodily harm; and (2) an instrument, such as a car or chair, that ordinarily is not used as a weapon may qualify as a dangerous weapon for purposes of the use of the aggravated assault guideline and the application of subsection (b)(2) when the defendant involves it in the offense with the intent to cause bodily harm.

Effective Date: The effective date of this amendment is November 1, 2001.

615. Amendment: The Commentary to §2A3.1 captioned "Application Notes" is amended by striking Note 5 as follows:

"5. If the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2 (Groups of Closely Related Counts), or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same victim or different victims, an upward departure would be warranted.";

by striking Note 7 as follows:

"7. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.";

and by redesignating Note 6 as Note 5.

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

"(1) 18, if the offense involved a violation of chapter 117 of title 18, United States Code; or

(2) 15, otherwise.",

and inserting the following:

"(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.".

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

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

and inserting the following:

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

The Commentary to §2A3.2 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 inserting before "'Victim' means" the following new paragraphs:

"'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).".

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

"2. If the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography, an upward departure may be warranted. See Chapter Five, Part K (Departures).";

by striking Note 8 as follows:

"8. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.";

by redesignating Notes 3 through 7 as Notes 2 through 6, respectively; and by inserting after Note 6, as redesignated by this amendment, the following:

"7. Upward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.".

The Commentary to §2A3.2 captioned "Application Notes" is amended in Note 2, as redesignated by this amendment, by inserting "Custody, Care, and Supervisory Control Enhancement.—" before "Subsection".

The Commentary to §2A3.2 captioned "Application Notes" is amended in Note 3, as redesignated by this amendment, by inserting "Abuse of Position of Trust.—" before "If the".

The Commentary to §2A3.2 captioned "Application Notes" is amended in Note 4, as redesignated by this amendment, by inserting "Misrepresentation of Identity.—" before "The enhancement".

The Commentary to §2A3.2 captioned "Application Notes" is amended in Note 5, as redesignated by this amendment, by inserting "Use of Computer or Internet-Access Device.—" before "Subsection (b)(3) provides".

The Commentary to §2A3.2 captioned "Application Notes" is amended in Note 6, as redesignated by this amendment, by inserting "Cross Reference.—" before "Subsection (c)(1)".

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

"4. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.".

Section 2A3.4(b) is amended by adding at the end the following:

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

The Commentary to §2A3.4 captioned "Application Notes" is amended by striking Note 8 as follows:

"8. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.".

Section 3D1.2(d) is amended in the second paragraph by inserting after "§§2E4.1, 2E5.1;" the following new line:

"§§2G2.2, 2G2.4;".

Chapter Four, Part B is amended by adding at the end the following:

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

(a) In any case in which the defendant's instant offense of conviction is a covered sex crime, §4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction:

(1) The offense level shall be the greater of:

(A) the offense level determined under Chapters Two and Three; or

(B) the offense level from the table below decreased by the number of levels corresponding to any applicable adjustment from §3E1.1 (Acceptance of Responsibility):

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

(2) The criminal history category shall be the greater of: (A) the criminal history category determined under Chapter Four, Part A (Criminal History); or (B) criminal history Category V.

(b) In any case in which the defendant's instant offense of conviction is a covered sex crime, neither §4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct:

(1) The offense level shall be 5 plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than level 22, the offense level shall be level 22, decreased by the number of levels corresponding to any applicable adjustment from §3E1.1.

(2) The criminal history category shall be the criminal history category determined under Chapter Four, Part A.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

3. Application of Subsection (a).—

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

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

(ii) 'Sex offense conviction' (I) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor; and (II) does not include trafficking in, receipt of, or possession of, child pornography. 'Child pornography' has the meaning given that term in 18 U.S.C. § 2256(8).

(B) Determination of Offense Statutory Maximum in the Case of Multiple Counts of Conviction.—In a case in which more than one count of the instant offense of conviction is a felony that is a

covered sex crime, the court shall use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (a).

4. Application of Subsection (b).—

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

(B) Determination of Pattern of Activity.—

(i) In General.—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if—

(I) on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor; and

(II) there were at least two minor victims of the prohibited sexual conduct.

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

(ii) Occasion of Prohibited Sexual Conduct.—An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion.

5. Treatment and Monitoring.—

(A) Recommended Maximum Term of Supervised Release.—The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.

(B) Recommended Conditions of Probation and Supervised Release.—Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.

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

Section 5B1.3(d) is amended by adding at the end the following:

"(7) Sex Offenses

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.".

Section 5D1.2 is amended by adding after subsection (b) the following:

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

The Commentary to §5D1.2 captioned "Application Notes" is amended by redesignating Notes 1 and 2 as Notes 2 and 3, respectively; by inserting before Note 2, as redesignated by this amendment, the following:

"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.";

in Note 2, as redesignated by this amendment, by inserting "Safety Valve Cases.—" before "A defendant"; and in Note 3, as redesignated by this amendment, by inserting "Substantial Assistance Cases.—" before "Upon motion".

Section 5D1.3(d) is amended by inserting at the end the following:

"(7) Sex Offenses

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.".

Reason for Amendment: This is a three-part amendment promulgated primarily in response to the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314 (the "Act"), which contains several directives to the Commission. In furtherance of the directives, the Commission initiated a comprehensive examination of the guidelines under which most sex crimes are sentenced. Amendment 592, effective November 1, 2000, addressed a number of these directives. (See Amendment 592.)

The first part of the amendment addresses the Act's directive to increase penalties in any case in which the defendant engaged in a pattern of activity of sexual abuse or sexual exploitation of a minor. In response to this directive, the amendment provides a new Chapter Four (Criminal History and Criminal Livelihood) guideline, §4B1.5 (Repeat and Dangerous Sex Offender Against Minors), that focuses on repeat child sex offenders. This new guideline works in a coordinated manner with §4B1.1 (Career Offender) and creates a tiered approach to punishing repeat child sex offenders.

The first tier, in §4B1.5(a), aims to incapacitate repeat child sex offenders who have an instant offense of conviction of sexual abuse of a minor and a prior felony conviction for sexual abuse of a minor (but to whom §4B1.1 does not apply). This provision subjects a defendant to the greater of the offense level determined under Chapters Two and Three or the offense level obtained from a table that, like the table in §4B1.1, bases the applicable offense level on the statutory maximum for the offense. In addition, the defendant is subject to an enhanced criminal history category of not less than Category V, similar to §4B1.1 (which provides for Category VI). By statute, defendants convicted of a federal sex offense are subject to twice the statutory maximum penalty for a subsequent sex offense conviction. This guideline provision effectuates the Commission's and Congress's intent to punish repeat child sex offenders severely.

The second tier, in §4B1.5(b), provides a five-level increase in the offense level and a minimum offense level of level 22 for defendants who are not subject to either §4B1.1 or to §4B1.5(a) and who have engaged in a pattern of activity involving prohibited sexual conduct with minors. This part of the guideline does not rely on prior convictions to increase the penalty for those who have a pattern of activity of sexual abuse or exploitation of a minor. The pattern of activity enhancement requires that the defendant engaged in prohibited sexual conduct on at least two separate occasions and that at least two minors were victims of the sexual conduct. This provision is similar to the existing five-level pattern of activity enhancement in subsection (b)(4) of §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 effectuates the Commission's and Congress's intent to punish severely offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.

Conforming amendments are made to the criminal sexual abuse guidelines in Chapter Two,

Part A, Subpart 3 to delete the upward departure provisions for prior sentences for similar conduct; that factor is now taken into account in the new guideline.

In addition to creating a new guideline, this part of the amendment also modifies §5D1.2 (Term of Supervised Release) to provide that the recommended term of supervised release for a defendant convicted of a sex crime is the maximum term authorized by statute. Amendments to §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) effectuate the Commission's intent that offenders who commit sex crimes receive appropriate treatment and monitoring.

The second part of the amendment addresses a circuit conflict regarding whether multiple counts of possession, receipt, or transportation of images containing child pornography should be grouped together pursuant to subsection (a) or (b) of §3D1.2 (Groups of Closely Related Counts). Resolution of the conflict depends, in part, on determining who is the victim of the offense: the child depicted in the pornography images or society as a whole. Six circuits have held that the child depicted is the victim, and, therefore, that the counts are not grouped. See United States v. Norris, 159 F.3d 926 (5th Cir. 1998); United States v. Hibbler, 159 F.3d 233 (6th Cir. 1998); United States v. Ketcham, 80 F.3d 789 (3d Cir. 1996); United States v. Rugh, 968 F.2d 750 (8th Cir. 1992); United States v. Boos, 127 F.3d 1207 (9th Cir. 1997), cert. denied, 522 U.S. 1066 (1998); and United States v. Tillmon, 195 F.3d 640 (11th Cir. 1999). In contrast, one circuit has held that society as a whole is the victim of these types of offenses, and, therefore, that one count of interstate transportation of child pornography does not group with a count of interstate transportation of a minor with intent to engage in illegal sexual activity in a case in which the child portrayed in the pornography was the same child transported. See United States v. Toler, 901 F.2d 399 (4th Cir. 1990).

In addressing the circuit conflict, the Commission adopted a position that provides for grouping of multiple counts of child pornography distribution, receipt, and possession pursuant to §3D1.2(d). Grouping multiple counts of these offenses pursuant to §3D1.2(d) is appropriate because these offenses typically are continuous and ongoing enterprises. This grouping provision does not require the determination of whether counts involve the same victim in order to calculate a combined adjusted offense level for multiple counts of conviction which, particularly in these kinds of cases, could be complex and time consuming. Consistent with the provisions of subsection (a)(2) of §1B1.3 (Relevant Conduct), this approach provides that additional images of child pornography (often involved in the case, but outside of the offense of conviction) shall be considered by the court in determining the appropriate sentence for the defendant if the conduct related to those images is part of the same course of conduct or common scheme or plan.

The third part of the amendment makes several modifications to §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts). The amendment responds to the directive in the Act to provide an enhancement for offenses under chapter 117 of title 18, United States Code, involving the transportation of minors for prostitution or prohibited sexual conduct. The amendment increases the offense levels in §2A3.2 and in §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact). The Act focuses on those individuals who travel to meet or transport minors for illegal sexual activity by providing increased statutory maximum penalties for those individuals. In response, the increase in penalties in these guidelines were geared toward those individuals. Specifically, the amendment distinguishes between chapter

117 offenses that involve the commission of a sexual act or sexual contact and those offenses (e.g., sting cases) that do not, by providing an alternative base offense level in §2A3.2 for chapter 117 offenses that also involve the commission of a sexual act or sexual contact that is three levels greater (i.e., level 24) than the base offense level applicable to chapter 117 offenses that do not involve a sexual act or sexual contact.

The amendment provides a three-level increase in the base offense level for offenses sentenced under §2A3.2, such that the base offense level (1) for statutory rape unaccompanied by aggravating conduct is increased from level 15 to level 18; (2) for a chapter 117 offense (unaccompanied by a sexual act or sexual contact) is increased from level 18 to level 21; and (3) for a chapter 117 offense (accompanied by a sexual act or sexual contact) results in a base offense level of level 24. The amendment reflects the seriousness accorded criminal sexual abuse offenses by Congress, which provided for statutory maximum penalties of 15 years' imprisonment (or 30 years' imprisonment with a prior conviction for a sex crime). A defendant who transmits child pornography to a minor as a means of enticing the minor to engage in illegal sexual activity will receive a sentence increase when that defendant subsequently travels across state lines to engage in illegal sexual activity with that minor. Therefore, this increase also maintains the proportionality between §§2A3.2 and 2G2.2.

The third part of the amendment also makes conforming changes to §2A3.2 to ensure that some chapter 117 offenses that do not include aggravating conduct receive the offense level applicable to statutory rape in its basic form. Technical changes made by the amendment (such as the addition of headings and the reordering of applications notes) are not intended to have substantive effect.

Effective Date: The effective date of this amendment is November 1, 2001.

616. Amendment: Section 2A6.2(a) is amended by striking "14" and inserting "18".

Section 2A6.2(c) is amended by striking subdivision (1) as follows:

> "(1) If the offense involved conduct covered by another offense guideline from Chapter Two, Part A (Offenses Against the Person), apply that offense guideline, if the resulting offense level is greater than that determined above.",

and inserting the following:

> "(1) If the offense involved the commission of another criminal offense, apply the offense guideline from Chapter Two, Part A (Offenses Against the Person) most applicable to that other criminal offense, if the resulting offense level is greater than that determined above.".

The Commentary to §2A6.2 captioned "Application Notes" is amended in Note 1 by striking the 1-em dash and inserting a colon; and by striking the last paragraph as follows:

> "'Stalking' means traveling with the intent to injure or harass another person and, in the course of, or as a result of, such travel, placing the person in reasonable fear of death or serious bodily injury to the person or the person's immediate family.

> See 18 U.S.C. § 2261A. 'Immediate family' has the meaning set forth in 18 U.S.C. § 115(c)(2).",

and inserting the following:

> "'Stalking' means (A) traveling with the intent to kill, injure, harass, or intimidate another person and, in the course of, or as a result of, such travel, placing the person in reasonable fear of death or serious bodily injury to that person or an immediate family member of that person; or (B) using the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, that person or an immediate family member of that person. See 18 U.S.C. § 2261A. 'Immediate family member' (A) has the meaning given that term in 18 U.S.C. § 115(c)(2); and (B) includes a spouse or intimate partner. 'Course of conduct' and 'spouse or intimate partner' have the meaning given those terms in 18 U.S.C. § 2266(2) and (7), respectively.".

The Commentary to §1B1.5 captioned "Application Notes" is amended in Note 3 by inserting after the first sentence the following:

> "Consistent with the provisions of §1B1.3 (Relevant Conduct), such other offense includes conduct that may be a state or local offense and conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States.".

Reason for Amendment: This amendment addresses section 1107 of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L 106–386 (the "Act"). That section amends 18 U.S.C. §§ 2261, 2261A, and 2262 to broaden the reach of those statutes to include international travel to stalk, commit domestic violence, or violate a protective order. Section 2261A also is amended to broaden the category of persons protected by this statute to include intimate partners of the person stalked. The Act also creates a new offense at section 2261A(2) that prohibits the use of the mail or any facility of interstate or foreign commerce to commit a stalking offense. Several technical changes were also made to these statutes.

The Act includes a directive to the Commission to amend the federal sentencing guidelines to reflect the changes made to 18 U.S.C. § 2261, with specific consideration to be given to the following factors: (1) whether the guidelines relating to stalking offenses should be modified in light of the amendment made by this subsection; and (2) whether any changes the Commission may make to the guidelines pursuant to clause (1) should also be made with respect to offenses under chapter 110A of title 18, United States Code (stalking and domestic violence offenses).

For several reasons, the amendment refers the new stalking by mail offense, like other stalking offenses, to §2A6.2 (Stalking or Domestic Violence). First, the statutory penalties for stalking by mail are the same as the statutory penalties for other stalking offenses. Second, although there was some consideration to refer this new offense to §2A6.1 (Threatening or Harassing Communications), stalking by mail offenses differ significantly from threatening communications in that the former require the defendant's intent to kill, or injure a person, or place a person in reasonable fear of death or serious bodily injury. Third,

referencing stalking by mail offenses to §2A6.1 could result in these offenses receiving higher penalties than other stalking offenses. For example, a defendant who writes a threatening letter, violates a protective order, and engages in some conduct evidencing an intent to carry out such threat, would receive an offense level of level 20 under §2A6.1. A defendant who engages in stalking by mail, violates a protective order, and actually commits bodily injury on the person who is the subject of the protection order would have received, prior to this amendment, an offense level of level 18 under §2A6.2. This amendment reflects the policy judgment that the second defendant should receive punishment equal to, or perhaps greater than, that received by the first defendant. Accordingly, because of concern for proportionality in sentencing stalking and domestic violence offenses relative to other crimes, such as threatening or harassing communications, this amendment increases the base offense level in §2A6.2 from level 14 to level 18. Setting the base offense level at level 18 for stalking and domestic violence crimes ensures that these offenses are sentenced at or above the offense levels for offenses involving threatening and harassing communications.

The amendment also conforms the definition of "stalking" in Application Note 1 of §2A6.2 to the statutory changes made by the Act. Additionally, the amendment modifies the language of subsection (c) in §2A6.2 to clarify application of the cross reference. This change is consistent with the amendment to Application Note 3 of §1B1.5 (Interpretation of References to Other Offense Guidelines), which also clarifies the operation of cross references generally.

These revisions are designed to clarify that, unless otherwise specified, cross references in Chapter Two (Offense Conduct) are to be determined consistently with the provisions of §1B1.3 (Relevant Conduct). Therefore, in a case in which the guideline includes a reference to use another guideline if the conduct involved another offense, the other offense includes conduct that may be a state or local offense and conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States.

Effective Date: The effective date of this amendment is November 1, 2001.

617. Amendment: Chapter Two is amended by striking the heading to Part B, the heading to Subpart 1 of Part B, and the Introductory Commentary to such subpart as follows:

" PART B - OFFENSES INVOLVING PROPERTY

1. THEFT, EMBEZZLEMENT, RECEIPT OF STOLEN PROPERTY, AND PROPERTY DESTRUCTION

Introductory Commentary

These sections address the most basic forms of property offenses: theft, embezzlement, transactions in stolen goods, and simple property damage or destruction. (Arson is dealt with separately in Part K, Offenses Involving Public Safety.) These guidelines apply to offenses prosecuted under a wide variety of federal statutes, as well as offenses that arise under the Assimilative Crimes Act.",

and inserting the following:

" PART B - BASIC ECONOMIC OFFENSES

1. THEFT, EMBEZZLEMENT, RECEIPT OF STOLEN PROPERTY, PROPERTY DESTRUCTION, AND OFFENSES INVOLVING FRAUD OR DECEIT

Introductory Commentary

These sections address basic forms of property offenses: theft, embezzlement, fraud, forgery, counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States), insider trading, transactions in stolen goods, and simple property damage or destruction. (Arson is dealt with separately in Chapter Two, Part K (Offenses Involving Public Safety)). These guidelines apply to offenses prosecuted under a wide variety of federal statutes, as well as offenses that arise under the Assimilative Crimes Act.".

Chapter Two, Part B is amended by striking §2B1.1, and its accompanying commentary, as follows:

"§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

(a) Base Offense Level: 4

(b) Specific Offense Characteristics

(1) If the loss exceeded $100, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$100 or less	no increase
(B)	More than $100	add 1
(C)	More than $1,000	add 2
(D)	More than $2,000	add 3
(E)	More than $5,000	add 4
(F)	More than $10,000	add 5
(G)	More than $20,000	add 6
(H)	More than $40,000	add 7
(I)	More than $70,000	add 8
(J)	More than $120,000	add 9
(K)	More than $200,000	add 10
(L)	More than $350,000	add 11
(M)	More than $500,000	add 12
(N)	More than $800,000	add 13
(O)	More than $1,500,000	add 14
(P)	More than $2,500,000	add 15
(Q)	More than $5,000,000	add 16
(R)	More than $10,000,000	add 17

(S)	More than $20,000,000	add 18
(T)	More than $40,000,000	add 19
(U)	More than $80,000,000	add 20.

(2) If the theft was from the person of another, increase by 2 levels.

(3) If (A) undelivered United States mail was taken, or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, and the offense level as determined above is less than level 6, increase to level 6.

(4) (A) If the offense involved more than minimal planning, increase by 2 levels; or

(B) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 4 levels.

(5) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the offense level as determined above is less than level 14, increase to level 14.

(6) If the offense --

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

(7) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit any foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.

(8) If the offense involved theft of property from a national cemetery, increase by 2 levels.

(c) Cross Reference

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense, or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 225, 553(a)(1), 641, 656, 657, 659, 662, 664, 1702, 1708, 1831, 1832, 2113(b), 2312-2317; 29 U.S.C. § 501(c). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. 'More than minimal planning,' 'firearm,' and 'destructive device' are defined in the Commentary to §1B1.1 (Application Instructions).

   'Trade secret' is defined in 18 U.S.C. § 1839(3).

   'Foreign instrumentality' and 'foreign agent' are defined in 18 U.S.C. § 1839(1) and (2), respectively.

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

2. 'Loss' means the value of the property taken, damaged, or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim. Loss does not include the interest that could have been earned had the funds not been stolen. When property is damaged, the loss is the cost of repairs, not to exceed the loss had the property been destroyed. Examples: (1) In the case of a theft of a check or money order, the loss is

the loss that would have occurred if the check or money order had been cashed. (2) In the case of a defendant apprehended taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately.

If the offense involved making a fraudulent loan or credit card application, or other unlawful conduct involving a loan, a counterfeit access device, or an unauthorized access device, the loss is to be determined in accordance with the Commentary to §2F1.1 (Fraud and Deceit). For example, in accordance with Application Note 17 of the Commentary to §2F1.1, in a case involving an unauthorized access device (such as a stolen credit card), loss includes any unauthorized charge(s) made with the access device. In such a case, the loss shall be not less than $500 per unauthorized access device. For purposes of this application note, 'counterfeit access device' and 'unauthorized access device' have the meaning given those terms in 18 U.S.C. § 1029(e)(2) and (e)(3), respectively.

In certain cases, an offense may involve a series of transactions without a corresponding increase in loss. For example, a defendant may embezzle $5,000 from a bank and conceal this embezzlement by shifting this amount from one account to another in a series of nine transactions over a six-month period. In this example, the loss is $5,000 (the amount taken), not $45,000 (the sum of the nine transactions), because the additional transactions did not increase the actual or potential loss.

In stolen property offenses (receiving, transporting, transferring, transmitting, or possessing stolen property), the loss is the value of the stolen property determined as in a theft offense.

In an offense involving unlawfully accessing, or exceeding authorized access to, a 'protected computer' as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), 'loss' includes the reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.

In the case of a partially completed offense (e.g., an offense involving a completed theft that is part of a larger, attempted theft), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.

3. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based upon the approximate number of victims and the average loss to each victim, or on more general factors such as the scope and duration of the offense.

4. Controlled substances should be valued at their estimated street value.

5. 'Undelivered United States mail' means mail that has not actually been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mail box).

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

7. Subsection (b)(5), referring to an 'organized scheme to steal vehicles or vehicle parts,' provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or 'chop shop.' 'Vehicles' refers to all forms of vehicles, including aircraft and watercraft.

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

9. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

10. 'The defendant derived more than $1,000,000 in gross receipts from the offense,' as used in subsection (b)(6)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000. 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

11. If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the

underlying series of offenses comprising the 'continuing financial crimes enterprise.'

12. If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved 'more than minimal planning.'

13. If the offense involved theft or embezzlement from an employee pension or welfare benefit plan (a violation of 18 U.S.C. § 664) and the defendant was a fiduciary of the benefit plan, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply. 'Fiduciary of the benefit plan' is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.

    If the offense involved theft or embezzlement from a labor union (a violation of 29 U.S.C. § 501(c)) and the defendant was a union officer or occupied a position of trust in the union as set forth in 29 U.S.C. § 501(a), an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply.

14. In cases where the loss determined under subsection (b)(1) does not fully capture the harmfulness of the conduct, an upward departure may be warranted. For example, the theft of personal information or writings (e.g., medical records, educational records, a diary) may involve a substantial invasion of a privacy interest that would not be addressed by the monetary loss provisions of subsection (b)(1).

15. In cases involving theft of information from a 'protected computer', as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), an upward departure may be warranted where the defendant sought the stolen information to further a broader criminal purpose.

Background: The value of the property stolen plays an important role in determining sentences for theft and other offenses involving stolen property because it is an indicator of both the harm to the victim and the gain to the defendant. Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.

The guidelines provide an enhancement for more than minimal planning, which includes most offense behavior involving affirmative acts on multiple occasions. Planning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof.

Consistent with statutory distinctions, an increased minimum offense level

is provided for the theft of undelivered mail. Theft of undelivered mail interferes with a governmental function, and the scope of the theft may be difficult to ascertain.

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies.

A minimum offense level of 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial (i.e., the value of the stolen property, combined with an enhancement for 'more than minimal planning' would itself result in an offense level of at least 14), but the value of the property is particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of 'organized scheme' is used as an alternative to 'loss' in setting the offense level.

Subsection (b)(6)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.

Subsection (b)(6)(B) implements the instruction to the Commission in section 2507 of Public Law 101-647.

Subsection (b)(8) implements the instruction to the Commission in section 2 of Public Law 105–101.".

A replacement guideline with accompanying commentary is inserted as §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).

Chapter Two, Part B is amended by striking §2B1.3 and its accompanying commentary as follows:

"§2B1.3. Property Damage or Destruction

(a) Base Offense Level: 4

(b) Specific Offense Characteristics

(1) If the loss exceeded $100, increase by the corresponding number of levels from the table in §2B1.1.

(2) If undelivered United States mail was destroyed, and the offense level as determined above is less than level 6, increase to level 6.

(3) If the offense involved more than minimal planning, increase by 2 levels.

(4) If property of a national cemetery was damaged or destroyed, increase by 2 levels.

(c) Cross Reference

(1) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives).

(d) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(5), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1030(a)(5), 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail is involved). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. 'More than minimal planning' is defined in the Commentary to §1B1.1 (Application Instructions).

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

2. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).

3. 'Undelivered United States mail' means mail that has not been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mailbox).

4. In some cases, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused. For example, the destruction of a $500 telephone line or interference with a telecommunications network may cause an interruption in service to thousands of people for several hours, with attendant life-threatening delay in the delivery of emergency medical treatment or disruption of other important governmental or private services. In such cases, an upward

departure may be warranted. See §§5K2.2 (Physical Injury), 5K2.7 (Disruption of Governmental Function), and 5K2.14 (Public Welfare).

Background: Subsection (b)(4) implements the instruction to the Commission in section 2 of Public Law 105–101.

Subsection (d) implements the instruction to the Commission in section 805(c) of Public Law 104-132.".

Chapter Two is amended by striking Part F in its entirety as follows:

"PART F - OFFENSES INVOLVING FRAUD OR DECEIT

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$2,000 or less	no increase
(B)	More than $2,000	add 1
(C)	More than $5,000	add 2
(D)	More than $10,000	add 3
(E)	More than $20,000	add 4
(F)	More than $40,000	add 5
(G)	More than $70,000	add 6
(H)	More than $120,000	add 7
(I)	More than $200,000	add 8
(J)	More than $350,000	add 9
(K)	More than $500,000	add 10
(L)	More than $800,000	add 11
(M)	More than $1,500,000	add 12
(N)	More than $2,500,000	add 13
(O)	More than $5,000,000	add 14
(P)	More than $10,000,000	add 15
(Q)	More than $20,000,000	add 16
(R)	More than $40,000,000	add 17
(S)	More than $80,000,000	add 18.

(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.

(3) If the offense was committed through mass-marketing, increase by 2 levels.

(4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; or (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(5) If the offense involved—

(A) the possession or use of any device-making equipment;

(B) the production or trafficking of any unauthorized access device or counterfeit access device; or

(C) (i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from another means of identification or obtained by the use of another means of identification,

increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(6) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(7) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase

by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(8) If the offense --

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

(c) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644; 18 U.S.C. §§ 225, 285-289, 471-473, 500, 510, 659, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4), 1031, 1341-1344, 2314, 2315. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The adjustments in §2F1.1(b)(4) are alternative rather than cumulative. If in a particular case, however, both of the enumerated factors applied, an upward departure might be warranted.

2. 'More than minimal planning' (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).

3. 'Mass-marketing,' as used in subsection (b)(3), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.

4. 'Scheme to defraud more than one victim,' as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one

person. In this context, "victim" refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.

5. Subsection (b)(4)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.

6. Subsection (b)(4)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).

   If the conduct that forms the basis for an enhancement under (b)(4)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.

7. Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).

8. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for

example, include interest the victim could have earned on such funds had the offense not occurred. Consistent with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell $40,000 in worthless securities, or representing that a forged check for $40,000 was genuine, the loss would be $40,000.

There are, however, instances where additional factors are to be considered in determining the loss or intended loss:

(a) Fraud Involving Misrepresentation of the Value of an Item or Product Substitution

A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth $40,000 and the stock is worth only $10,000, the loss is the amount by which the stock was overvalued (i.e., $30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.

(b) Fraudulent Loan Application and Contract Procurement Cases

In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used.

In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct. For example, where the defendant substantially understated his debts to obtain a loan, which he nevertheless repaid, the loss determined above (zero loss) will tend not to reflect adequately the risk of loss created by the defendant's conduct. Conversely, a defendant may understate his debts to a limited degree to obtain a loan (e.g., to expand a grain export business), which he genuinely expected to repay and for which he would have qualified at a higher interest rate had he made truthful disclosure, but he is unable to repay the loan because of some unforeseen event (e.g., an embargo imposed on grain exports) which would have caused a default in any event. In such a case, the loss determined above may

overstate the seriousness of the defendant's conduct. Where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted.

(c) Consequential Damages in Procurement Fraud and Product Substitution Cases

In contrast to other types of cases, loss in a procurement fraud or product substitution case includes not only direct damages, but also consequential damages that were reasonably foreseeable. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose, plus the government's reasonably foreseeable cost of rectifying the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.

(d) Diversion of Government Program Benefits

In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses.

(e) Davis-Bacon Act Cases

In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the

loss is the difference between the legally required and actual wages paid.

9. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.

10. In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.

11. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:

    (a) a primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm;

    (b) false statements were made for the purpose of facilitating some other crime;

    (c) the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma;

    (d) the offense endangered national security or military readiness;

    (e) the offense caused a loss of confidence in an important institution;

    (f) the offense involved the knowing endangerment of the solvency of one or more victims.

    In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted.

12. Offenses involving access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. In such a case, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.

    Offenses involving identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than §2F1.1.

13. If the fraud exploited vulnerable victims, an enhancement will apply. See §3A1.1 (Hate Crime Motivation or Vulnerable Victim).

14. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 would be more apt, and false statements to a customs officer, for which §2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than §2F1.1. Otherwise, in such cases, §2F1.1 is to be applied, but a departure from the guidelines may be considered.

15. For purposes of subsection (b)(5)—

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

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

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

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

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

16. Subsection (b)(5)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

Examples of conduct to which this subsection should apply are as follows:

(A) A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.

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

Examples of conduct to which subsection (b)(5)(C)(i) should not apply are as follows:

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

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

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

In a case involving unlawfully produced or unlawfully obtained means of identification, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense. Examples may include the following:

(A) The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.

(B) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in the individual's name.

(C) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.

17. In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit

access device or unauthorized access device. In any such case, loss shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this application note, 'counterfeit access device' and 'unauthorized access device' have the meaning given those terms in Application Note 15.

18. For purposes of subsection (b)(6)(B), 'United States' means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

For purposes of subsection (b)(6)(C), 'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.

The enhancement for sophisticated means under subsection (b)(6)(C) requires conduct that is significantly more complex or intricate than the conduct that may form the basis for an enhancement for more than minimal planning under subsection (b)(2)(A).

If the conduct that forms the basis for an enhancement under subsection (b)(6) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.

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

of persons.

20. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

21. 'The defendant derived more than $1,000,000 in gross receipts from the offense,' as used in subsection (b)(8)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000. 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

22. If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the 'continuing financial crimes enterprise.'

23. If subsection (b)(5), subsection (b)(8)(A), or subsection (b)(8)(B) applies, there shall be a rebuttable presumption that the offense also involved more than minimal planning for purposes of subsection (b)(2).

    If the conduct that forms the basis for an enhancement under subsection (b)(5) is the only conduct that forms the basis of an enhancement under subsection (b)(6), do not apply an enhancement under subsection (b)(6).

Background: This guideline is designed to apply to a wide variety of fraud cases. The statutory maximum term of imprisonment for most such offenses is five years. The guideline does not link offense characteristics to specific code sections. Because federal fraud statutes are so broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity.

Empirical analyses of pre-guidelines practice showed that the most important factors that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.

The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement

when this factor is present.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm. The commission of a fraud in the course of a bankruptcy proceeding subjects the defendant to an enhanced sentence because that fraudulent conduct undermines the bankruptcy process as well as harms others with an interest in the bankruptcy estate.

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

Subsections (b)(5)(A) and(B) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.

Subsection (b)(5)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as 'affirmative identity theft' or 'breeding,' in which a defendant uses another individual's name, social security number, or some other form of identification (the 'means of identification') to 'breed' (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines 'means of identification,' the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part, because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were 'bred' (i.e., produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been 'stolen.' Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

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

Subsection (b)(7)(B) implements, in a broader form, the instruction to the

Commission in section 110512 of Public Law 103–322.

Subsection (b)(8)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)(8)(B) implements the instruction to the Commission in section 2507 of Public Law 101–647.

Subsection (c) implements the instruction to the Commission in section 805(c) of Public Law 104–132.

§2F1.2. Insider Trading

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Increase by the number of levels from the table in §2F1.1 corresponding to the gain resulting from the offense.

Commentary

Statutory Provisions: 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

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

Background: This guideline applies to certain violations of Rule 10b-5 that are commonly referred to as 'insider trading.' Insider trading is treated essentially as a sophisticated fraud. Because the victims and their losses are difficult if not impossible to identify, the gain, i.e., the total increase in value realized through trading in securities by the defendant and persons acting in concert with him or to whom he provided inside information, is employed instead of the victims' losses.

Certain other offenses, e.g., 7 U.S.C. § 13(e), that involve misuse of inside information for personal gain also may appropriately be covered by this guideline.".

Chapter Two, Part B, Subpart 1, is amended by adding at the end the following:

"§2B1.4. Insider Trading

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) If the gain resulting from the offense 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: 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

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

Background: This guideline applies to certain violations of Rule 10b-5 that are commonly referred to as 'insider trading'. Insider trading is treated essentially as a sophisticated fraud. Because the victims and their losses are difficult if not impossible to identify, the gain, i.e., the total increase in value realized through trading in securities by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information, is employed instead of the victims' losses.

Certain other offenses, e.g., 7 U.S.C. § 13(e), that involve misuse of inside information for personal gain also appropriately may be covered by this guideline.".

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1 by striking subdivision (f) as follows:

"(f) 'More than minimal planning' means more planning than is typical for commission of the offense in a simple form. 'More than minimal planning' also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies.

'More than minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Consequently, this adjustment will apply especially frequently in property offenses.

In an assault, for example, waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. By contrast, luring the victim to a specific location, or wearing a ski mask to prevent identification, would constitute more than minimal planning.

In a commercial burglary, for example, checking the area to make sure no witnesses were present would not alone constitute more than minimal planning. By contrast, obtaining building plans to plot a particular course of entry, or disabling an alarm system, would constitute more than minimal planning.

In a theft, going to a secluded area of a store to conceal the stolen item in one's pocket would not alone constitute more than minimal planning. However, repeated instances of such thefts on several occasions would constitute more than minimal planning. Similarly, fashioning a special device to conceal the property, or obtaining information on delivery dates so that an especially valuable item could be obtained, would constitute more than minimal planning.

In an embezzlement, a single taking accomplished by a false book entry would constitute only minimal planning. On the other hand, creating purchase orders to, and invoices from, a dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accompanied by false entries.";

and by redesignating subdivisions (g) through (l) as subdivisions (f) through (k), respectively.

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 4 in the second paragraph by striking the last sentence as follows:

"For example, the adjustments from §2F1.1(b)(2) (more than minimal planning) and §3B1.1 (Aggravating Role) are applied cumulatively.".

The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 1 in the fourth paragraph by striking "§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 5 by striking "§2F1.1 (Fraud and Deceit)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

The Commentary to §2B2.1 captioned "Application Notes" is amended in Note 1 by striking "'More than minimal planning,' 'firearm,'" and inserting "'Firearm,'".

The Commentary to §2B2.1 captioned "Application Notes" is amended by striking the text of Note 2 as follows:

"Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).",

and inserting the following:

"'Loss' means the value of the property taken, damaged, or destroyed.".

The Commentary to §2B2.1 captioned "Application Notes" is amended by adding at the end the following:

"4. More than Minimal Planning.—'More than minimal planning' means more planning than is typical for commission of the offense in a simple form. 'More than minimal planning' also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies. 'More than minimal planning' shall be considered to be present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. For example, checking the area to make sure no witnesses were present would not alone constitute more than minimal planning. By contrast, obtaining building plans to plot a particular course of entry, or disabling an alarm system, would constitute more than minimal planning.".

Section 2B2.3(b) is amended by striking subdivision (3) as follows:

"(3) If the offense involved invasion of a protected computer resulting in a loss exceeding $2000, increase the offense level by the number of levels from the table in §2F1.1 corresponding to the loss.",

and inserting the following:

"(3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (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.".

The Commentary to §2B2.3 captioned "Application Notes" is amended in Note 2 by striking "§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

The Commentary to §2B3.1 captioned "Application Notes" is amended by striking the text of Note 3 as follows:

"Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).",

and inserting:

"'Loss' means the value of the property taken, damaged, or destroyed.".

Section 2B3.3(b) is amended by striking subdivision (1) as follows:

"(1) If the greater of the amount obtained or demanded exceeded $2,000, increase by the corresponding number of levels from the table in §2F1.1.",

and inserting the following:

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

Section 2B4.1(b) is amended by striking subdivision (1) as follows:

"(1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded $2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1.",

and inserting the following:

"(1) If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.".

Section 2B5.1(b) is amended by striking subdivision (1) as follows:

"(1) If the face value of the counterfeit items exceeded $2,000, increase by the corresponding number of levels from the table at §2F1.1 (Fraud and Deceit).",

and inserting the following:

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

The Commentary to §2B5.1 captioned "Application Notes" is amended in Note 3 by striking "§2F1.1 (Fraud and Deceit)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

Section 2B5.3(b) is amended by striking subdivision (1) as follows:

"(1) If the infringement amount exceeded $2,000, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount.",

and inserting the following:

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

The Commentary to §2B5.3 captioned "Background" is amended in the first paragraph by

striking "guidelines" and inserting "guideline".

Section 2B6.1(b) is amended by striking subdivision (1) as follows:

"(1) If the retail value of the motor vehicles or parts involved exceeded $2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).",

and inserting the following:

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

The Commentary to §2B6.1 captioned "Application Notes" is amended in Note 1 by striking "§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

The Commentary to §2B6.1 captioned "Application Notes" is amended in Note 2 by striking "'corresponding" before "number" and inserting "term 'increase by the"; and by striking "§2F1.1 (Fraud and Deceit)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount".

Section 2C1.1(b) is amended by striking subdivision (2)(A) as follows:

"(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, exceeded $2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).",

and inserting the following:

"(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.".

The Commentary to §2C1.1 captioned "Application Notes" is amended in Note 2 by striking "'Loss' is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and includes both actual and intended loss" and inserting "'Loss', for purposes of subsection (b)(2)(A), shall be determined in accordance with Application Note 2 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud)".

Section 2C1.2(b) is amended by striking subdivision (2)(A) as follows:

"(A) If the value of the gratuity exceeded $2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).",

and inserting the following:

"(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.".

Section 2C1.6(b) is amended by striking subdivision (1) as follows:

"(1) If the value of the gratuity exceeded $2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).",

and inserting the following:

"(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.".

Section 2C1.7(b) is amended by striking subdivision (1)(A) as follows:

"(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, exceeded $2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or"

and inserting the following:

"(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.".

The Commentary to §2C1.7 captioned "Application Notes" is amended by striking the text of Note 3 as follows:

"'Loss' is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and includes both actual and intended loss.",

and inserting the following:

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

Section 2E5.1(b) is amended by striking subdivision (2) as follows:

"(2) Increase by the number of levels from the table in §2F1.1 (Fraud and

Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.",

and inserting the following:

"(2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.".

Section 2G2.2(b)(2)(A) is amended by striking "§2F1.1 (Fraud and Deceit)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

Section 2G3.1(b)(1)(A) is amended by striking "§2F1.1 (Fraud and Deceit)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

Section 2G3.2(b)(2) is amended by striking "at §2F1.1(b)(1)" and inserting "in §2B1.1 (Theft, Property Destruction, and Fraud)".

Section 2H3.3(a) is amended by striking the text of subdivision (2) as follows:

"if the conduct was theft of mail, apply §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft);",

and inserting the following:

"if the conduct was theft or destruction of mail, apply §2B1.1 (Theft, Property Destruction, and Fraud).";

and by striking subdivision (3) as follows:

"(3) if the conduct was destruction of mail, apply §2B1.3 (Property Damage or Destruction).".

The Commentary to §2H3.3 captioned "Background" is amended by striking "§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or §2B1.3 (Property Damage or Destruction)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

The Commentary to §2J1.1 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 2K1.4(a) subdivision (2) is amended by inserting "or" after "or a structure other than a dwelling;"; by striking the text of subdivision (3) as follows:

"2 plus the offense level from §2F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud; or",

and inserting the following:

"2 plus the offense level from §2B1.1 (Theft, Property Destruction, and Fraud).";

and by striking subdivision (4) as follows:

"(4) 2 plus the offense level from §2B1.3 (Property Damage or Destruction).".

Section 2K1.4(b)(2) is amended by striking "(4)" and inserting "(3)".

Section 2N2.1(b)(1) is amended by striking "§2F1.1 (Fraud and Deceit)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

The Commentary to §2N2.1 captioned "Statutory Provisions" is amended by inserting ", 6810, 7734" after "150gg".

The Commentary to §2N2.1 captioned "Application Notes" is amended in Note 2 by inserting "theft, property destruction, or" after "involved"; and by striking "theft, bribery, revealing trade secrets, or destruction of property" and inserting "bribery".

The Commentary to §2N2.1 captioned "Application Notes" is amended in Note 4 by striking "§2F1.1 (Fraud and Deceit)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

Section 2N3.1(b)(1) is amended by striking "§2F1.1 (Fraud and Deceit)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

The Commentary to §2N3.1 captioned "Background" is amended by striking "the guideline for fraud and deception, §2F1.1," and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

Section 2Q1.6(a)(2) is amended by striking "§2B1.3 (Property Damage or Destruction)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

Section 2Q2.1(b) is amended by striking subdivision (3)(A) as follows:

"(A) If the market value of the fish, wildlife, or plants exceeded $2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or",

and inserting the following:

"(A) If the market value of the fish, wildlife, or plants (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; or ".

Section 2S1.3(a) is amended by striking "§2F1.1 (Fraud and Deceit)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

Section 2T1.1(b)(2) is amended by striking "concealment" and inserting "means"; and by inserting after "levels." the following:

"If the resulting offense level is less than level 12, increase to level 12.".

Section 2T1.1(c)(1) is amended by adding at the end the following:

"(D) If the offense involved (i) conduct described in subdivisions (A), (B), or (C) of these Notes; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses added together.".

Section 2T1.1(c)(2) is amended in the second paragraph by striking "Note" and inserting "Notes"; by inserting "(A)" before "If"; and by adding at the end the following:

"(B) If the offense involved (i) conduct described in subdivision (A) of these Notes; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses added together.".

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 1 in the first paragraph by inserting ", except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203" after "penalties".

The Commentary to §2T1.1 captioned "Application Notes" is amended by striking the text of Note 4 as follows:

"For purposes of subsection (b)(2), 'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.",

and inserting the following:

"Sophisticated Means Enhancement.— For purposes of subsection (b)(2), 'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.".

The Commentary to §2T1.1 captioned "Application Notes" is amended by striking the text of Note 7 as follows:

"If the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.",

and inserting the following:

"If the offense involved both individual and corporate tax returns, the tax loss is the aggregate tax loss from the individual tax offense and the corporate tax offense added together. Accordingly, in a case in which a defendant fails to report income derived from a corporation on both the defendant's individual tax return and the defendant's corporate tax return, the tax loss is the sum of (A) the unreported or diverted amount multiplied by (i) 28%; or (ii) the tax rate for the individual tax

offense, if sufficient information is available to make a more accurate assessment of that tax rate; and (B) the unreported or diverted amount multiplied by (i) 34%; or (ii) the tax rate for the corporate tax offense, if sufficient information is available to make a more accurate assessment of that tax rate. For example, the defendant, the sole owner of a Subchapter C corporation, fraudulently understates the corporation's income in the amount of $100,000 on the corporation's tax return, diverts the funds to the defendant's own use, and does not report these funds on the defendant's individual tax return. For purposes of this example, assume the use of 34% with respect to the corporate tax loss and the use of 28% with respect to the individual tax loss. The tax loss attributable to the defendant's corporate tax return is $34,000 ($100,000 multiplied by 34%). The tax loss attributable to the defendant's individual tax return is $28,000 ($100,000 multiplied by 28%). The tax loss for the offenses are added together to equal $62,000 ($34,000 + $28,000).".

Section 2T1.4(b)(2) is amended by striking "concealment" and inserting "means"; and by inserting after "levels." the following:

"If the resulting offense level is less than level 12, increase to level 12.".

The Commentary to §2T1.4 captioned "Application Notes" is amended by striking the text of Note 3 as follows:

"For purposes of subsection (b)(2), 'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.",

and inserting the following:

"Sophisticated Means.—For purposes of subsection (b)(2), 'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.".

Section 2T1.6(b)(1) is amended by striking "(Larceny, Embezzlement, and Other Forms of Theft)" and inserting "(Theft, Property Destruction, and Fraud)".

Section 2T3.1(b)(1) is amended by striking "concealment" and inserting "means"; and by inserting after "levels." the following:

"If the resulting offense level is less than level 12, increase to level 12.".

The Commentary to §2T3.1 captioned "Application Notes" is amended by striking the text of Note 3 as follows:

"For purposes of subsection (b)(1), ' sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets

or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.",

and inserting the following:

"Sophisticated Means.—For purposes of subsection (b)(1), 'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.".

Section 2T4.1 is amended by striking the text as follows:

"Tax Loss (Apply the Greatest)		Offense Level
(A)	$1,700 or less	6
(B)	More than $1,700	7
(C)	More than $3,000	8
(D)	More than $5,000	9
(E)	More than $8,000	10
(F)	More than $13,500	11
(G)	More than $23,500	12
(H)	More than $40,000	13
(I)	More than $70,000	14
(J)	More than $120,000	15
(K)	More than $200,000	16
(L)	More than $325,000	17
(M)	More than $550,000	18
(N)	More than $950,000	19
(O)	More than $1,500,000	20
(P)	More than $2,500,000	21
(Q)	More than $5,000,000	22
(R)	More than $10,000,000	23
(S)	More than $20,000,000	24
(T)	More than $40,000,000	25
(U)	More than $80,000,000	26.",

and inserting the following:

"Tax Loss (Apply the Greatest)		Offense Level
(A)	$2,000 or less	6
(B)	More than $2,000	8
(C)	More than $5,000	10
(D)	More than $12,500	12
(E)	More than $30,000	14
(F)	More than $80,000	16
(G)	More than $200,000	18
(H)	More than $400,000	20
(I)	More than $1,000,000	22

(J)	More than $2,500,000	24
(K)	More than $7,000,000	26
(L)	More than $20,000,000	28
(M)	More than $50,000,000	30
(N)	More than $100,000,000	32.".

The Commentary to §3B1.3 captioned "Application Notes" is amended by adding after Note 3 the following:

"4. The following additional illustrations of an abuse of a position of trust pertain to theft or embezzlement from employee pension or welfare benefit plans or labor unions:

(A) If the offense involved theft or embezzlement from an employee pension or welfare benefit plan and the defendant was a fiduciary of the benefit plan, an adjustment under this section for abuse of a position of trust will apply. 'Fiduciary of the benefit plan' is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.

(B) If the offense involved theft or embezzlement from a labor union and the defendant was a union officer or occupied a position of trust in the union (as set forth in 29 U.S.C. § 501(a)), an adjustment under this section for an abuse of a position of trust will apply.".

Section 3D1.2(d) is amended in the second paragraph by striking "2B1.3" and inserting "2B1.4"; and by striking "§§2F1.1, 2F1.2;".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 6 in the third paragraph by striking ", and would include, for example, larceny, embezzlement, forgery, and fraud".

Section 3D1.3(b) is amended by striking "(e.g., theft and fraud)".

The Commentary to §3D1.3 captioned "Application Notes" is amended in Note 3 by striking "(e.g., theft and fraud)"; and by striking the last sentence as follows:

"In addition, the adjustment for 'more than minimal planning' frequently will apply to multiple count convictions for property offenses.".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended by striking Illustration 2 as follows:

"2. Defendant B was convicted on the following seven counts: (1) theft of a $2,000 check; (2) uttering the same $2,000 check; (3) possession of a stolen $1,200 check; (4) forgery of a $600 check; (5) possession of a stolen $1,000 check; (6) forgery of the same $1,000 check; (7) uttering the same $1,000 check. Counts 1, 3 and 5 involve offenses under Part B (Offenses Involving Property), while Counts 2, 4, 6 and 7 involve offenses under Part F (Offenses Involving Fraud and Deceit). For purposes of §3D1.2(d), fraud and theft are treated as offenses of the same kind, and therefore all counts are grouped into a single Group, for which the offense level depends on the aggregate harm. The total value of the checks is $4,800. The fraud guideline is applied, because it produces an offense level that is as high as or higher than the theft guideline. The base offense level is 6; 1 level is added because of the value of the property (§2F1.1(b)(1)); and 2 levels are added because the conduct involved repeated acts with some planning (§2F1.1(b)(2)(A)). The resulting offense level is 9.";

and by redesignating Illustrations 3 and 4 as Illustrations 2 and 3, respectively.

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in Illustration 3, as redesignated by this amendment, by striking "§2F1.1 (Fraud and Deceit)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)"; by striking "14" each place it appears and inserting "16"; and by striking "§2B4.1 or §2F1.1" and inserting "§2B1.1 (assuming the application of the 'sophisticated means' enhancement in §2B1.1(b)(8)) or §2B4.1".

The Commentary to §8A1.2 captioned "Application Notes" is amended in Note 3(i) by striking "§§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), 2F1.1 (Fraud and Deceit)" and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

Section 8C2.1(a) is amended by striking "2B1.3" and inserting "2B1.4"; and by striking "§§2F1.1, 2F1.2;".

The Commentary to §8C2.1 captioned "Application Notes" is amended in Note 2 by striking "§2F1.1 (Fraud and Deceit)" each place it appears and inserting "§2B1.1 (Theft, Property Destruction, and Fraud)".

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. § 6 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 7 U.S.C. § 6b(A) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 7 U.S.C. § 6b(B) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 7 U.S.C. § 6b(C) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 7 U.S.C. § 6c by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 7 U.S.C. § 6h by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 7 U.S.C. § 6o by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 7 U.S.C. § 13(a)(2) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 7 U.S.C. § 13(a)(3) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 7 U.S.C. § 13(a)(4) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 7 U.S.C. § 13(d) by striking "2F1.2" and inserting "2B1.4";

in the line referenced to 7 U.S.C. § 13(f) by striking "2F1.2" and inserting "2B1.4";

in the line referenced to 7 U.S.C. § 23 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 7 U.S.C. § 270 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 7 U.S.C. § 2024(b) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 7 U.S.C. § 2024(c) by striking "2F1.1" and inserting "2B1.1";

by inserting after the line referenced to 7 U.S.C. § 6810 the following new line:

"7 U.S.C. § 7734 2N2.1";

in the line referenced to 12 U.S.C. § 631 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 15 U.S.C. § 50 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 15 U.S.C. § 77e by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 15 U.S.C. § 77q by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 15 U.S.C. § 77x by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 15 U.S.C. § 78j by striking "2F1.1" and inserting "2B1.1"; and by striking "2F1.2" and inserting "2B1.4";

in the line referenced to 15 U.S.C. § 78ff by striking "2B4.1, 2F1.1" and inserting "2B1.1, 2B4.1";

in the line referenced to 15 U.S.C. § 80b-6 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 15 U.S.C. § 158 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 15 U.S.C. § 645(a) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 15 U.S.C. § 645(b) by striking ", 2F1.1";

in the line referenced to 15 U.S.C. § 645(c) by striking ", 2F1.1";

in the line referenced to 15 U.S.C. § 714m(a) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 15 U.S.C. § 714m(b) by striking ", 2F1.1";

in the line referenced to 15 U.S.C. § 1281 by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 15 U.S.C. § 1644 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 15 U.S.C. § 1681q by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 15 U.S.C. § 1693n(a) by striking "2F1.1" and inserting "2B1.1";

by inserting after the line referenced to 15 U.S.C. § 2615 the following new line:

"15 U.S.C. § 6821 2B1.1";

in the line referenced to 16 U.S.C. § 114 by striking ", 2B1.3";

in the line referenced to 16 U.S.C. § 117c by striking ", 2B1.3";

in the line referenced to 16 U.S.C. § 123 by striking "2B1.3,";

in the line referenced to 16 U.S.C. § 146 by striking "2B1.3,";

in the line referenced to 16 U.S.C. § 413 by striking ", 2B1.3";

in the line referenced to 16 U.S.C. § 433 by striking ", 2B1.3";

in the line referenced to 16 U.S.C. § 831t(b) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 16 U.S.C. § 831t(c) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 32(a),(b) by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 33 by striking "2B1.3"and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 37 by striking "2B1.3" and inserting "2B1.1";

by inserting after the line referenced to 18 U.S.C. § 37 the following new line:

"18 U.S.C. § 38 2B1.1";

in the line referenced to 18 U.S.C. § 43 by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 112(a) by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 152 by striking "2B4.1, 2F1.1" and inserting "2B1.1, 2B4.1";

in the line referenced to 18 U.S.C. § 153 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 155 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 225 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 285 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 286 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 287 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 288 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 289 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 332 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 335 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 470 by inserting "2B1.1," before "2B5.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 471 by inserting "2B1.1," before "2B5.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 472 by inserting "2B1.1," before "2B5.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 473 by inserting "2B1.1," before "2B5.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 474 by inserting "2B1.1," before "2B5.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 474A by inserting "2B1.1," before "2B5.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 476 by inserting "2B1.1," before "2B5.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 477 by inserting "2B1.1," before "2B5.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 478 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 479 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 480 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 481 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 482 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 483 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 484 by inserting "2B1.1," before "2B5.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 485 by inserting "2B1.1," before "2B5.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 486 by inserting "2B1.1," before "2B5.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 488 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 491 by inserting "2B1.1," before "2B5.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 493 by inserting "2B1.1," before "2B5.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 494 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 495 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 496 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 497 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 498 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 499 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 500 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 501 by inserting "2B1.1," before "2B5.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 502 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 503 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 505 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 506 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 507 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 508 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 509 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 510 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 513 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 514 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 642 by inserting "2B1.1," before "2B5.1" and striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 656 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 657 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 659 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 663 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 665(a) by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 666(a)(1)(A) by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 709 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 712 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 911 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 914 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 915 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 917 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 970(a) by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1001 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1002 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1003 by inserting "2B1.1," before "2B5.1" and striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 1004 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1005 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1006 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1007 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1010 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1011 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1012 by inserting "2B1.1," before "2C1.3"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 1013 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1014 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1015 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1016 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1017 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1018 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1019 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1020 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1021 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1022 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1023 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 1025 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1026 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1028 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1029 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1030(a)(4) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1030(a)(5) by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1030(a)(6) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1031 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1032 by inserting "2B1.1," before "2B4.1"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 1033 by striking "2F1.1,";

in the line referenced to 18 U.S.C. § 1035 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1341 by inserting "2B1.1," before "2C1.7"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 1342 by inserting "2B1.1," before "2C1.7"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 1343 by inserting "2B1.1," before "2C1.7"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 1344 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1347 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1361 by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1362 by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1363 by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1366 by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1422 by inserting "2B1.1," before "2C1.2"; and by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 1702 by striking "2B1.3,";

in the line referenced to 18 U.S.C. § 1703 by striking "2B1.3,";

in the line referenced to 18 U.S.C. § 1704 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 1705 by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1706 by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1708 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 1712 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1716C by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1720 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1728 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1852 by striking ", 2B1.3";

in the line referenced to 18 U.S.C. § 1853 by striking ", 2B1.3";

in the line referenced to 18 U.S.C. § 1854 by striking ", 2B1.3";

in the line referenced to 18 U.S.C. § 1857 by striking "2B1.3," and inserting "2B1.1,";

in the line referenced to 18 U.S.C. § 1861 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1902 by striking "2F1.2" and inserting "2B1.4";

in the line referenced to 18 U.S.C. § 1919 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1920 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1923 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 1992 by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 2071 by striking ", 2B1.3";

in the line referenced to 18 U.S.C. § 2072 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 2073 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 2197 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 2272 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 2275 by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 2276 by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 2280 by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 2281 by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 18 U.S.C. § 2314 by striking ", 2F1.1";

in the line referenced to 18 U.S.C. § 2315 by striking ", 2F1.1";

in the line referenced to 19 U.S.C. § 1434 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 19 U.S.C. § 1435 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 19 U.S.C. § 1436 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 19 U.S.C. § 1919 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 19 U.S.C. § 2316 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 20 U.S.C. § 1097(a) by striking ", 2F1.1";

in the line referenced to 20 U.S.C. § 1097(b) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 20 U.S.C. § 1097(d) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 21 U.S.C. § 333(a)(2) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 22 U.S.C. § 1980(g) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 22 U.S.C. § 2197(n) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 22 U.S.C. § 4221 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 25 U.S.C. § 450d by striking ", 2F1.1";

in the line referenced to 26 U.S.C. § 7208 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 26 U.S.C. § 7214 by inserting "2B1.1," before "2C1.1"; and by striking ", 2F1.1";

in the line referenced to 26 U.S.C. § 7232 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 29 U.S.C. § 1141 by inserting "2B1.1," before "2B3.2"; and by striking ", 2F1.1";

in the line referenced to 38 U.S.C. § 787 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 38 U.S.C. § 3502 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 41 U.S.C. § 423(e) by inserting "2B1.1," before "2C1.1"; and by striking ", 2F1.1";

in the line referenced to 42 U.S.C. § 408 by striking "2F1.1" and inserting "2B1.1";

by inserting after the line referenced to 42 U.S.C. § 408 the following new line:

"42 U.S.C. § 1011 2B1.1";

in the line referenced to 42 U.S.C. § 1307(a) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 1307(b) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 1307a-7b by striking ", 2F1.1";

in the line referenced to 42 U.S.C. § 1383(d)(2) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 1383a(a) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 1383a(b) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 1395nn(a) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 1395nn(c) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 1396h(a) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 1713 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 1760(g) by striking ", 2F1.1";

in the line referenced to 42 U.S.C. § 1761(o)(1) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 1761(o)(2) by striking ", 2F1.1";

in the line referenced to 42 U.S.C. § 3220(a) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 3220(b) by striking ", 2F1.1";

in the line referenced to 42 U.S.C. § 3426 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 3791 by striking ", 2F1.1";

in the line referenced to 42 U.S.C. § 3792 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 42 U.S.C. § 3795 by striking ", 2F1.1";

in the line referenced to 42 U.S.C. § 5157(a) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 45 U.S.C. § 359(a) by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 46 U.S.C. § 1276 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 49 U.S.C. § 121 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 49 U.S.C. § 11903 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 49 U.S.C. § 11904 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 49 U.S.C. § 14912 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 49 U.S.C. § 16102 by striking "2F1.1" and inserting "2B1.1";

by inserting after the line referenced to 49 U.S.C. § 16104 the following new line:

"49 U.S.C. § 30170 2B1.1";

by inserting after the line referenced to 49 U.S.C. § 46312 the following new line:

"49 U.S.C. § 46317(a) 2B1.1";

in the line referenced to 49 U.S.C. § 60123(d) by striking "2B1.3" and inserting "2B1.1";

in the line referenced to 49 U.S.C. § 80116 by striking "2F1.1" and inserting "2B1.1";

in the line referenced to 49 U.S.C. § 80501 by striking "2B1.3" and inserting "2B1.1"; and

in the line referenced to 49 U.S.C. App. § 1687(g) by striking "2B1.3" and inserting "2B1.1".

Reason for Amendment: This "Economic Crime Package" is a six-part amendment that is the result of Commission study of economic crime issues over a number of years. The major parts of the amendment are: (1) consolidation of the theft, property destruction, and fraud guidelines; (2) a revised, common loss table for the consolidated guideline, and a similar table for tax offenses; (3) a revised, common definition of loss for the consolidated guideline; (4) revisions to guidelines that refer to the loss table in the consolidated guideline; (5) technical and conforming amendments; and (6) amendments regarding tax loss.

Consolidation of Theft, Property Destruction, and Fraud; Miscellaneous Revisions

The first part of this amendment consolidates the guidelines for theft, §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property), property destruction, §2B1.3 (Property Damage or Destruction), and fraud, §2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) into one guideline, §2B1.1 (Theft, Property Destruction, and Fraud). Consolidation will provide similar treatment for similar offenses for which pecuniary harm is a major factor in determining the offense level and, therefore, decrease unwarranted sentencing disparity that may be caused by undue complexity in the guidelines. Consolidation addresses concerns raised over several years by probation officers, judges, and practitioners about the difficulties of determining for particular cases, whether to apply §2B1.1 or §2F1.1 and the disparate sentencing outcomes that can result depending on that decision. Commentators have noted that inasmuch as theft and fraud offenses are conceptually similar, there is no strong reason to sentence them differently.

The base offense level for the consolidated guideline is level 6. This maintains the base offense level for fraud offenses, but represents a two-level increase for theft and property destruction offenses, which prior to this amendment was level 4. The increase of two levels in the base offense levels for theft and property destruction offenses will have minimal impact for low-level theft offenses involving offenders in criminal history Category I or Category II. Commission analysis indicates that only a few defendants will move from Zone A (where probation without conditions of confinement is possible) to Zone B or Zone C, and those that are moved into a zone at higher offense levels in the Sentencing Table generally will have criminal history categories above Category I. As a result, the Commission decided against promulgating a two-level reduction for offenses involving loss amounts less than $2,000.

The amendment deletes the two-level enhancement for more than minimal planning previously at §§2B1.1(b)(4)(A) and 2F1.1(b)(2)(A). The two-fold reason for this change was to obviate the need for judicial fact-finding about this frequently occurring enhancement and to avoid the potential overlap between the more than minimal planning enhancement and the sophisticated means enhancement previously at §2F1.1(b)(6) and now, by this amendment, at §2B1.1(b)(8).

The amendment also eliminates the alternative prong of the more than minimal planning enhancement, at §2F1.1(b)(2)(B) prior to this amendment, which provided a two-level increase if the offense involved more than one victim. The amendment replaces this enhancement with a specific offense characteristic for offenses that involved large numbers of victims. This change addresses three concerns. First, as a result of the consolidation, the more-than-one-victim enhancement, if retained, would apply in cases that, prior to this amendment, were not subject to such an enhancement. Second, a two-level increase in every case involving more than one victim is arguably inconsistent with the approach in subsection (b)(2) of §3A1.1 (Hate Crime Motivation or Vulnerable Victim), which provides a two-level increase if the offense involved a large number of vulnerable victims. Third, in practice, the more than minimal planning enhancement was so closely linked with this enhancement that the decision to eliminate the former argues strongly for also eliminating the latter.

The amendment provides a two-level enhancement for offenses involving ten or more, but fewer than 50, victims, and a four-level increase for offenses involving 50 or more victims. This provision is designed to provide a measured increment that results in increased punishment for offenses involving larger numbers of victims. Its applicability to those cases in which victims, both individuals and organizations, sustain an actual loss under subsection (b)(1) or sustain bodily injury.

A special rule is provided for application of the victim enhancement for offenses involving United States mail because of (i) the unique proof problems often attendant to such offenses, (ii) the frequently significant, but difficult to quantify, non-monetary losses in such offenses, and (iii) the importance of maintaining the integrity of the United States mail.

In addition, the amendment moves the mass-marketing enhancement into the new victim-related specific offense characteristic, as an alternative to the two-level adjustment for more than ten, but fewer than 50, victims. The provision is retained to remain responsive to the congressional directive that led to its original promulgation and reflects the Commission's expectation that most telemarketing cases, or similar mass-marketing cases, will have at least ten victims and, receive this enhancement. The mass-marketing alternative enhancement also will continue to apply in cases in which mass-marketing has been used to target a large number of persons, regardless of the number of persons who have sustained an actual loss or injury.

In addition, the amendment provides that if a victim enhancement applies, the enhancement under §3A1.1(b)(2) for "a large number of vulnerable victims" does not also apply because the more serious conduct already would have resulted in a higher penalty level.

In response to issues raised in a circuit conflict, the amendment revises the commentary related to subsection (b)(4)(B) of §2B1.1 to clarify the meaning of "person in the business of receiving and selling stolen property." The amendment addresses an issue that has arisen in case law regarding what conduct receives a defendant for the 4-level enhancement.

In determining the meaning of "in the business of", some circuits apply what has been termed the "fence test", under which the court must consider (1) if the stolen property was bought and sold, and (2) to what extent the stolen property transactions encouraged others to commit property crimes. Other circuits have adopted the "totality of the circumstances test" that focuses on the regularity and sophistication of the defendant's operation. Compare United States v. Esquivel, 919 F.2d 957 (5th Cir. 1990), with United States v. St. Cyr, 997

F.2d 698 (1st Cir. 1992). Under either test, courts consider the sophistication and regularity of the business as well as the control, volume, turnover, relationship with thieves, and connections with buyers. Although the factors considered by all of these circuits are similar, the approaches are different.

After consideration, the Commission adopted the totality of circumstances approach because it is more objective and more properly targets the conduct of the individual who is actually in the business of fencing. See United States v. St. Cyr, supra.

In addition, this amendment resolves a circuit conflict regarding the scope of the enhancement in the consolidated guideline for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency. (Prior to this amendment, the enhancement was at subsection (b)(4)(A) of §2F1.1). The conflict concerns whether the misrepresentation enhancement applies only in cases in which the defendant does not have any authority to act on behalf of the covered organization or government agency or if it applies more broadly to cases in which the defendant has a legitimate connection to the covered organization or government agency, but misrepresents that the defendant is acting solely on behalf of that organization or agency. Compare, e.g., United States v. Marcum, 16 F.3d 599 (4th Cir. 1994) (enhancement appropriate even though defendant did not misrepresent his authority to act on behalf of the organization but rather only misrepresented that he was conducting an activity wholly on behalf of the organization), with United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995) (application of the enhancement is limited to cases in which the defendant exploits the victim by claiming to have authority which in fact does not exist).

The amendment follows the broader view of the Fourth Circuit. It provides for application of the enhancement, now, by this amendment, at §2B1.1(b)(7)(A), if the defendant falsely represented that the defendant was acting to obtain a benefit for a covered organization or agency when, in fact, the defendant intended to divert all or part of that benefit (for example, for the defendant's personal gain), regardless of whether the defendant actually was associated with the organization or government agency. The Commission determined that the enhancement was appropriate in such cases because the representation that the defendant was acting to obtain a benefit for the organization enables the defendant to commit the offense. In the case of an employee who also holds a position of trust, the amendment provides an application note instructing the court not to apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) if the same conduct forms the basis both for the enhancement and the adjustment in §3B1.3.

The amendment implements the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106–420, by providing an additional alternative enhancement that applies if the offense involves a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education. The enhancement targets the provider of the financial assistance or scholarship services, not the individual applicant for such assistance or scholarship, consistent with the intent of the legislation.

This amendment makes two minor substantive changes to the enhancement for conscious or reckless risk of serious bodily injury, now, by this amendment, at subsection (b)(11)(A). First, it increases the minimum offense level from level 13 to level 14 to promote proportionality within this guideline. For example, within the theft and fraud guidelines

prior to this amendment, there were other specific offense characteristics that had a higher floor offense level than the risk of bodily injury enhancement: (1) "chop shops" (level 14); (2) jeopardizing the solvency of a financial institution (level 24); and (3) personally receiving more than $1,000,000 from a financial institution (level 24). Second, it inserts "death" before the term "or serious bodily injury" to clarify that the risk of the greater harm also is covered. Including risk of death also provides consistency with similar provisions in other parts of the Guidelines Manual, where risk of death is always included with risk of serious bodily injury.

The amendment modifies the four-level increase and minimum offense level of level 24 for a defendant who personally derives more than $1,000,000 in gross receipts from an offense that affected a financial institution, now, by this amendment, at subsection (b)(12)(A). The amendment retains the minimum offense level but reduces the four-level enhancement to two levels because of the increased offense levels that will result from the loss table for the consolidated guideline. The two-level increase was retained because elimination of the enhancement entirely would not provide an appropriate punishment for those offenders involved with losses that are in the $1,000,000 to $2,500,000 range of loss.

The enhancement also was modified to address issues about what it means to "affect" a financial institution and how to apply the enhancement to a case in which there are more than one financial institution involved. Accordingly, the revised provision focuses on whether the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense.

The amendment includes a new cross reference (subsection (c)(3)) that is more generally applicable and intended to apply whenever a broadly applicable fraud statute is used to reach conduct that is addressed more specifically in another Chapter Two guideline. Prior to this amendment, the fraud guideline contained an application note that instructed the user to move to another, more appropriate Chapter Two guideline, under specified circumstances. Although this note was not a cross reference, but rather a reminder of the principles enunciated in §1B1.2, it operated like a cross reference in the sense that it required use of a different guideline.

This amendment also makes a minor revision (adding "in a broader form") to the background commentary regarding the implementation of the directive in section 2507 of Public Law 101–647, nullifying the effect of United States v. Tomasino, 206 F. 3d 739 (7th Cir. 2000).

Loss Tables

The amendment provides revised loss tables for this consolidated guideline and for the tax offense guidelines. A principle feature of the new tables is that they expand the previously existing one-level increments into two-level increments, thus increasing the range of losses that correspond to an individual increment, compressing the table, and reducing fact-finding. The new loss tables also provide substantial increases in penalties for moderate and higher loss amounts, even, for fraud and theft offenses, notwithstanding the elimination of the two-level enhancement for more than minimal planning. These higher penalty levels respond to comments received from the Department of Justice, the Criminal Law Committee of the Judicial Conference, and others, that the offenses sentenced under the guidelines consolidated by this amendment under-punish individuals involved with moderate and high loss amounts, relative to penalty levels for offenses of similar seriousness sentenced under

other guidelines.

Some offenders accountable for relatively low dollar losses will receive slightly lower offense levels under the new loss table for the consolidated guideline because of (1) the elimination of the enhancement for more than minimal planning; (2) the change from one-level to two-level increments for increasing loss amounts; (3) the selection of the breakpoints for the loss increments (including $5,000 as the first loss amount that results in an increase); and (4) the slope chosen for the relationship between increases in loss amount and increases in offense level at the lower loss amounts. This amendment reflects a decision by the Commission that this effect on penalty levels at lower loss amounts is appropriate for several reasons: (1) the lower offense levels provide appropriate deterrence and punishment, generally, (2) at lower offense levels more defendants will be subject to the court's ability to fashion sentencing alternatives as appropriate (see, e.g., §5C1.1 (Imposition of a Term of Imprisonment)); and (3) these penalty levels may facilitate the payment of restitution.

The loss table for the consolidated guideline provides the first of incremental increases for cases in which loss exceeds $5,000, rather than $2,000 provided previously in §2F1.1, or $100 provided previously in §2B1.1. The Commission believes this will reduce the fact-finding burden on courts for less serious offenses that are generally subject to greater sentencing flexibility because of the availability of alternatives to incarceration.

The amendment also provides a revised loss table in §2T4.1 (Tax Table) for tax offenses that ensures significantly higher penalty levels for offenses involving moderate and high tax loss in a similar manner and degree as the loss table for the consolidated guideline. The new table is designed to reflect more appropriately the seriousness of tax offenses and to maintain proportionality with the offenses sentenced under the consolidated guideline.

The tax loss table is similar to the loss table for the consolidated guideline, except it does not reduce generally any sentences for offenders involved with lower loss amounts. The tax table provides its first increment for loss at $2,000, rather than the $5,000 threshold under the consolidated guideline (and the $1,700 threshold under the tax loss table prior to this amendment). These differences are intended to avoid unintended decreases that would occur otherwise. The increases in the new tax loss table for offenders involved with lower loss amounts are intended to maintain the long-standing treatment of tax offenses relative to theft and fraud offenses.

Definition of Loss

This amendment provides a new definition of loss applicable to offenses previously sentenced under §§2B1.1, 2B1.3, and 2F1.1. The revised definition makes clarifying and substantive revisions to the definitions of loss previously in the commentary to §§2B1.1 and 2F1.1, resolves a number of circuit conflicts, addresses a variety of application issues, and promotes consistency in application.

Significantly, the new definition of loss retains the core rule that loss is the greater of actual and intended loss. The Commission concluded that, for cases in which intended loss is greater than actual loss, the intended loss is a more appropriate initial measure of the culpability of the offender. Conversely, in cases which the actual loss is greater, that amount is a more appropriate measure of the seriousness of the offense.

A definition is provided for intended loss that is consistent with the rule regarding the interaction of actual and intended loss.

The amendment includes a resolution of the circuit conflict relating to the meaning and application of intended loss.

The amendment resolves the conflict to provide that intended loss includes unlikely or impossible losses that are intended, because their inclusion better reflects the culpability of the offender. Compare United States v. Geevers, 226 F.3d 186 (3d Cir. 2000) (agreeing with the majority of circuits holding that impossibility is not in and of itself a limit on the intended loss for purposes of calculating sentences under the guidelines . . . impossibility does not require a sentencing court to lower its calculations of intended loss); and United States v. Coffman, 94 F.3d 330 (7th Cir. 1996) (rejecting the argument that a loss that cannot possibly occur cannot be intended); United States v. Koenig, 952 F.2d 267 (9th Cir. 1991) (holding that §2F1.1 only requires a calculation of intended loss and does not require a finding that the intentions were realistic); United States v. Klisser, 190 F. 3d 34, 36 (2d Cir. 1999) (same); United States v. Blitz, 151 F. 3d 1002, 1010 (9th Cir. 1998) (same); United States v. Studevent, 116 F. 3d 1559, 1563 (D.C. Cir. 1997) (same); United States v. Wai-Keung, 115 F. 3d 874, 877 (11th Cir. 1997) (same), with United States v. Galbraith, 20 F. 3d 1054, 1059 (10th Cir. 1993) (because intended loss only includes losses that are possible, in an undercover sting operation the intended loss is zero); and United States v. Watkins, 994 F.2d 1192, 1196 (6th Cir. 1993) (holding that a limitation on the broad reach of the intended loss rule is that the intended loss must have been possible to be considered relevant).

Accordingly, concepts such as "economic reality" or "amounts put at risk" will no longer be considerations in the determination of intended loss. See United States v. Bonanno, 146 F.3d 502 (7th Cir. 1998) (holding that the relevant inquiry is how much the scheme put at risk); and United States v. Wells, 127 F. 3d 739 (8th Cir. 1997) (citing United States v. Morris, 18 F.3d 562 (8th Cir. 1994)) (holding that intended loss properly was measured by the possible loss the defendant intended, and did not hinge on actual or net loss).

This amendment also resolves differing circuit interpretations of the standard of causation applicable for actual loss, an issue that was not addressed expressly in the prior definition of actual loss. Various circuits recognized three arguably inconsistent standards for loss causation. First, §1B1.3 (Relevant Conduct) provides that a defendant is responsible for all losses – foreseen or unforeseen – that result from the defendant's actions or that result from the foreseeable actions of co-participants. See United States v. Sarno, 73 F.3d 1470 (9th Cir. 1995) (holding that "[a] sentence calculated pursuant to the loss tables . . . is properly based on actual loss notwithstanding the fact that this loss may be greater than the intended, expected or foreseeable loss"), cert. denied, 518 U.S. 1020 (1996); and United States v. Lopreato, 83 F.3d 571 (2d Cir. 1996) (holding that in a bribery case, the defendant is responsible for all losses, foreseeable or not). A second view is premised on the fact that prior to this amendment commentary in §2F1.1 limited the loss amount to the value of the money, property, or services unlawfully taken. See United States v. Marlatt, 24 F.3d 1005 (7th Cir. 1994) (refusing to count foreseeable losses in loss figure because they did not represent the actual thing taken). A third view is that the commentary's explicit inclusion of consequential damages in the loss determination for contract procurement and product substitution cases implies that only non-consequential or direct damages are included in other cases. See United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995), cert. denied, 516 U.S. 1166 (1996) (only non-consequential or direct damages are included in loss). See also

United States v. Daddona, 34 F.3d 163 (3d Cir.), cert. denied, 513 U.S. 1002 (1994) (holding that merely incidental or consequential damages may not be counted in computing loss); and United States v. Newman, 6 F.3d 623 (9th Cir. 1993) (holding that loss caused by the defendant arsonist was only the value of the property destroyed by the fire, not costs of putting out the fire).

The amendment defines "actual loss" as the "reasonably foreseeable pecuniary harm" that resulted from the offense. The amendment incorporates this causation standard that, at a minimum, requires factual causation (often called "but for" causation) and provides a rule for legal causation (i.e., guidance to courts regarding how to draw the line as to what losses should be included and excluded from the loss determination). Significantly, the application of this causation standard in the great variety of factual contexts in which it is expected to occur appropriately is entrusted to sentencing judges.

"Pecuniary harm" is defined in a manner that excludes emotional distress, harm to reputation, and other non-economic harm, in order to foreclose the laborious effort sometimes necessary to quantify non-economic harms (as in some tort proceedings, for example).

"Reasonably foreseeable pecuniary harm" is defined to include pecuniary harms that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense. The Commission determined that this standard better ensures the inclusion in loss of those harms that reflect the seriousness of the offense and the culpability of the offender.

The definition deletes the previous rule that, by negative implication, excludes consequential damages (except in specified cases), thus resolving a circuit conflict. Compare United States v. Izydore, 167 F.3d 213 (5th Cir. 1999) (the fact that the Commission prescribed consequential losses in only specific fraud cases, and not others, is strong evidence that consequential damages were omitted from the general loss definition by design rather than mistake), with United States v. Gottfried, 58 F.3d 648 (D.C. Cir. 1995) (holding that merely incidental or consequential damages may not be counted in computing loss). The Commission decided, however, not to use the term "consequential damages," or any similar civil law distinction between direct and indirect harms. Rather, the Commission determined that the reasonable foreseeability standard provides sufficient guidance to courts as to what type of harms are included in loss.

In addition, this amendment preserves the special provisions addressing loss in protected computer offenses and the inclusion of consequential damages in product substitution and contract procurement offenses; however, these special cases are re-characterized as rules of construction to avoid any negative implications regarding other types of offenses.

The amendment reflects a decision by the Commission that interest and similar costs shall be excluded from loss. However, the amendment provides that a departure may be warranted in the rare case in which exclusion of interest will under-punish the offender. Thus, the rule resolves the circuit split regarding whether "bargained for" interest may be included in loss. Compare United States v. Henderson, 19 F.3d 917 (5th Cir.), cert. denied, 513 U.S. 877 (1994) (holding that interest should be included if the victim had a reasonable expectation of receiving interest from the transaction); United States v. Gilberg, 75 F.3d 15 (1st Cir. 1996) (including in loss interest on fraudulently procured mortgage loan); and United States v. Sharma, 190 F.3d 220 (3d Cir. 1999) (holding that Application Note 8 of

§2F1.1 requires the exclusion of "opportunity cost" interest, but did not intend to exclude bargained-for interest), with United States v. Hoyle, 33 F.3d 415 (4th Cir. 1994), cert. denied, 513 U.S. 1133 (1995) (excluding interest from the determination of loss for sentencing purposes); and United States v. Guthrie, 144 F.3d 1006 (6th Cir. 1998) (holding that when the defendant concealed assets in a bankruptcy proceeding, the lower court's determination that loss to creditors included interest was erroneous). This rule is consistent with the general purpose of the loss determination to serve as a rough measurement of the seriousness of the offense and culpability of the offender and avoids unnecessary litigation regarding the amount of interest to be included.

The loss definition also excludes from loss certain costs incurred by the government and victims in connection with criminal investigation and prosecution of the offense. Such losses are likely to occur in a broad range of cases, would present a fact-finding burden in those cases, and would not contribute to the ability of loss to perform its essential function.

The loss definition also provides for the exclusion from loss of certain economic benefits transferred to victims, to be measured at the time of detection. This provision codifies the "net loss" approach that has developed in the case law, with some modifications made for policy reasons. This crediting approach is adopted because the seriousness of the offense and the culpability of a defendant is better determined by using a net approach. This approach recognizes that the offender who transfers something of value to the victim(s) generally is committing a less serious offense than an offender who does not.

The amendment adopts "time of detection" as the most appropriate and least burdensome time for measuring the value of the transferred benefits. The Commission determined that valuing such benefits at the time of transfer would be especially problematic in cases in which the offender misrepresented the value of an item that is difficult to value. Although the time of detection standard will allow some fluctuation in value which may inure to the defendant's benefit or detriment, the Commission determined that, because the time of detection is closer in time to the sentencing and occurs at a point when the authorities are aware of the criminality, its use generally would make it easier to determine a more accurate value of the benefit.

The definition of "time of detection" was adopted because there may be situations in which it is difficult to prove that the defendant knew the offense was detected even if it was already discovered. In addition, the words "about to be detected" are included to cover those situations in which the offense is not yet detected, but the defendant knows it is about to be detected. In such a case, it would be inappropriate to credit the defendant with benefits transferred to the victim after that defendant's awareness.

The definition of "loss" also provides special rules for certain schemes. One rule includes in loss (and excludes from crediting) the benefits received by victims of persons fraudulently providing professional services. This rule reverses case law that has allowed crediting (or exclusion from loss) in cases in which services were provided by persons posing as attorneys and medical personnel. See United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996) (calculating loss by subtracting the value of satisfactory legal services from amount of fees paid to a person posing as a lawyer); and United States v. Reddeck, 22 F.3d 1504 (10th Cir. 1994) (reducing loss by the value of education received from a sham university). The Commission determined that the seriousness of these offenses and the culpability of these offenders is best reflected by a loss determination that does not credit the value of the

unlicensed benefits provided. In addition, this provision eliminates the additional burden that would be imposed on courts if required to determine the value of these benefits.

Similarly, the definition of loss provides a special rule that includes in loss (and excludes from crediting) the value of items that were falsely represented as approved by a regulatory agency, for which regulatory approval was obtained by fraud, or for which regulatory approval was required but not obtained. The Commission determined that the seriousness of these offenses and the culpability of these offenders is best reflected by a loss determination that does not credit the value of these items. This decision reflects the importance of the regulatory approval process to public health, safety, and confidence.

Regarding investment schemes, the amendment resolves a circuit conflict regarding whether and how to credit payments made to victims. Compare United States v. Mucciante, 21 F.3d 1228 (2nd Cir. 1994) (under the Guidelines, loss includes the value of all property taken, even though all or part of it was returned.); United States v. Deavours, 219 F.3d 400 (5th Cir. 2000) (intended loss is not reduced by any sums returned to investors); and United States v. Loayza, 107 F.3d 257 (4th Cir.1997) (declining to follow the approach of net loss and holding defendants responsible for the value of all property taken, even though all or a part is returned), with United States v. Holiusa, 13 F.3d 1043 (7th Cir.1994) (holding that only the net loss should be included in loss, thus allowing a credit for returned interest), and United States v. Orton, 73 F.3d 331 (11th Cir. 1996) (only payments made to losing investors should be credited, not payments to investors who made a profit).

This amendment adopts the approach of the Eleventh Circuit that excludes the gain to any individual investor in the scheme from being used to offset the loss to other individual investors because any gain realized by an individual investor is designed to lure others into the fraudulent scheme. See United States v. Orton, supra.

The definition retains the rule providing for the use of gain when loss cannot reasonably be determined. It clarifies that there must be a loss for gain to be considered. In doing so, the Commission resolved another circuit conflict. Compare United States v. Robie, 166 F.3d 444 (2d Cir. 1999) (holding that use of defendant's gain for purposes of subsection (b)(1) is improper if there is no economic loss to the victim), with United States v. Haas, 171 F.3d 259 (5th Cir. 1999) (stating that "if the loss is either incalculable or zero, the district court must determine the §2F1.1 sentence enhancement by estimating the gain to the defendant as a result of his fraud"). The Commission decided not to expand the use of gain to situations in which loss can be determined but the gain is greater than the loss because such instances should occur infrequently, the efficiency of the criminal operation as reflected in the amount of gain ordinarily should not determine the penalty level, and the traditional use of loss is generally adequate.

The amendment revises the special rule on determining loss in cases involving diversion of government program benefits to resolve another circuit conflict. The revision is intended to clarify that loss in such cases only includes amounts that were diverted from intended recipients or uses, not benefits received or used by authorized persons. In other words, even if such benefits flowed through an unauthorized intermediary, as long as they went to intended recipients for intended uses, the amount of those benefits should not be included in loss. Compare United States v. Henry, 164 F.3d 1304 (10th Cir. 1999) (holding that loss includes the value of gross benefits paid, rather than the value of benefits improperly received or diverted in determining the loss), with United States v. Peters, 59 F.3d 732 (8th

Cir. 1995) (determining that loss is the value of benefits diverted from intended recipients); and United States v. Barnes, 117 F.3d 328 (7th Cir. 1997) (holding that the sentence is calculated only on the value of the government benefits diverted from intended recipients or users). This net loss approach is more consistent with general rules for determining loss.

Referring Guidelines for Theft and Fraud

The amendment includes revisions to the guidelines that, prior to this amendment, referred to the loss tables in §2B1.1 or §2F1.1. Pursuant to this amendment, these guidelines will refer to the loss tables in the consolidated guideline. Prior to this amendment, the referring guidelines used the tables in §§2B1.1 and 2F1.1, which provided the first loss increment for losses in excess of $2,000. Because the consolidated loss table provides the first loss increment for losses in excess of $5,000, the referring guidelines are amended to provide a one-level increase in a case in which the loss is more than $2,000, but did not exceed $5,000. This increase is provided to avoid a one-level decrease that would otherwise occur for an offense involving losses of more than $2,000 but not more than $5,000.

Two referring guidelines (§§2B2.1 (Burglary of a Residence or a Structure Other than a Residence) and 2B3.1 (Robbery)) that use the definition of loss previously in §2B1.1 will retain that definition of loss rather than the new loss definition in the consolidated guideline. The existing definition has not proven problematic for cases sentenced under these guidelines.

Technical and Conforming Amendments

The amendment includes a number of technical and conforming amendments, most of which are necessitated by the consolidation and the deletion of the more than minimal planning enhancement.

Computing Tax Loss

This amendment addresses several issues related to tax loss. It addresses a circuit conflict regarding how tax loss under §2T1.1 (Tax Evasion) is computed for cases that involve a defendant's under-reporting of income on both individual and corporate tax returns. Such a case often arises when (1) the defendant fails to report, and pay corporate income taxes on, income earned by the corporation; (2) the defendant diverts that unreported corporate income for the defendant's personal use; and (3) the defendant fails to report, and to pay personal income taxes on, that diverted income. The amendment provides that the amount of the federal tax loss is the sum of the federal income tax due from the corporation and the amount of federal income tax due from the individual.

The amendment thereby resolves a circuit conflict as to the methodology used to calculate tax loss in cases involving a corporate diversion. Two circuits use a sequential method to aggregate the tax loss. Under this method, the court determines the corporate federal income tax that would have been due, subtracts that amount from the amount diverted to the defendant personally, then determines the personal federal income tax that would have been due on the reduced diverted amount. See United States v. Harvey, 996 F.2d 919 (7th Cir. 1993); and United States v. Martinez-Rios, 143 F.3d 662 (2d Cir. 1998). The Commission adopted the alternative method used in United States v. Cseplo, 42 F.3d 360 (6th Cir. 1994), in which the court determines the corporate federal income tax due on the diverted amount,

and adds that amount to the personal federal income tax due on the total amount diverted. This clarifies the prior rule in Application Note 7 of §2T1.1 that "if the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together" and reflects the Commission's conclusion that, in cases of corporate diversions, the method for computing total tax loss adopted by the Sixth Circuit in Cseplo more accurately reflects the seriousness of the total harm caused by these offenses than would be reflected by the alternative method.

In evasion-of-payment tax cases, the Commission amended the definition of "tax loss" to include interest and penalties because, in contrast to evasion-of-assessment tax cases, such amounts appropriately are included in tax loss for such cases. This amendment limits the inclusion of interest or penalties to willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203. The nature of these cases is such that the interest and penalties often greatly exceed the assessed tax amount constituting the bulk of the harm associated with these offenses.

This amendment also revises the sophisticated concealment enhancement in subsection (b)(2) of §§2T1.1 (Tax Evasion) and 2T1.4 (Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud) to conform to the sophisticated means enhancement in the consolidated guideline, including imposition of a minimum offense level of level 12. This revision is appropriate inasmuch as certain tax offenses can be committed using sophisticated means in addition to being concealed in a sophisticated manner. Indeed, tax offenses committed in a sophisticated manner are more serious offenses, and reflect a greater culpability on the part of the offender (just as a tax offense concealed in a sophisticated manner reflects greater culpability). Consequently, this revision will allow the enhancement to apply to a somewhat greater range of tax offenses than the previously existing sophisticated concealment enhancement.

In addition, the amendment revises "offshore bank accounts" by substituting "financial" for "bank", to ensure that the enhancement applies to conduct involving similar kinds of accounts, consistent with language in §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity). A similar revision is made in §2B1.1.

Effective Date: The effective date of this amendment is November 1, 2001.

618. Amendment: Section 2B5.1(b)(2) is amended by inserting "(A)" after "defendant"; and by striking ", and the offense level as determined above is less than 15, increase to level 15." and inserting "; or (B) controlled or possessed (i) counterfeiting paper similar to a distinctive paper; or (ii) a feature or device essentially identical to a distinctive counterfeit deterrent, increase by 2 levels.".

Section 2B5.1(b) is amended by redesignating subdivisions (3) and (4) as subdivisions (4) and (5), respectively; and by inserting after subdivision (2) the following:

"(3) If subsection (b)(2)(A) applies, and the offense level determined under that subsection is less than level 15, increase to level 15.".

The Commentary to §2B5.1 captioned "Statutory Provisions" is amended by inserting "A" after "474".

The Commentary to §2B5.1 captioned "Application Notes" is amended by striking Note 1 as follows:

"1. For purposes of this guideline, 'United States' means each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.",

and inserting the following:

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

'Distinctive counterfeit deterrent' and 'distinctive paper' have the meaning given those terms in 18 U.S.C. § 474A(c)(2) and (1), respectively.

'United States' means each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.".

The Commentary to §2B5.1 captioned "Application Notes" is amended in Note 2 by inserting "Applicability to Counterfeit Bearer Obligations of the United States.—" before "This guideline".

The Commentary to §2B5.1 captioned "Application Notes" is amended in Note 3 by inserting "Inapplicability to Genuine but Fraudulently Altered Instruments.—" before "'Counterfeit,".

The Commentary to §2B5.1 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. Subsection (b)(2) does not apply to persons who merely photocopy notes or otherwise produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny.",

and inserting the following:

"4. Inapplicability to Certain Obviously Counterfeit Items.—Subsection (b)(2)(A) does not apply to persons who produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny.".

The Commentary to §2B5.1 captioned "Background" is amended by striking "(b)(3)" and inserting "(b)(4)".

Reason for Amendment: The frequency of counterfeiting offenses has increased significantly since 1995 due to the increasing affordability and availability of personal computers and digital printers. This amendment addresses concerns raised by the Department of the Treasury and the United States Secret Service regarding both the operation of, and the penalties provided by, §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States). The amendment increases penalties for counterfeiting

activity in two ways.

First, the amendment adds a two-level enhancement for manufacturing, in addition to the minimum offense level of level 15 for manufacturing. This change will ensure some degree of additional punishment for all offenders who engage in manufacturing activity.

Second, the amendment adds a two-level enhancement (which would apply alternatively to the manufacturing enhancement) if the offense involved possessing or controlling (1) paper that is similar to a distinctive paper used by the United States for its currency, obligations, or securities; or (2) a feature or device that is essentially identical to a distinctive counterfeit deterrent used by the United States for its currency, obligations, or securities. This enhancement is justified because of the higher statutory maximum penalties under 18 U.S.C. § 474A (i.e., a term of imprisonment of up to 25 years compared to 10, 15, and 20 years for other counterfeiting offenses). In addition, use of paper similar to "distinctive paper" and use of features and devices essentially identical to "distinctive counterfeit deterrents" (both of which are defined in §2B5.1 consistently with the statute) make the counterfeit item more passable and the offense more sophisticated.

In addition, the amendment deletes the language in the commentary of §2B5.1 that suggests that the manufacturing adjustment does not apply if the defendant "merely photocopies". That commentary was intended to make the manufacturing minimum offense level of level 15 inapplicable to notes that are so obviously counterfeit that they are unlikely to be accepted. Particularly with the advent of digital technology, it cannot be said that photocopying necessarily produces a note so obviously counterfeit as to be impassible.

Effective Date: The effective date of this amendment is November 1, 2001.

619. Amendment: Section 2C1.3 is amended in the title by adding "; Payment or Receipt of Unauthorized Compensation" after "Interest".

Section 2C1.3 is amended by adding after subsection (b) the following:

"(c) Cross Reference

(1) If the offense involved a bribe or gratuity, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than the offense level determined above.".

The Commentary to §2C1.3 captioned "Statutory Provisions" is amended by inserting ", 209, 1909" after "208".

The Commentary to §2C1.3 captioned "Application Note" is amended in Note 1 by inserting "Abuse of Position of Trust.—" before "Do not".

The Commentary to §2C1.3 is amended by striking the background as follows:

"Background: This section applies to financial and non-financial conflicts of interest by present and former federal officers and employees.".

Chapter Two, Part C is amended by striking §2C1.4 and its accompanying commentary as follows:

"§2C1.4. Payment or Receipt of Unauthorized Compensation

(a) Base Offense Level: 6

Commentary

Statutory Provisions: 18 U.S.C. §§ 209, 1909.

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. § 209 involve the unlawful supplementation of salary of various federal employees. 18 U.S.C. § 1909 prohibits bank examiners from performing any service for compensation for banks or bank officials.".

Section 8C2.1(a) is amended by striking "2C1.4,".

Reason for Amendment: The amendment (1) consolidates §§2C1.3 (Conflict of Interest) and 2C1.4 (Payment or Receipt of Unauthorized Compensation) covering payments to obtain public office, to promote ease of application; and (2) adds a cross reference in §2C1.3 (Conflict of Interest; Payment or Receipt of Unauthorized Compensation) to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) and §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) to account for aggravating conduct often occurring in offenses involving the unlawful supplementation of the salary of various federal officials and employees committed in violation of 18 U.S.C. § 209.

The amendment simplifies guideline operation by consolidating §§2C1.3 and 2C1.4. Consolidation is appropriate because the gravamen of the offenses covered by §§2C1.3 and 2C1.4 is similar: unauthorized receipt of a payment in respect to an official act. The cross reference to §2C1.1 or §2C1.2 was added by this amendment because the cases to which these guidelines apply usually involve a conflict of interest offense that is associated with a bribe or gratuity.

Effective Date: The effective date of this amendment is November 1, 2001.

620. Amendment: Section 2D1.1(b)(5) through (7), Notes 20 and 21 of the Commentary to §2D1.1 captioned "Application Notes", the ninth and tenth paragraphs of the Commentary to §2D1.1 captioned "Background", and §2D1.10, effective December 16, 2000 (see Amendment 608), are repromulgated with the following changes:

Section 2D1.1(b) is amended by striking subdivision (5) as follows:

"(5) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase

by 2 levels.";

by redesignating subdivisions (6) and (7) as subdivisions (5) and (6), respectively; by redesignating subdivisions (5)(A) and (5)(B), as redesignated by this amendment, as subdivisions (5)(B) and (5)(C), respectively; and by inserting before subdivision (5)(B), as redesignated by this amendment, the following:

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

Section 2D1.1(b)(5)(B), as redesignated by this amendment, is amended by striking "subsection (b)(6)(B)" and inserting "subdivision (C)".

The Commentary to §2D1.1 captioned "Application Notes" is amended by striking Note 20 (redesignated as Note 19 by amendment 624) as follows:

"20. Hazardous or Toxic Substances.—Subsection (b)(5) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(5) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).",

and inserting the following:

"20. Hazardous or Toxic Substances.—Subsection (b)(5)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(5)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel).

> In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 21(A) (redesignated as Note 20(A) by amendment 624) by striking "(b)(6)" and inserting "(b)(5)(B) or (C)"; by striking "may consider factors such as the following" and inserting "shall include consideration of the following factors"; by striking "or" after "at the laboratory," and inserting "and"; by striking "or" after "disposed," and inserting "and"; by striking "or" after "the offense" and inserting "and"; by striking "amphetamine or methamphetamine"; and by inserting "whether the laboratory is located" after "e.g.,".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 21(B) (redesignated as Note 20(B) by amendment 624) by striking "(b)(6)(B)" and inserting "(b)(5)(C)".

The Commentary to §2D1.1 captioned "Background" is amended in the ninth paragraph by inserting "(A)" after "(b)(5)"; and in the tenth paragraph by striking "Subsection (b)(6) implements" and inserting "Subsections (b)(5)(B) and (C) implement, in a broader form,"; and by striking "878" and inserting "310".

The Commentary to §2D1.10 captioned "Application Note" is amended in Note 1 by striking "may consider factors such as the following" and inserting "shall include consideration of the following factors"; by striking "or" after "at the laboratory," and inserting "and"; by striking "or" after "disposed," and inserting "and"; by striking "or" after "the offense" and inserting "and"; by striking "amphetamine or methamphetamine"; and by inserting "whether the laboratory is located" after "e.g.,".

The Commentary to §2D1.10 captioned "Background" is amended by striking "878" and inserting "310".

Reason for Amendment: The Commission promulgated an emergency amendment addressing the directive in section 102 (the "substantial risk directive") of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310 (the "Act"), with an effective date of December 16, 2000. (See Amendment 608.) This amendment repromulgates the emergency amendment, with modifications, as a permanent amendment.

The substantial risk directive instructs the Commission to amend the federal sentencing guidelines with respect to any offense relating to the manufacture, attempt to manufacture, or conspiracy to manufacture amphetamine or methamphetamine in (1) the Controlled Substances Act, 21 U.S.C. §§ 801-90; (2) the Controlled Substances Import and Export Act, 21 U.S.C. §§ 951-71; or (3) the Maritime Drug Law Enforcement Act, 46 U.S.C. App.

§§ 1901-04.

The Act requires the Commission, in carrying out the substantial risk directive, to provide the following enhancements—

> (A) if the offense created a substantial risk of harm to human life (other than a life described in subparagraph (B)) or the environment, increase the base offense level for the offense—
>
> > (i) by not less than 3 offense levels above the applicable level in effect on the date of the enactment of this Act; or
> >
> > (ii) if the resulting base offense level after an increase under clause (i) would be less than level 27, to not less than level 27; or
>
> (B) if the offense created a substantial risk of harm to the life of a minor or incompetent, increase the base offense level for the offense—
>
> > (i) by not less than 6 offense levels above the applicable level in effect on the date of the enactment of this Act; or
> >
> > (ii) if the resulting base offense level after an increase under clause (i) would be less than level 30, to not less than level 30.

The emergency amendment provided enhancements in §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and 2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance) that also apply in the case of an attempt or a conspiracy to manufacture amphetamine or methamphetamine. The amendment did not amend §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) or §2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment). Although offenses that involve the manufacture of amphetamine or methamphetamine also are referenced in Appendix A (Statutory Index) to §§2D1.11 and 2D1.12, the cross references in these guidelines, which apply if the offense involved the manufacture of a controlled substance, will result in application of §2D1.1 and accordingly, the enhancements.

The basic structure of the emergency amendment to §§2D1.1 and 2D1.10 tracked the structure of the substantial risk directive. Accordingly, in §2D1.1, the amendment provided a three-level increase and a minimum offense level of level 27 if the offense (1) involved the manufacture of amphetamine or methamphetamine; and (2) created a substantial risk of harm either to human life or the environment. For offenses that created a substantial risk of harm to the life of a minor or an incompetent, the amendment provided a six-level increase and a minimum offense level of level 30.

However, the structure of the emergency amendment to §2D1.10 differed from the structure of the emergency amendment to §2D1.1 with respect to the first prong of the enhancement (regarding substantial risk of harm to human life or to the environment). Specifically, the emergency amendment provided a three-level increase and a minimum offense level of level 27 if the offense involved the manufacture of amphetamine or methamphetamine without

making application of the enhancement dependent upon whether the offense also involved a substantial risk of either harm to human life or the environment. Consideration of whether the offense involves a substantial risk of harm to human life also is unnecessary because §2D1.10 applies only to convictions under 21 U.S.C. § 858, and the creation of a substantial risk of harm to human life is an element of an offense under 21 U.S.C. § 858. Therefore, the base offense level already takes into account the substantial risk of harm to human life. Consideration of whether the offense involved a substantial risk of harm to the environment was unnecessary because the directive predicated application of the enhancement on substantial risk of harm either to human life or to the environment, and the creation of a substantial risk of harm to human life necessarily is taken into account as an element of the offense.

Neither the substantial risk directive nor any statutory provision defines "substantial risk of harm." Based on an analysis of relevant case law that interpreted "substantial risk of harm," the emergency amendment provided commentary setting forth factors that may be relevant in determining whether a particular offense created a substantial risk of harm. The definition of "incompetent" was modeled after several state statutes.

This permanent amendment re-promulgates, with modifications, the emergency amendment regarding the substantial risk directive. This amendment differs from the emergency amendment in several respects:

First, in §2D1.1, this amendment treats the existing specific offense characteristic in §2D1.1(b)(5), relating to a two-level enhancement for environmental violations occurring in the course of a drug trafficking offense, as an alternative to the three-level enhancement for substantial risk of harm to human life or the environment. This portion of the amendment is in response to an issue related to the substantial risk directive regarding how to implement it in a manner consistent with the earlier environmental hazard directive in section 303 of the Comprehensive Methamphetamine Control Act, Pub. L. 104–237. The emergency amendment made the enhancements cumulative. However, this permanent amendment makes the new guideline provision alternative with the pre-existing enhancement for environmental hazards in §2D1.1.

Second, in §2D1.1, this amendment lists four factors that the court "shall", as opposed to "may", consider to determine whether subsection (b)(6)(A) or (B) applies. Similarly, in §2D1.10, this amendment lists four factors the court "shall" consider to determine whether subsection (b)(1)(B) applies. The list of four factors was identified by the Commission to assist the courts in defining the meaning of "substantial risk of harm" for offenses related to the production and trafficking of precursor chemicals and the manufacture of amphetamine and methamphetamine.

Third, in §2D1.1, this amendment provides that the court (1) shall consider any costs of environmental cleanup and harm to individuals and property in cases involving the manufacture of amphetamine or methamphetamine in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), and (2) should consider such costs and harms in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine.

The amendment also makes a minor technical change in the background commentary.

Effective Date: The effective date of this amendment is November 1, 2001.

621. Amendment: The subdivision captioned "LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*" of the Drug Equivalency Tables of Note 10 of the Commentary to §2D1.1 captioned "Application Notes", effective May 1, 2001 (see Amendment 609), is repromulgated without change.

Reason for Amendment: This amendment repromulgates (as a permanent amendment) without change the emergency amendment previously promulgated that addressed the directive in section 3664 of the Ecstasy Anti-Proliferation Act of 2000, Pub. L. 106–310 (the "Act"). (See Amendment 609). That directive instructs the Commission to provide increased penalties for the manufacture, importation, exportation, or trafficking of "Ecstasy". The directive specifically requires the Commission to increase the base offense level for 3,4-Methylenedioxymethamphetamine (MDMA), 3,4-Methylenedioxyamphetamine (MDA), 3,4-Methylenedioxy-N-ethylamphetamine (MDEA), Paramethoxymethamphetamine (PMA), and any other controlled substance that is marketed as "Ecstasy" and that has either a chemical structure similar to MDMA or an effect on the central nervous system substantially similar to or greater than MDMA.

The amendment addresses the directive by amending the Drug Equivalency Tables in §2D1.1, Application Note 10, to increase substantially the marihuana equivalencies for the specified controlled substances, which has the effect of substantially increasing the penalties for offenses involving "Ecstasy". The new penalties for "Ecstasy" trafficking provide penalties which, gram for gram, are more severe than those for powder cocaine. Under the Drug Equivalency Tables, one gram of powder cocaine has a marihuana equivalency of 200 grams. This amendment sets the marihuana equivalency for one gram of "Ecstasy" at 500 grams.

There is a combination of reasons why the Commission has substantially increased the penalties in response to the congressional directive. Much evidence received by the Commission indicated that "Ecstasy" (1) has powerful pharmacological effects; (2) has the capacity to cause lasting physical harms, including brain damage; and (3) is being abused by rapidly increasing numbers of teenagers and young adults. Indeed, the market for "Ecstasy" is overwhelmingly comprised of persons under the age of 25 years.

The Commission considered whether the penalty levels for "Ecstasy" should be set at the same levels as for heroin (one gram of heroin has a marihuana equivalency of 1000 grams) and decided that somewhat lesser penalties were appropriate for "Ecstasy" for a number of reasons: (1) the potential for addiction is greater with heroin; (2) heroin distribution often involves violence while, at this time, violence is not reported in "Ecstasy" markets; (3) because heroin it is a narcotic and is often injected, the risk of death from overdose is much greater than for "Ecstasy"; and (4) because heroin is often injected, there are more secondary health consequences, such as infections and the transmission of the human immunodeficiency virus (HIV) and hepatitis than for "Ecstasy".

Finally, based on information regarding "Ecstasy" trafficking patterns, the penalty levels chosen are appropriate and sufficient to target serious and high-level traffickers and to provide appropriate punishment, deterrence, and incentives for cooperation. The penalty levels chosen for "Ecstasy" offenses provide five year sentences for serious traffickers (those whose relevant conduct involved approximately 800 pills) and ten year sentences for high-

level traffickers (those whose relevant conduct involved approximately 8,000 pills).

Effective Date: The effective date of this amendment is November 1, 2001.

622. **Amendment:** Section 2D1.1(b)(4) is amended by inserting "amphetamine or" before "methamphetamine" each place it appears.

The Commentary to §2D1.1 captioned "Statutory Provisions" is amended by inserting "; 49 U.S.C. § 46317(b)" after "960(a), (b)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 19 by inserting "amphetamine or" before "methamphetamine".

Appendix A (Statutory Index), as amended by amendment 617, is further amended by inserting after the line referenced to 49 U.S.C. § 46317(a) the following new line:

"49 U.S.C. § 46317(b) 2D1.1".

The sixth entry, relating to Amphetamine and Amphetamine (actual), in each of subdivisions (1) through (14) of section 2D1.1(c), Note (B) of the "*Notes to Drug Quantity Table" in §2D1.1(c), Note 9 of the Commentary to §2D1.1 captioned "Application Notes", and the subdivision captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*" of the Drug Equivalency Tables in Note 10 of the Commentary to §2D1.1 captioned "Application Notes", effective May 1, 2001 (see Amendment 610), are repromulgated with the following change:

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*" by striking "1 gm of Dextroamphetamine = 200 gm of marihuana".

Reason for Amendment: This amendment repromulgates as a permanent amendment the emergency amendment previously promulgated to implement the directive in section 3611 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310 (the "Act"), which directs the Commission to provide increased guideline penalties for amphetamine offenses such that those penalties are comparable to the base offense level for methamphetamine offenses. The directive provided the Commission emergency amendment authority. (See Amendment 610.)

This amendment revises §2D1.1 to include amphetamine in the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). This amendment also treats amphetamine and methamphetamine identically, at a 1:1 ratio (i.e., the same quantities of amphetamine and methamphetamine will result in the same base offense level) because of the similarities of the two substances. Specifically, amphetamine and methamphetamine (1) are chemically similar; (2) are produced by a similar method and are trafficked in a similar manner; (3) share similar methods of use; (4) affect the same parts of the brain; and (5) have similar intoxicating effects. The amendment also distinguishes between pure amphetamine (i.e., amphetamine (actual)) and amphetamine mixture in the same manner, and at the same quantities, as pure methamphetamine (i.e., methamphetamine

(actual)) and methamphetamine mixture, respectively. The Commission determined that the 1:1 ratio is appropriate given the similarity of these two controlled substances.

This amendment differs from the emergency amendment in that it also (1) amends §2D1.1(b)(4) to make the enhancement for the importation of methamphetamine applicable to amphetamine offenses as well, and makes a conforming change in the commentary to §2D1.1 in Application Note 19; (2) deletes as unnecessary the marihuana equivalency for dextroamphetamine in the Drug Equivalency Tables in §2D1.1; and (3) amends Appendix A (Statutory Index) to refer a new offense at 49 U.S.C. § 46317(b), (prohibiting transportation of controlled substances by aircraft) to §2D1.1.

Effective Date: The effective date of this amendment is November 1, 2001.

623. **Amendment:** Section 2D1.1(c)(1) is amended by striking the period after "Hashish Oil" and inserting a semi-colon; and by adding at the end the following:

"30,000,000 units or more of Schedule I or II Depressants;
1,875,000 units or more of Flunitrazepam.".

Section 2D1.1(c)(2) is amended by striking the period after "Hashish Oil" and inserting a semi-colon; and by adding at the end the following:

"At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
At least 625,000 but less than 1,875,000 units of Flunitrazepam.".

Section 2D1.1(c)(3) is amended by striking the period after "Hashish Oil" and inserting a semi-colon; and by adding at the end the following:

"At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
At least 187,500 but less than 625,000 units of Flunitrazepam.".

Section 2D1.1(c)(4) is amended by striking the period after "Hashish Oil" and inserting a semi-colon; and by adding at the end the following:

"At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
At least 62,500 but less than 187,500 units of Flunitrazepam.".

Section 2D1.1(c)(5) is amended by striking the period after "Hashish Oil" and inserting a semi-colon; and by adding at the end the following:

"At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
At least 43,750 but less than 62,500 units of Flunitrazepam.".

Section 2D1.1(c)(6) is amended by striking the period after "Hashish Oil" and inserting a semi-colon; and by adding at the end the following:

"At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
At least 25,000 but less than 43,750 units of Flunitrazepam.".

Section 2D1.1(c)(7) is amended by striking the period after "Hashish Oil" and inserting a

semi-colon; and by adding at the end the following:

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

Section 2D1.1(c)(8) is amended by striking the period after "Hashish Oil" and inserting a semi-colon; and by adding at the end the following:

> "At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
> At least 5,000 but less than 6,250 units of Flunitrazepam.".

Section 2D1.1(c)(9) is amended by striking the period after "Hashish Oil" and inserting a semi-colon; and by adding at the end the following:

> "At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
> At least 3,750 but less than 5,000 units of Flunitrazepam.".

Section 2D1.1(c)(10) is amended in the line referenced to Schedule I or II Depressants by striking "40,000 or more" and inserting "At least 40,000 but less than 60,000"; and in the line referenced to Flunitrazepam, by striking "2,500 or more" and inserting "At least 2,500 but less than 3,750".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned "Flunitrazepam**" by striking the following:

> "** Provided, that the combined equivalent weight of flunitrazepam, all Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances shall not exceed 99.99 kilograms of marihuana.
>
> The minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.",

and inserting the following:

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

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned "Schedule I or II Depressants***" in the heading by striking "***" after "Schedule I or II Depressants"; and by striking the following:

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

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned "Schedule III Substances****" in the heading by striking "****" and inserting "***"; by striking "****Provided," and inserting "***Provided,"; and by striking "Schedule I or II depressants," after "Schedule III substances,".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned "Schedule IV Substances (except flunitrazepam)*****" in the heading by striking "*****" and inserting "****"; and by striking "*****Provided," and inserting "****Provided,".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned "Schedule V Substances******" in the heading by striking "******" and inserting "*****"; and by striking "******Provided," and inserting "*****Provided,".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 17 by striking "(e.g., the maximum offense level in the Drug Quantity Table for flunitrazepam is level 20)".

Reason for Amendment: This amendment implements the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. 106–172 (the "Act"), which provides the emergency scheduling of gamma hydroxybutyric acid ("GHB") as a Schedule I controlled substance under the Controlled Substances Act when the drug is used illicitly. The Act also amended section 401(b)(1)(C) of the Controlled Substances Act, 21 U.S.C. § 841(b)(1)(C), and section 1010(b)(3) of the Controlled Substances Import and Export Act, 21 U.S.C. § 960(b)(3), to provide penalties of not more than 20 years' imprisonment for an offense that involves GHB.

This amendment eliminates the maximum base offense level of level 20 in the Drug Quantity Table of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) for Schedule I and II depressants (including GHB). The same change is made with respect to flunitrazepam, which, for sentencing purposes, is tied to Schedule I and II depressants. The Commission determined that increased penalties for the more serious offenses involving Schedule I and II depressants are appropriate.

Corresponding changes to the Drug Equivalency Tables in §2D1.1 were made for both Flunitrazepam and Schedule I or II depressants by eliminating the maximum marihuana equivalency when offenses involving these controlled substances also involve offenses for controlled substances in Schedules III, IV, or V.

Effective Date: The effective date of this amendment is November 1, 2001.

624. **Amendment:** Section 2D1.1(b)(6), as redesignated by amendment 620, is amended by inserting "subsection (a) of" after "(1)-(5) of"; and by striking "and the offense level determined above is level 26 or greater".

The Commentary to §2D1.1 captioned "Application Notes", as amended by amendments 620, 621, 622, and 623, is further amended by striking Note 14 as follows:

"14. Where (A) the amount of the controlled substance for which the defendant is accountable under §1B1.3 (Relevant Conduct) results in a base offense level greater than 36, (B) the court finds that this offense level overrepresents the defendant's culpability in the criminal activity, and (C) the defendant qualifies for a mitigating role adjustment under §3B1.2 (Mitigating Role), a downward departure may be warranted. The court may depart to a sentence no lower than the guideline range that would have resulted if the defendant's Chapter Two offense level had been offense level 36. Provided, that a defendant is not eligible for a downward departure under this provision if the defendant:

(a) has one or more prior felony convictions for a crime of violence or a controlled substance offense as defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1);

(b) qualifies for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill);

(c) possessed or induced another participant to use or possess a firearm in the offense;

(d) had decision-making authority;

(e) owned the controlled substance or financed any part of the offense; or

(f) sold the controlled substance or played a substantial part in negotiating the terms of the sale.

Example: A defendant, who the court finds meets the criteria for a downward departure under this provision, has a Chapter Two offense level of 38, a 2-level reduction for a minor role from §3B1.2, and a 3-level reduction for acceptance of responsibility from §3E1.1. His final offense level is 33. If the defendant's Chapter Two offense level had been 36, the 2-level reduction for a minor role and 3-level reduction for acceptance of responsibility would have resulted in a final offense level of 31. Therefore, under this provision, a downward departure not to exceed 2 levels (from level 33 to level 31) would be authorized.";

and by redesignating Notes 15 through 21 as Notes 14 through 20, respectively.

Section 5C1.2 is amended in the first paragraph by striking "In" and inserting "(a) Except as provided in subsection (b), in".

Section 5C1.2 is amended by inserting after subsection (a), as so designated by this amendment, the following:

"(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense

Conduct) and Three (Adjustments) shall be not less than level 17.".

The Commentary to §5C1.2 captioned "Application Notes" is amended in Notes 1 and 2 by striking "subdivision" each place it appears and inserting "subsection (a)".

The Commentary to §5C1.2 captioned "Application Notes" is amended in Note 3 by striking "subdivisions" and inserting "subsection (a)"; and striking "subdivision" and inserting "subsection (a)".

The Commentary to §5C1.2 captioned "Application Notes" is amended in Notes 4 through 7 by striking "subdivision" each place it appears and inserting "subsection (a)".

Reason for Amendment: This amendment expands the eligibility for the two-level reduction in subsection (b)(6) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) for persons who meet the criteria set forth in §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) to include defendants with an offense level less than level 26. The Commission determined that limiting the applicability of this reduction to defendants with an offense level of level 26 or greater is inconsistent with the general principles underlying this two-level reduction (and the related safety valve provision, see 18 U.S.C. § 3553(f)) to provide lesser punishment for first time, nonviolent offenders.

This amendment also establishes in §5C1.2 a minimum offense level of level 17 for a defendant who meets the requirements set forth in §5C1.2, and for whom the statutorily required minimum sentence is at least five years, in order to comply more strictly with the directive to the Commission at section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322.

Effective Date: The effective date of this amendment is November 1, 2001.

625. Amendment: The subdivision captioned "List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)*******" in the Drug Equivalency Tables in Note 10 of the Commentary to §2D1.1 captioned "Application Notes" and §2D1.11, effective May 1, 2001 (see Amendment 611), are repromulgated with the following changes:

Section 2D1.11 is amended in the heading to subsection (d)(1) by striking "(d)(1)" before "Ephedrine," and inserting "(d)".

Section 2D1.11 is amended in the heading to subsection (d)(2) by striking "(d)(2)" before "Chemical" and inserting "(e)".

Section 2D1.11(e)(1), as redesignated by this amendment, is amended by striking the period after "3, 4-Methylenedioxyphenyl-2-propanone" and inserting a semicolon; and by adding at the end the following:

"10,000 KG or more of Gamma-butyrolactone.".

Section 2D1.11(e)(2), as redesignated by this amendment, is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 3,000 KG but less than 10,000 KG of Gamma-butyrolactone;";

and in the subdivision captioned "List II Chemicals" by striking the period after "Toluene" and inserting a semi-colon; and by adding at the end the following:

"376.2 G or more of Iodine.".

Section 2D1.11(e)(3), as redesignated by this amendment, is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 1,000 KG but less than 3,000 KG of Gamma-butyrolactone;";

and in the subdivision captioned "List II Chemicals" by striking the period after "Toluene" and inserting a semi-colon; and by adding at the end the following:

"At least 125.4 G but less than 376.2 G of Iodine.".

Section 2D1.11(e)(4), as redesignated by this amendment, is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 700 KG but less than 1,000 KG of Gamma-butyrolactone;";

and in the subdivision captioned "List II Chemicals" by striking the period after "Toluene" and inserting a semi-colon; and by adding at the end the following:

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

Section 2D1.11(e)(5), as redesignated by this amendment, is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 400 KG but less than 700 KG of Gamma-butyrolactone;";

and in the subdivision captioned "List II Chemicals" by striking the period after "Toluene" and inserting a semi-colon; and by adding at the end the following:

"At least 50.2 G but less than 87.8 G of Iodine.".

Section 2D1.11(e)(6), as redesignated by this amendment, is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 100 KG but less than 400 KG of Gamma-butyrolactone;";

and in the subdivision captioned "List II Chemicals" by striking the period after "Toluene" and inserting a semi-colon; and by adding at the end the following:

"At least 12.5 G but less than 50.2 G of Iodine.".

Section 2D1.11(e)(7), as redesignated by this amendment, is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 80 KG but less than 100 KG of Gamma-butyrolactone;";

and in the subdivision captioned "List II Chemicals" by striking the period after "Toluene" and inserting a semi-colon; and by adding at the end the following:

"At least 10 G but less than 12.5 G of Iodine. ".

Section 2D1.11(e)(8), as redesignated by this amendment, is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 60 KG but less than 80 KG of Gamma-butyrolactone;";

and in the subdivision captioned "List II Chemicals" by striking the period after "Toluene" and inserting a semi-colon; and by adding at the end the following:

"At least 7.5 G but less than 10 G of Iodine.".

Section 2D1.11(e)(9), as redesignated by this amendment, is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 40 KG but less than 60 KG of Gamma-butyrolactone;";

and in the subdivision captioned "List II Chemicals" by striking the period after "Toluene" and inserting a semi-colon; and by adding at the end the following:

"At least 5 G but less than 7.5 G of Iodine.".

Section 2D1.11(e)(10), as redesignated by this amendment, is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"Less than 40 KG of Gamma-butyrolactone;";

and in the subdivision captioned "List II Chemicals" by striking the period after "Toluene" and inserting a semi-colon; and by adding at the end the following:

"Less than 5 G of Iodine.".

The Commentary to §2D1.11 captioned "Application Notes" is amended in the first paragraph of Note 4(A) by striking "subsection (d) of".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned "List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)*******" in the heading by striking "*******" and inserting "******"; and by striking "*******Provided," and inserting "******Provided,".

Reason for Amendment: This amendment repromulgates, with additional changes, the emergency amendment previously promulgated in response to the three-part directive in section 3651 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310 (the "Act"), regarding enhanced punishment for trafficking in List I chemicals. (See Amendment

611). That section provided the Commission emergency amendment authority to implement the directive.

This amendment provides a new chemical quantity table in §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) specifically for ephedrine, pseudoephedrine, and phenylpropanolamine (PPA). The table ties the base offense levels for these chemicals to the base offense levels for methamphetamine (actual) set forth in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), assuming a 50 percent actual yield of the controlled substance from the chemicals. (Methamphetamine (actual) is used rather than methamphetamine mixture because ephedrine and pseudoephedrine produce methamphetamine (actual), and PPA produces amphetamine (actual)). This yield is based on information provided by the Drug Enforcement Administration (DEA) that the typical yield of these substances for clandestine laboratories is 50 to 75 percent.

This new chemical quantity table has a maximum base offense level of level 38 (as opposed to a maximum base offense level of level 30 for all other precursor chemicals). Providing a maximum base offense level of level 38 complies with the directive to establish penalties for these precursors that "correspond to the quantity of controlled substance that reasonably could have been manufactured using the quantity of ephedrine, phenylpropanolamine, or pseudoephedrine possessed or distributed." Additionally, this eliminates the six-level distinction that currently exists between precursor chemical offenses that involve intent to manufacture amphetamine or methamphetamine and such offenses that also involve an actual attempt to manufacture amphetamine or methamphetamine.

This amendment eliminates the Ephedrine Equivalency Table in §2D1.11 and, in its place, provides a general rule for the court to determine the base offense level in cases involving multiple precursors (other than ephedrine, pseudoephedrine, or PPA) by using the quantity of the single chemical resulting in the greatest offense level. An upward departure is provided for cases in which the offense level does not adequately address the seriousness of the offense.

However, this amendment provides an exception to that general rule for offenses that involve a combination of ephedrine, pseudoephedrine, or PPA because these chemicals often are used in the same manufacturing process. In a case that involves two or more of these chemicals, the base offense level will be determined using the total quantity of these chemicals involved. The purpose of this exception is twofold: (1) any of the three primary precursors in the same table can be combined without difficulty; and (2) studies conducted by the DEA indicate that because the manufacturing process for amphetamine is essentially identical to the manufacturing process for methamphetamine, there are cases in which the different precursors are included in the same batch of drugs. If the chemical is PPA, amphetamine results; if the chemical is ephedrine or pseudoephedrine, methamphetamine results.

The amendment also adds to the Drug Equivalency Tables in §2D1.1 a conversion table for these precursor chemicals, providing for a 50 percent conversion ratio. This is based on data from the DEA that the actual yield from ephedrine, pseudoephedrine, or PPA typically is in the range of 50 to 75 percent. The purpose of this part of the amendment is to achieve the same punishment level (as is achieved by the first part of this amendment) for an offense

involving any of these precursor chemicals when such offense involved the manufacture of amphetamine or methamphetamine and, as a result, is sentenced under §2D1.1 pursuant to the cross reference in §2D1.11.

This amendment also increases the base offense level for Benzaldehyde, Hydriodic Acid, Methylamine, Nitroethane, and Norpseudoephedrine by re-calibrating these levels to the appropriate quantity of methamphetamine (actual) that could be produced assuming a 50 percent yield of chemical to drug and retaining a cap at level 30. Previously, these chemicals had been linked to methamphetamine (mixture) penalty levels. Based on a study conducted by the DEA, ephedrine and pseudoepehdrine are the primary precursors used to make methamphetamine in the United States. Phenylproponolamine is the primary precursor used to make amphetamine. Unlike the five additional List I chemicals, the chemical structures of ephedrine, pseudoephedrine, and PPA are so similar to the resulting drug (i.e., methamphetamine or amphetamine) that the manufacture of methamphetamine or amphetamine from ephedrine, pseudoephedrine, or PPA is a very simple one-step synthesis which anyone can perform using a variety of chemical reagents. The manufacture of methamphetamine or amphetamine from the five additional List I chemicals is a more complex process which requires a heightened level of expertise.

This amendment adds to the emergency amendment in two ways. First, it amends the Chemical Quantity Table in §2D1.11 to include gamma-butyrolactone (GBL), a precursor for gamma hydroxybutyric acid (GHB), as a List I chemical. This change is in response to the Hillory J. Farias and Samantha Reid Date Rape Prohibition Act of 2000, Pub. L. 106–172, which added GBL to the list of List 1 chemicals in section 401 (b)(1)(C) of the Controlled Substances Act, 21 U.S.C. § 841(b)(1)(C). Offense levels for GBL were established in the same manner as other List I chemicals. The offense level for a specific quantity of GHB that can be produced from a given quantity of GBL, assuming a 50 percent yield, was determined using the Drug Quantity Table in §2D1.1. From this offense level, six levels were subtracted to reflect the fact that an attempt to manufacture is not a required element of these offenses and, therefore, they are less serious offenses than offenses covered by §2D1.1.

Second, the amendment adds iodine to the Chemical Quantity Table in §2D1.11(e) in response to a recent classification of iodine as a List II chemical. Iodine is used to produce hydrogen iodide which, in the presence of water, becomes hydriodic acid, a List I chemical that is a reagent used in the production of amphetamine and methamphetamine. The penalties for iodine were established based upon its conversion to hydriodic acid.

Effective Date: The effective date of this amendment is November 1, 2001.

626. Amendment: Section 2D1.12 is amended in the title by inserting "Transportation, Exportation," after "Distribution,"; and by striking "or Equipment" and inserting ", Equipment, Chemical, Product, or Material".

Section 2D1.12(a)(1), (a)(2), and (b)(1) are amended by inserting "flask," after "prohibited" each place it appears; and by inserting ", chemical, product, or material" after "equipment" each place it appears.

The Commentary to §2D1.12 captioned "Statutory Provisions" is amended by inserting "§" before "843"; and by inserting ", 864" after "(7)".

The Commentary to §2D1.12 captioned "Application Notes" is amended by striking the text of Note 1 as follows:

> "If the offense involved the large-scale manufacture, distribution, or importation of prohibited flasks or equipment, an upward departure may be warranted.",

and inserting the following:

> "If the offense involved the large-scale manufacture, distribution, transportation, exportation, or importation of prohibited flasks, equipment, chemicals, products, or material, an upward departure may be warranted.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 21 U.S.C. § 863 the following:

> "21 U.S.C. § 864 2D1.12".

Reason for Amendment: This amendment addresses the new offense, in section 423 of the Controlled Substances Act, 21 U.S.C. § 864, of stealing or transporting across state lines anhydrous ammonia knowing, intending, or having reasonable cause to believe that such anhydrous ammonia will be used to manufacture a controlled substance. This new offense, created by section 3653 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310, carries the statutory penalties contained in section 403(d) of the Controlled Substances Act, 21 U.S.C. § 843, i.e., not more than four years' imprisonment (or not more than eight years' imprisonment in the case of certain prior convictions), or not more than ten years' imprisonment (or not more than 20 years' imprisonment in the case of certain prior convictions) if the offense involved the manufacture of methamphetamine.

The amendment references the new offense to §2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy). Reference to this guideline is appropriate because the new offense is similar to other offenses that already are referenced to the guideline and have the same penalty structure, such as 21 U.S.C. § 843(a)(6), which among other things, makes it unlawful to possess any chemical, product, or material that may be used to manufacture a controlled substance. In addition, this amendment expands the coverage of Application Note 1 to also apply to cases involving the transportation and exportation of prohibited chemicals, products, or material. Finally, the amendment makes minor, non-substantive changes to the guideline in order to fully incorporate the new and existing offenses.

Effective Date: The effective date of this amendment is November 1, 2001.

627. Amendment: Sections 2G1.1, 2G2.1, 2H4.1, 2H4.2, and 5E1.1, and each line in Appendix A (Statutory Index) referenced to 18 U.S.C. § 241, § 1589, § 1590, §1591, or §1592, or to 29 U.S.C. § 1851, effective May 1, 2001 (see Amendment 612), are repromulgated with the following changes:

Section 5E1.1(a)(1) is amended by inserting ", or 21 U.S.C. § 853(q)" after "3663A".

The Commentary to §5E1.1 captioned "Background" is amended in the first paragraph by inserting ", and 21 U.S.C. § 853(q)" after "3663A".

Reason for Amendment: This amendment repromulgates as a permanent amendment the previously promulgated emergency amendment on human trafficking. (See Amendment 612.) The amendment implements the congressional directive in section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106–386 (the "Act").

The directive requires the Commission to amend, if appropriate, the guidelines applicable to human trafficking (i.e., peonage, involuntary servitude, and forced labor) offenses. It also requires the Commission to ensure that the guidelines "are sufficiently stringent to deter and adequately reflect the heinous nature of these offenses." In compliance with the directive, the amendment (1) creates a new guideline, §2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act); (2) refers violations of four new statutes, 18 U.S.C. §§ 1589 (Forced Labor), 1590 (Trafficking with Respect to Peonage, Involuntary Servitude or Forced Labor), 1591 (Sex Trafficking of Children by Force, Fraud or Coercion), and 1592 (Unlawful Conduct with Respect to Documents in Furtherance of Peonage, Involuntary Servitude, or Forced Labor) to the appropriate guidelines; and (3) makes changes, consistent with the directive, which both enhance sentences and reflect changes to three existing statutes: 18 U.S.C. §§ 1581(a) (Peonage), 1583 (Enticement into Slavery) and 1584 (Sale into Involuntary Servitude).

To address this multi-faceted directive, the amendment makes changes to several existing guidelines and creates a new guideline for criminal violations of the Migrant and Seasonal Agricultural Worker Protection Act. Although the directive instructs the Commission to amend the guidelines applicable to the Fair Labor Standards Act (29 U.S.C. § 201 et. seq.), a criminal violation of the Fair Labor Standards Act is only a Class B misdemeanor. See 29 U.S.C. § 216. Thus, the guidelines are not applicable to those offenses.

The amendment references the new offense at 18 U.S.C. § 1591 to §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct). Section 1591 provides criminal penalties for a defendant who participates in the transporting or harboring of a person, or who benefits from participating in such a venture, with the knowledge that force, fraud, or coercion will be used to cause that person to engage in a commercial sex act or with knowledge that the person is not 18 years old and will be forced to engage in a commercial sex act. Despite the statute's inclusion in a chapter of title 18 devoted mainly to peonage offenses, section 1591 offenses are more analogous to the offenses referenced to the prostitution guideline.

Section 1591 cases alternatively have been referred in Appendix A (Statutory Index) to §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). This has been done in anticipation that some portion of section 1591 cases will involve forcing or coercing children to engage in commercial sex acts for the purpose of producing pornography. Such offenses, as recognized by the higher base offense level at §2G2.1, are more serious because they both involve specific harm to an individual victim and further an additional criminal purpose, namely, commercial pornography.

The amendment maintains the view that §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) continues to be an appropriate tool for determining sentences for violations of 18 U.S.C. §§ 1581, 1583, and 1584. Section 2H4.1 also is designed to cover offenses under three new statutes: 18 U.S.C. §§ 1589, 1590, and 1592. Section 1589 provides criminal penalties for a defendant who provides or obtains the labor or services of another by the use

of threats of serious harm or physical restraint against a person, or by a scheme or plan intended to make the person believe that physical restraint or serious harm would result from not performing the labor or services. This statute also applies to defendants who provide or obtain labor or services of another by abusing or threatening abuse of the law or the legal process. See 18 U.S.C. § 1589.

Section 1590 provides criminal penalties for a defendant who harbors, transports, or is otherwise involved in obtaining, a person for labor or services. Section 1592 provides criminal penalties for a defendant who knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person in the course of a violation of § 1581 (peonage), § 1583 (enticement into slavery), § 1584 (sale into involuntary servitude), § 1589 (forced labor), § 1590 (trafficking with respect to these offenses), § 1591 (sex trafficking of children by force, fraud, or coercion), or § 1594(a) (attempts to violate these offenses). Section 1592 also provides criminal penalties for a defendant who, with intent to violate § 1581, § 1583, § 1584, § 1589, § 1590, or § 1591, knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person. These statutes prohibit the types of behaviors that traditionally have been sentenced under §2H4.1.

The amendment provides an alternative, less punitive base offense level of level 18 for those who violate 18 U.S.C. § 1592, an offense which limits participation in peonage cases to the destruction or wrongful confiscation of a passport or other immigration document. This alternative, lower base level reflects the lower statutory maximum sentence for section 1592 offenses (i.e., 5 years' imprisonment).

Section 2H4.1(b)(2) has been expanded to provide a four-level increase if a dangerous weapon was used and a two-level increase if a dangerous weapon was brandished or its use was threatened. Prior to this amendment, only actual use of a dangerous weapon was covered. This change reflects the directive to consider an enhancement for the use or threatened use of a dangerous weapon. The commentary to §2H4.1 is amended to clarify that the threatened use of a dangerous weapon applies regardless of whether a dangerous weapon was actually present.

The amendment also creates a new guideline, §2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act), in response to the directive to amend the guidelines applicable to such offenses. These offenses, which have a statutory maximum sentence of one year imprisonment for first offenses and three years' imprisonment for subsequent offenses, were not, prior to this amendment, referred to any specific guideline. The amendment provides a base offense level of level 6 in recognition of the low statutory maximum sentences set for these cases by Congress. Further, these offenses typically involve violations of regulatory provisions. Setting the base offense level at level 6 provides consistency with guidelines for other regulatory offenses. See, e.g., §§2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) and 2N3.1 (Odometer Laws and Regulations). Subsections (b)(1), an enhancement for bodily injury, and (b)(2), an enhancement applicable to defendants who commit the instant offense after previously sustaining a civil penalty for similar misconduct, have been established to respond to the directive that the Commission consider sentencing enhancement for this aggravated conduct. This provision addresses the Department of Justice's and the Department of Labor's concern regarding the need for enhanced penalties in cases involving prior administrative and civil adjudications.

This amendment also addresses that portion of section 112 of the Act that amends chapter 77 of title 18, United States Code, to provide mandatory restitution for peonage and involuntary servitude offenses. The amendment amends §5E1.1 (Restitution) to include a reference to 18 U.S.C. § 1593 in the guideline provision regarding mandatory restitution.

By enactment of various sentencing enhancements and encouraged upward departures for areas of concern identified by Congress, the Commission has provided for more severe sentences for perpetrators of human trafficking offenses in keeping with the conclusion that the offenses covered by this amendment are both heinous in nature and being committed with increasing frequency.

In addition, to repromulgating the emergency amendment, this amendment responds to section 3613 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310, that amends 21 U.S.C. § 853(q) to provide mandatory restitution for offenses involving the manufacture of methamphetamine. Accordingly, the amendment amends §5E1.1 (Restitution) to include a reference to 21 U.S.C. § 853(q) in the guideline provision regarding mandatory restitution.

Effective Date: The effective date of this amendment is November 1, 2001.

628. Amendment: Section 2H3.1 is amended in the title by striking "or" and inserting a semicolon; and by inserting "; Disclosure of Tax Return Information" after "Eavesdropping".

Section 2H3.1 is amended by striking subsection (a) as follows:

"(a) Base Offense Level: 9",

and inserting the following:

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

(1) 9; or

(2) 6, if the defendant was convicted of 26 U.S.C. § 7213A or 26 U.S.C. § 7216.".

Section 2H3.1(b)(1) is amended by striking "conduct" and inserting "offense".

Section 2H3.1(c)(1) is amended by striking "conduct" and inserting "offense"; and by striking "that offense" and inserting "that other offense".

The Commentary to §2H3.1 captioned "Statutory Provisions" is amended by inserting "26 U.S.C. §§ 7213(a)(1)-(3), (a)(5), (d), 7213A, 7216;" after "2511;".

The Commentary to §2H3.1 captioned "Application Note" is amended by striking "Note" and inserting "Notes"; by redesignating Note 1 as Note 2; and by inserting before Note 2, as redesignated by this amendment, the following:

"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.".

The Commentary to §2H3.1 captioned "Application Notes" as re-captioned by this amendment, is amended in Note 2, as redesignated by this amendment, by inserting "Satellite Cable Transmissions.—" before "If the".

The Commentary to §2H3.1 captioned "Background" is amended by adding at the end the following additional paragraph:

" 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 26 U.S.C. § 7212(b) the following new lines:

"26 U.S.C. § 7213(a)(1)	2H3.1
26 U.S.C. § 7213(a)(2)	2H3.1
26 U.S.C. § 7213(a)(3)	2H3.1
26 U.S.C. § 7213(a)(5)	2H3.1
26 U.S.C. § 7213(d)	2H3.1
26 U.S.C. § 7213A	2H3.1";

and by inserting after the line referenced to 26 U.S.C. § 7215 the following new line:

"26 U.S.C. § 7216	2H3.1".

Reason for Amendment: This amendment responds to the Internal Revenue Service Restructuring and Reform Act of 1998, Public Law 105–206 ("the Act"). The Act created new tax offenses pertaining to the unlawful disclosure of tax-related information contained on computer software and to unlawful requests for tax audits. In addition, the Taxpayer Browsing Protection Act of 1997, Public Law 105–35, created another tax offense pertaining to the unlawful inspection of tax information.

Specifically, Public Law 105–35 expanded 26 U.S.C. § 7213 to prohibit federal and state employees and certain other persons from disclosing tax-related computer software. Public Law 105–35 also created an offense at 26 U.S.C. § 7213A making it unlawful for federal and state employees and certain other persons to inspect tax return information in any way other than that authorized under the Internal Revenue Code.

This is a two-part amendment. First, this amendment updates Appendix A (Statutory Index) by referring most of these offenses to §2H3.1 (Interception of Communications and Eavesdropping). Prior to this amendment, no guideline provision or statutory reference was expressly promulgated to address tax offenses that implicated privacy interests. Under subsection (a) of §1B1.2 (Applicable Guidelines) and under §2X5.1 (Other Offenses), courts are required to use the most analogous offense guideline from Chapter Two (Offense Conduct) in each pending case brought under a statute having no reference in the guidelines'

statutory index.

In general, the guideline most analogous for these offenses is §2H3.1. Section 2H3.1 concerns offenses against privacy and, in large measure, these tax-related offenses are devoted to protecting taxpayer privacy interests. Section 2H3.1 also contains a cross reference to "another offense" if a greater offense level will result.

Second, this amendment adds a three-level decrease in the base offense level under §2H3.1 for the least serious types of offense behavior, in which there was no intent to harm or obtain pecuniary gain. The base offense level for §2H3.1 is level 9 with a range of 4 to 10 months (in criminal history Category I). The Commission determined that a base offense level of level 9 is too severe for the misdemeanor offenses contained in 26 U.S.C. §§ 7213A (Unauthorized Inspection) and 7216 (Unauthorized Disclosure), and the three-level decrease addresses this concern.

Effective Date: The effective date of this amendment is November 1, 2001.

629. Amendment: Section 2K1.3(a) is amended by striking the text of subdivision (3) as follows:

> "16, if the defendant is a prohibited person; or knowingly distributed explosive materials to a prohibited person; or",

and inserting the following:

> "16, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; or (B) knowingly distributed explosive materials to a prohibited person; or".

The Commentary to §2K1.3 captioned "Statutory Provisions" is amended by inserting "(l)-(o), (p)(2)," after "(i),".

The Commentary to §2K1.3 captioned "Application Notes" is amended by striking the text of Note 3 as follows:

> "'Prohibited person,' as used in subsection (a)(3), means anyone who: (i) is under indictment for, or has been convicted of, a 'crime punishable by imprisonment for a term exceeding one year,' as defined at 18 U.S.C. § 841(l); (ii) is a fugitive from justice; (iii) is an unlawful user of, or is addicted to, any controlled substance; or (iv) has been adjudicated as a mental defective or involuntarily committed to a mental institution.",

and inserting the following:

> "For purposes of subsection (a)(3), 'prohibited person' means any person described in 18 U.S.C. § 842(i).".

Section 2K2.1(a)(4)(B) is amended by striking "is" after "(i)" and inserting "was"; and by inserting "at the time the defendant committed the instant offense" after "prohibited person".

Section 2K2.1(a)(6) is amended by striking "is" after "(A)" and inserting "was"; and by inserting "at the time the defendant committed the instant offense" after "prohibited person".

The Commentary to §2K2.1 captioned "Application Notes" is amended by striking the text of Note 6 as follows:

> 'Prohibited person,' as used in subsections (a)(4)(B) and (a)(6), means anyone who: (i) is under indictment for, or has been convicted of, a 'crime punishable by imprisonment for more than one year,' as defined by 18 U.S.C. § 921(a)(20); (ii) is a fugitive from justice; (iii) is an unlawful user of, or is addicted to, any controlled substance; (iv) has been adjudicated as a mental defective or involuntarily committed to a mental institution; (v) being an alien, is illegally or unlawfully in the United States; (vi) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child as defined in 18 U.S.C. § 922(d)(8); or (vii) has been convicted in any court of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33).",

and inserting the following:

> "For purposes of subsections (a)(4)(B) and (a)(6), 'prohibited person' means any person described in 18 U.S.C. § 922(g) or § 922(n).".

Reason for Amendment: This amendment makes two revisions regarding the definition of "prohibited person" in subsection (a)(3) of §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials) and subsections (a)(4)(B) and (a)(6) of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). First, the amendment adopts the definitions of prohibited person found in specific statutes for explosive and firearm offenses. (There is no uniform statutory definition of prohibited person.) The relevant statutory provision for §2K1.3 is 18 U.S.C. § 842(i), and the relevant statutory provisions for §2K2.1 are 18 U.S.C. § 922(g) and (n).

Second, the amendment clarifies that the pertinent alternative base offense level applies only when the offender attains the requisite status prior to committing the instant offense. This clarification is consistent with the amendment on prior felonies, which provides for increased punishment only when the offender sustains certain felony convictions prior to committing the instant offense.

Effective Date: The effective date of this amendment is November 1, 2001.

630. Amendment: Section 2K1.3(a)(1) is amended by striking "had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or" and inserting "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;";

Section 2K1.3(a)(2) is amended by striking "had one prior felony conviction of either a crime of violence or a controlled substance offense; or" and inserting "committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of

violence or a controlled substance offense;".

The Commentary to §2K1.3 captioned "Application Notes" is amended by striking the text of Note 2 as follows:

> 'Crime of violence,' 'controlled substance offense,' and 'prior felony conviction(s),' as used in subsections (a)(1) and (a)(2), are defined at §4B1.2 (Definitions of Terms Used in Section 4B1.1), subsection (a), subsection (b), and Application Note 1 of the Commentary, respectively. For purposes of determining the number of such convictions under subsections (a)(1) and (a)(2), count any such prior conviction that receives any points under §4A1.1 (Criminal History Category).",

and inserting the following:

> "For purposes of this guideline:
>
> 'Controlled substance offense' has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).
>
> 'Crime of violence' has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.
>
> 'Felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).".

The Commentary to §2K1.3 captioned "Application Notes" is amended in Note 9 by inserting before the first paragraph the following:

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

Section 2K2.1(a)(1) is amended by striking "had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or" and inserting "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;".

Section 2K2.1(a)(2) is amended by striking "had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or" and inserting "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;".

Section 2K2.1(a)(3) is amended by striking "had one prior felony conviction of either a crime of violence or controlled substance offense; or" and inserting "committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;".

Section 2K2.1(a)(4)(A) is amended by striking "had one prior felony conviction of either a crime of violence or controlled substance offense; or" and inserting "committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or".

Section 2K2.1(a) is amended in subdivision (4)(B) by striking "; or" after "922(d)" and inserting a semi-colon; in subdivision (5), by striking "; or" after "921(a)(30)" and inserting a semi-colon; and in subdivision (6) by striking "; or" after "§ 922(d)" and inserting a semi-colon.

The Commentary to §2K2.1 captioned "Application Notes" is amended by striking Note 5 as follows:

> "5. 'Crime of violence,' 'controlled substance offense,' and 'prior felony conviction(s),' are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1), subsection (a), subsection (b), and Application Note 1 of the Commentary, respectively. For purposes of determining the number of such convictions under subsections (a)(1), (a)(2), (a)(3), and (a)(4)(A), count any such prior conviction that receives any points under §4A1.1 (Criminal History Category).

and inserting the following:

> "5. For purposes of this guideline:
>
> 'Controlled substance offense' has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).
>
> 'Crime of violence' has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.
>
> 'Felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an

adult).".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 15 by inserting before the first paragraph the following:

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

Reason for Amendment: This amendment modifies subsections (a)(1) and (a)(2) of §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials) and subsections (a)(1), (a)(2), (a)(3) and (a)(4)(A) of §2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition) to resolve a circuit conflict regarding whether a crime committed after the commission of the instant offense and before sentencing for the instant offense is counted as a prior felony conviction for purposes of determining the defendant's base offense level. Compare United States v. Pugh, 158 F.3d 1308, 1311 (D.C. Cir. 1998) (finding the guideline language ambiguous but the commentary language clear, thereby counting prior felony conviction that was sentenced prior to sentencing for the instant federal offense, even if the defendant committed the prior felony offense after the instant federal offense); United States v. McCary, 14 F.3d 1502, 1506 (10th Cir. 1994) (the defendant's base offense level is to be determined on the basis of the defendant's status as of the date the district court imposed sentence, not the date of the offense for which he had previously been convicted); and United States v. Laihben, 167 F.3d 1364 (11th Cir. 1999) (district court properly considered defendant's conviction, which occurred after commission of, but before sentencing, on the federal firearms offense, in determining offense level), with United States v. Barton, 100 F.3d 43, 46 (6th Cir. 1996) (defendant's state drug crime, which was committed after federal offense of being a felon in possession of firearm, could not have been counted as prior felony conviction under §2K2.1(a), even though defendant was convicted and sentenced on state offense prior to sentencing on federal charge; only those convictions that occur prior to the commission of the firearm offense may be counted against the defendant in determining the base offense level)) and United States v. Oetken, 241 F.3d 1057 (8th Cir. 2001) (only convictions that occur prior to the commission of the offense qualify as "prior convictions").

The amendment adopts the minority view that an offense committed after the commission of any part of the offense cannot be counted as a prior felony conviction. The amendment clarifies, in §2K1.3(a)(1) and (a)(2) and in §2K2.1(a)(1), (a)(2), (a)(3) and (a)(4)(A), that the instant offense must have been committed subsequent to sustaining the prior felony conviction. In so doing, this amendment adopts a rule that is consistent with the requirements concerning the use of prior convictions under §§4B1.1 (Career Offender) and 4B1.2 (Definitions of Terms Used in Section 4B1.1).

This amendment also clarifies that in cases in which more than one prior felony conviction is required for application of the base offense level in §2K1.3 or §2K2.1, the prior felony convictions must be counted separately under Chapter Four (Criminal History and Criminal Livelihood).

The amendment makes nonsubstantive clarifying changes in the definitions of "controlled

substance offense", "crime of violence", and "felony conviction" for purposes of §§2K1.3 and 2K2.1.

Effective Date: The effective date of this amendment is November 1, 2001.

631. Amendment: Section 2K2.1(b)(1) is amended in the table by striking subdivisions (A) through (F) as follows:

"(A)	3-4	add 1
(B)	5-7	add 2
(C)	8-12	add 3
(D)	13-24	add 4
(E)	25-49	add 5
(F)	50 or more	add 6.",

and inserting the following:

"(A)	3-7	add 2
(B)	8-24	add 4
(C)	25-99	add 6
(D)	100-199	add 8
(E)	200 or more	add 10.".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 16 by striking "significantly" and inserting "substantially"; and by striking "fifty" and inserting "200".

Reason for Amendment: This amendment responds to a recommendation from the Bureau of Alcohol, Tobacco and Firearms (ATF) to increase the penalties in §2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition) for offenses involving more than 100 firearms.

The amendment modifies the firearms table at §2K2.1(b)(1), to provide enhancements in two-level increments. Prior to this amendment, the table provided enhancements in one-level increments. This change has the effect of compressing the table by providing a wider range in each subdivision of the table for the number of firearms involved in the offense. Compressing the table in this manner diminishes some of the fact-finding required to determine how many firearms were involved in the offense and provides some increase in penalties. The amendment provides additional two-level increases for offenses that involve either 100-199 firearms, or 200 or more firearms. These increases are provided to ensure adequate and proportionate punishment in cases that involve large numbers of firearms.

The amendment also makes a conforming change to Application Note 16 of §2K2.1 regarding upward departures.

Effective Date: The effective date of this amendment is November 1, 2001.

632. Amendment: Chapter Two, Part L, Subpart 1 is amended by striking §2L1.2 and its

accompanying commentary as follows:

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

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, use the greater):

(A) If the conviction was for an aggravated felony, increase by 16 levels.

(B) If the conviction was for (i) any other felony, or (ii) three or more misdemeanor crimes of violence or misdemeanor controlled substance offenses, increase by 4 levels.

Commentary

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

Application Notes:

1. For purposes of this guideline—

'Deported after a conviction,' means that the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction. An alien has previously been 'deported' if he or she has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

'Remained in the United States following a removal order issued after a conviction,' means that the removal order was subsequent to the conviction, whether or not the removal order was in response to such conviction.

'Aggravated felony,' is defined at 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony.

'Crime of violence' and 'controlled substance offense' are defined in §4B1.2. For purposes of subsection (b)(1)(B), "crime of violence" includes offenses punishable by imprisonment for a term of one year or less.

'Firearms offense' means any offense covered by Chapter Two, Part K, Subpart 2, or any similar offense under state or local law.

'Felony offense' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

2. This guideline applies only to felonies. A first offense under 8 U.S.C. § 1325(a) is a Class B misdemeanor for which no guideline has been promulgated. A prior sentence for such offense, however, is to be considered under the provisions of Chapter Four, Part A (Criminal History).

3. In the case of a defendant with repeated prior instances of deportation, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).

4. An adjustment under subsection (b) for a prior felony conviction applies in addition to any criminal history points added for such conviction in Chapter Four, Part A (Criminal History).

5. Aggravated felonies that trigger the adjustment from subsection (b)(1)(A) vary widely. If subsection (b)(1)(A) applies, and (A) the defendant has previously been convicted of only one felony offense; (B) such offense was not a crime of violence or firearms offense; and (C) the term of imprisonment imposed for such offense did not exceed one year, a downward departure may be warranted based on the seriousness of the aggravated felony.".

A replacement guideline is inserted as §2L1.2 (Unlawfully Entering or Remaining in the United States).

Reason for Amendment: This amendment responds to concerns raised by a number of judges, probation officers, and defense attorneys, particularly in districts along the southwest border between the United States and Mexico, that §2L1.2 (Unlawfully Entering or Remaining in the United States) sometimes results in disproportionate penalties because of the 16-level enhancement provided in the guideline for a prior conviction for an aggravated felony. The disproportionate penalties result because the breadth of the definition of "aggravated felony" provided in 8 U.S.C. § 1101(a)(43), which is incorporated into the guideline by reference, means that a defendant who previously was convicted of murder, for example, receives the same 16-level enhancement as a defendant previously convicted of simple assault. The Commission also observed that the criminal justice system has been addressing this inequity on an ad hoc basis in such cases by increased use of departures.

This amendment responds to these concerns by providing a more graduated sentencing enhancement of between 8 levels and 16 levels, depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant. In doing so, the Commission determined that the 16-level enhancement is warranted if the defendant previously was deported, or unlawfully remained in the United States, after a conviction for certain serious offenses, specifically, a drug trafficking offense for which the sentence imposed exceeded 13 months, a felony that is a crime of violence, a felony that is a firearms offense, a felony that is a national security or terrorism offense, a felony that is a human trafficking offense,

and a felony that is an alien smuggling offense committed for profit. Other felony drug trafficking offenses will receive a 12-level enhancement. All other aggravated felony offenses will receive an 8-level enhancement.

This amendment also deletes an application note providing that a downward departure may be warranted based on the seriousness of the offense if the 16-level enhancement applied and (1) the defendant has previously been convicted of only one felony offense; (2) such offense was not a crime of violence or firearms offense; and (3) the term of imprisonment for such offenses did not exceed one year. The Commission determined that the graduation of the 16-level enhancement based on the seriousness of the prior conviction negated the need for this departure provision. As a result, this amendment may have the indirect result of reducing the departure rate for cases sentenced under §2L1.2. In addition, this amendment renders moot a circuit conflict regarding whether the three criteria set forth in the application note are the exclusive basis for a downward departure from the 16-level enhancement. Compare United States v. Sanchez-Rodriguez, 161 F.3d 556 (9th Cir. 1998) (holding that Application Note 5 to §2L1.2 does not limit the circumstances under which a downward departure from the 16-level enhancement is warranted); and United States v. Alfaro-Zayas, 196 F.3d 1338 (11th Cir. 1999) (same), with United States v. Tappin, 205 F.3d 536 (2d Cir. 2000) (holding that a defendant must satisfy all three criteria set forth in Application Note 5 in §2L1.2 to receive a downward departure from the 16-level enhancement).

This amendment also makes a number of other minor changes to §2L1.2, to provide guidance regarding the application of the enhancement for the commission of three or more prior misdemeanors and to provide definitions for terms used in the guideline.

Effective Date: The effective date of this amendment is November 1, 2001.

633. Amendment: The heading to Chapter Two, Part M is amended by adding at the end "And Weapons of Mass Destruction".

Section 2M5.1 is amended by striking subsection (a) as follows:

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

(1) 22, if national security or nuclear proliferation controls were evaded; or

(2) 14.",

and inserting the following:

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

(1) 26, if national security controls or controls relating to the proliferation of nuclear, biological, or chemical weapons or materials were evaded; or

(2) 14, otherwise.".

Section 2M5.2(a)(1) is amended by striking "22" and inserting "26".

The heading to Chapter Two, Part M, Subpart 6 is amended by striking "Atomic Energy" and inserting "Nuclear, Biological, And Chemical Weapons And Materials, And Other Weapons of Mass Destruction".

Chapter Two, Part M is amended by striking §2M6.1 as follows:

"§2M6.1. Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities

(a) Base Offense Level: 30

(b) Specific Offense Characteristic

(1) If the offense was committed with intent to injure the United States or to aid a foreign nation, increase by 12 levels.

Commentary

Statutory Provisions: 42 U.S.C. §§ 2077(b), 2122, 2131. Also, 18 U.S.C. § 831 (only where the conduct is similar to that proscribed by the aforementioned statutory provisions). For additional statutory provision(s), see Appendix A (Statutory Index).".

A replacement guideline is inserted as §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 Commentary to §2X1.1 captioned "Application Notes" is amended in Note 1 by inserting after the line referenced to "§2E5.1;" the following:

"§2M6.1;".

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 1 by inserting after the line referenced to "§2H1.1" the following:

"§2M6.1;".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 155 the following new line:

"18 U.S.C. § 175 2M6.1";

by inserting after the line referenced to 18 U.S.C. § 228 the following new line:

"18 U.S.C. § 229 2M6.1";

by inserting after the line referenced to 18 U.S.C. § 842(l)-(o) the following new line:

"18 U.S.C. § 842(p)(2) 2K1.3, 2M6.1";

in the line referenced to 18 U.S.C. § 2332a by striking "2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.5, 2A2.1, 2A2.2, 2B1.3," and by inserting ", 2M6.1" after "2K1.4"; and

by inserting after the line referenced to 50 U.S.C. App. § 462 the following new line:

"50 U.S.C. App. § 1701 2M5.1, 2M5.2".

Reason for Amendment: This amendment responds to a statutory provision expressing a sense of Congress and addresses two offenses relating to biological and chemical weapons. Specifically, the amendment responds to section 1423(a) of the National Defense Authorization Act for Fiscal Year 1997, Public Law 104–201, that expressed a sense of Congress that guideline penalties are inadequate for certain offenses involving the importation and exportation of nuclear, chemical, and biological weapons, materials, or technologies by providing a four-level increase for those offenses in subsection (a)(1) of both §§2M5.1 (Evasion of Export Controls) and 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without a Required Validated Export License). This increase serves to make the penalty structure for those offenses proportional to other national security guidelines in Chapter Two, Part M. In addition, Appendix A (Statutory Index) is amended to refer one of the offenses, 50 U.S.C. § 1701 (which prior to this amendment was not referenced in the Statutory Index), to both §§2M5.1 and 2M5.2.

The amendment also substantially revises §2M6.1 to incorporate offenses at 18 U.S.C. § 175, relating to biological weapons, and 18 U.S.C. § 229, relating to chemical weapons. Specifically, the amendment modifies §2M6.1 as follows:

First, the amendment provides three alternative base offense levels. The first alternative base offense level of level 42 applies if the offense was committed with the intent to injure the United States or to aid a foreign government or foreign terrorist organization and incorporates the 12-level enhancement previously at subsection (b)(1). Therefore, this change does not affect the overall offense level for these offenses. "Foreign terrorist organizations" are added because such groups are investing in the acquisition of unconventional weapons such as nuclear, biological, and chemical agents. This first alternative base offense level is expected to apply to cases previously covered by the guideline (i.e., the acquisition of nuclear material from nuclear facilities in order to assist foreign governments, thereby creating a threat to the national security), as well as to cases that implicate the national security and involve biological and chemical weapons and other weapons of mass destruction.

The amendment provides that, if the base offense level of level 42 applies, none of the adjustments in subsection (b) shall apply. However, if death results, the cross reference allows for the possibility of a greater offense level through application of the first degree murder guideline.

The second alternative base offense level of level 28 applies to those cases that do not threaten the national security of the United States, and is expected to apply in most cases.

The third alternative base offense level of level 20 applies to cases which involve a threat to use a nuclear, biological, or chemical weapon or material, or other weapon of mass

destruction, but do not involve any conduct evidencing an intent or ability to carry out the threat and, accordingly, are less serious offenses.

Second, the amendment provides a two-level enhancement in subsection (b)(1) if the offense or threat involved particularly dangerous types of nuclear, chemical, and biological weapons and materials that are defined in the guideline commentary by reference to the applicable statutory and regulatory provisions. This enhancement reflects the distinctions already made in international treaties, provisions of title 18, United States Code, relevant regulatory schemes, and the fact that certain types of weapons and materials are inherently more lethal and pose a greater threat to the public safety.

Third, the amendment provides a four-level enhancement in subsection (b)(2) if any victim died or sustained permanent or life-threatening bodily injury, and a two-level enhancement if any victim sustained serious bodily injury. If the degree of injury is between permanent or life-threatening bodily injury and serious bodily injury, a three-level enhancement is provided. This enhancement is modeled after the enhancement found in §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury).

Fourth, the amendment provides a four-level enhancement for cases involving a substantial disruption of public, governmental, or business functions or services, or the substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense.

Fifth, the amendment provides two cross references, applicable if the resulting offense level is greater and either death resulted (in which case the first or second degree murder guideline would apply), or if the offense was tantamount to attempted murder (in which case the attempted murder guideline would apply). These cross references are also modeled after the cross reference found in §2N1.1.

Sixth, the amendment provides a special instruction that if the defendant is convicted of one count involving the death of, serious bodily injury to, or attempted murder of, more than one victim, the grouping rules will be applied as if the defendant had been convicted of separate counts for each such victim.

Seventh, the amendment amends Appendix A to refer violations of 18 U.S.C. §§ 175 and 229 to §2M6.1 and to delete a number of guideline references for violations of 18 U.S.C. § 2332a and instead provide a reference for that offense to §§2K1.4 (Arson; Property Damage by Use of Explosives) and 2M6.1 (in the case of other weapons of mass destruction).

Finally, the amendment amends the title of §2M6.1 to include attempts and conspiracies, and adds §2M6.1 under the sections addressing attempts and conspiracies in Application Note 1 of §2X1.1 (Attempt, Solicitation, or Conspiracy) to indicate that attempts and conspiracies are covered expressly by the §2M6.1 offense guideline.

Effective Date: The effective date of this amendment is November 1, 2001.

634. Amendment: Chapter Two, Part S is amended by striking §2S1.1 as follows:

"§2S1.1. Laundering of Monetary Instruments

(a) Base Offense Level:

(1) 23, if convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A);

(2) 20, otherwise.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 3 levels.

(2) If the value of the funds exceeded $100,000, increase the offense level as follows:

	Value (Apply the Greatest)	Increase in Level
(A)	$100,000 or less	no increase
(B)	More than $100,000	add 1
(C)	More than $200,000	add 2
(D)	More than $350,000	add 3
(E)	More than $600,000	add 4
(F)	More than $1,000,000	add 5
(G)	More than $2,000,000	add 6
(H)	More than $3,500,000	add 7
(I)	More than $6,000,000	add 8
(J)	More than $10,000,000	add 9
(K)	More than $20,000,000	add 10
(L)	More than $35,000,000	add 11
(M)	More than $60,000,000	add 12
(N)	More than $100,000,000	add 13.

(c) Special Instruction for Fines - Organizations

(1) In lieu of the applicable amount from the table in subsection (d) of §8C2.4 (Base Fine), use:

(A) the greater of $250,000 or 100 percent of the value of the funds if subsections (a)(1) and (b)(1) are used to determine the offense level; or

(B) the greater of $200,000 or 70 percent of the value of the funds if subsections (a)(2) and (b)(1) are used to determine the offense level; or

(C) the greater of $200,000 or 70 percent of the value of the funds if subsection (a)(1)

but not (b)(1) is used to determine the offense level; or

(D) the greater of $150,000 or 50 percent of the value of the funds if subsection (a)(2) but not (b)(1) is used to determine the offense level.

Commentary

Statutory Provision: 18 U.S.C. § 1956.

Background: The statute covered by this guideline is a part of the Anti-Drug Abuse Act of 1986, and prohibits financial transactions involving funds that are the proceeds of 'specified unlawful activity,' if such transactions are intended to facilitate that activity, or conceal the nature of the proceeds or avoid a transaction reporting requirement. The maximum term of imprisonment authorized is twenty years.

In keeping with the clear intent of the legislation, this guideline provides for substantial punishment. The punishment is higher than that specified in §2S1.2 and §2S1.3 because of the higher statutory maximum, and the added elements as to source of funds, knowledge, and intent.

A higher base offense level is specified if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A) because those subsections apply to defendants who encouraged or facilitated the commission of further crimes. Effective November 18, 1988, 18 U.S.C. § 1956(a)(1)(A) contains two subdivisions. The base offense level of 23 applies to § 1956(a)(1)(A)(i) and (ii).

The amount of money involved is included as a factor because it is an indicator of the magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise. Narcotics trafficking is included as a factor because of the clearly expressed Congressional intent to adequately punish persons involved in that activity.".

A replacement guideline with accompanying commentary is inserted as §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity).

Chapter Two, Part S is amended by striking §2S1.2 as follows:

"§2S1.2. Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity

(a) Base Offense Level: 17

(b) Specific Offense Characteristics

(1) If the defendant knew that the funds were the

proceeds of:

(A) an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 5 levels; or

(B) any other specified unlawful activity (see 18 U.S.C. § 1956(c)(7)), increase by 2 levels.

(2) If the value of the funds exceeded $100,000, increase the offense level as specified in §2S1.1(b)(2).

(c) Special Instruction for Fines - Organizations

(1) In lieu of the applicable amount from the table in subsection (d) of §8C2.4 (Base Fine), use:

(A) the greater of $175,000 or 60 percent of the value of the funds if subsection (b)(1)(A) is used to determine the offense level; or

(B) the greater of $150,000 or 50 percent of the value of the funds if subsection (b)(1)(B) is used to determine the offense level.

Commentary

Statutory Provisions: 18 U.S.C. § 1957. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. 'Specified unlawful activity' is defined in 18 U.S.C. § 1956(c)(7) to include racketeering offenses (18 U.S.C. § 1961(1)), drug offenses, and most other serious federal crimes but does not include other money-laundering offenses.

Background: The statute covered by this guideline is a part of the Anti-Drug Abuse Act of 1986, and prohibits monetary transactions that exceed $10,000 and involve the proceeds of 'specified unlawful activity' (as defined in 18 U.S.C. § 1956), if the defendant knows that the funds are criminally derived property. (Knowledge that the property is from a specified unlawful activity is not an element of the offense.) The maximum term of imprisonment specified is ten years.

The statute is similar to 18 U.S.C. § 1956, but does not require that the

recipient exchange or 'launder' the funds, that he have knowledge that the funds were proceeds of a specified unlawful activity, nor that he have any intent to further or conceal such an activity. In keeping with the intent of the legislation, this guideline provides for substantial punishment. The offense levels are higher than in §2S1.3 because of the higher statutory maximum and the added element of knowing that the funds were criminally derived property.

The 2-level increase in subsection (b)(1)(B) applies if the defendant knew that the funds were not merely criminally derived, but were in fact the proceeds of a specified unlawful activity. Such a distinction is not made in §2S1.1, because the level of intent required in that section effectively precludes an inference that the defendant was unaware of the nature of the activity.".

The Commentary to §2S1.3 captioned "Statutory Provisions" is amended by inserting "18 U.S.C. § 1960;" before "26 U.S.C. § 7203"; and by inserting ", 5326" after "5324".

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 1957 and the line referenced to 21 U.S.C. § 854 by striking "2S1.2" and inserting "2S1.1";

by inserting after the line referenced to 18 U.S.C. § 1959 the following new line:

"18 U.S.C. § 1960 2S1.3";

and by inserting after the line referenced to 31 U.S.C. § 5324 the following new line:

"31 U.S.C. § 5326 2S1.3, 2T2.2".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 6 in the first paragraph by striking the second sentence as follows:

"For example, in §2S1.1 (Laundering of Monetary Instruments), subsection (a)(1) applies if the defendant 'is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A).'",

and inserting the following:

"For example, in §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant 'is convicted under 18 U.S.C. § 1956'.".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 6 in the second paragraph by striking "An express" and inserting "Unless otherwise specified, an express"; and by striking the last sentence as follows:

"For example, §2S1.1(a)(1) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A).",

and inserting the following:

> "For example, §2S1.1(b)(2)(B) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) in a case in which the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956 but would not be applied in a case in which the defendant is convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957. See Application Note 3(C) of §2S1.1.".

Section 3D1.2(d) is amended in the second paragraph by striking "2S1.2,".

Section 8C2.1(a) is amended by striking "2S1.2,".

The Commentary to §8C2.4 captioned "Application Notes" is amended in Note 5 by striking "; 2S1.1 (Laundering of Monetary Instruments); and 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity)"; and by inserting "and" before "2R1.1".

The Commentary to §8C2.4 captioned "Background" is amended in the seventh sentence by striking "and money laundering".

Reason for Amendment: This amendment consolidates the money laundering guidelines, §§2S1.1 (Laundering of Monetary Instruments) and 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity), into one guideline that applies to convictions under 18 U.S.C. § 1956 or § 1957, or 21 U.S.C. § 854. The amendment responds in several ways to concerns that the penalty structure existing prior to this amendment for such offenses did not reflect adequately the culpability of the defendant or the seriousness of the money laundering conduct because the offense level for money laundering was determined without sufficient consideration of the defendant's involvement in, or the relative seriousness of, the underlying offense. This amendment is designed to promote proportionality by providing increased penalties for defendants who launder funds derived from more serious underlying criminal conduct, such as drug trafficking, crimes of violence, and fraud offenses that generate relatively high loss amounts, and decreased penalties for defendants who launder funds derived from less serious underlying criminal conduct, such as basic fraud offenses that generate relatively low loss amounts.

First, this amendment ties offense levels for money laundering more closely to the underlying conduct that was the source of the criminally derived funds by separating money laundering offenders into two categories for purposes of determining the base offense level. For direct money launderers (offenders who commit or would be accountable under §1B1.3(a)(1)(A) (Relevant Conduct) for the underlying offense which generated the criminal proceeds), subsection (a)(1) sets the base offense level at the offense level in Chapter Two (Offense Conduct) for the underlying offense (i.e., the base offense level, specific offense characteristics, cross references, and special instructions for the underlying offense). For third party money launderers (offenders who launder the proceeds generated from underlying offenses that the defendant did not commit or would not be accountable for under §1B1.3(a)(1)(A)), subsection (a)(2) sets the base offense level at level 8, plus an increase based on the value of the laundered funds from the table in subsection (b)(1) of §2B1.1 (Theft, Fraud, Property Destruction).

Second, in addition to the base offense level calculation, this amendment provides an enhancement designed to reflect the differing seriousness of the underlying conduct that was the source of the criminally derived funds. Subsection (b)(1) provides a six-level enhancement for third party money launderers who knew or believed that any of the laundered funds were the proceeds of, or were intended to promote, certain types of more serious underlying criminal conduct; specifically, drug trafficking, crimes of violence, offenses involving firearms, explosives, national security, terrorism, and the sexual exploitation of a minor. The Commission determined that defendants who knowingly launder the proceeds of these more serious underlying offenses are substantially more culpable than third party launderers of criminally derived proceeds of less serious underlying offenses.

Third, this amendment provides three alternative enhancements, with the greatest applicable enhancement to be applied. These enhancements are designed to (1) ensure that all direct money launderers receive additional punishment for committing both the money laundering offense and the underlying offense, and (2) reflect the differing seriousness of money laundering conduct depending on the nature and sophistication of the offense. Specifically, subsection (b)(2)(A) provides a one-level increase if the defendant was convicted under 18 U.S.C. § 1957, and subsection (b)(2)(B) provides a two-level increase if the defendant was convicted under 18 U.S.C. § 1956. The one-level difference between these two enhancements reflects the fact that 18 U.S.C. § 1956 has a statutory maximum penalty (20 years' imprisonment) that is twice as long as the statutory maximum penalty for violations of 18 U.S.C. § 1957 (10 years' imprisonment). In addition, subsection (b)(3) provides an additional two-level increase if subsection (b)(2)(B) applies and the offense involved sophisticated laundering such as the use of fictitious entities, shell corporations, two or more levels of transactions, or offshore financial accounts. The Commission determined that, similar to fraud and tax offenses that involve sophisticated means, see subsection (b)(8) of §2B1.1 (Theft, Property Destruction, and Fraud), subsection (b)(2) of §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), violations of 18 U.S.C. § 1956 that involve sophisticated laundering warrant additional punishment because such offenses are more difficult and time consuming for law enforcement to detect than less sophisticated laundering. As a result of the enhancements provided by subsections (b)(2)(A), (b)(2)(B), and (b)(3), all direct money launderers will receive an offense level that is one to four levels greater than the Chapter Two offense level for the underlying offense, depending on the statute of conviction and sophistication of the money laundering offense conduct.

With respect to third party money launderers, subsection (b)(2)(C) provides a four-level enhancement if the defendant is "in the business" of laundering funds. The Commission determined that, similar to a professional "fence", see §2B1.1(b)(4)(B), defendants who routinely engage in laundering funds on behalf of others, and who gain financially from engaging in such transactions, warrant substantial additional punishment because they encourage the commission of additional criminal conduct.

Fourth, this amendment contains an application note expressly providing instructions regarding the grouping of money laundering counts with a count of conviction for the underlying offense. In a case in which the defendant is to be sentenced on a count of conviction for money laundering and a count of conviction for the underlying offense that generated the laundered funds, this application note instructs that such counts shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely-Related Counts), thereby

resolving a circuit conflict on this issue. Compare United States v. Cusumano, 943 F.2d 305 (3d Cir. 1991), cert. denied, 502 U.S. 1036 (1992) (affirming decision to group under §3D1.2(b) money laundering count with other offenses that "were all part of one scheme to obtain money" from an employee benefit fund); United States v. Leonard, 61 F.3d 1181 (5th Cir. 1995) (affirming decision to group fraud and money laundering offenses under §3D1.2(d) because defendant's money laundering activity and fraudulent telemarketing scheme constituted the same common plan and had the same victims); and United States v. Wilson, 98 F.3d 281 (7th Cir. 1996) (district court erred in not grouping money laundering and mail fraud convictions under §3D1.2(d)), with United States v. Kneeland, 148 F.3d 6 (1st Cir. 1998) (affirming district court decision not to group fraud and money laundering counts under §3D1.2(d) because the offense level for fraud, unlike money laundering, is determined "largely on the basis of total amount of harm or loss"); United States v. Napoli, 179 F.3d 1 (2d Cir. 1999), cert. denied, 528 U.S. 1162 (2000) (affirming decision not to group wire fraud and money laundering counts under §3D1.2(b) or (d) because the offenses have different victims and the offense level for money laundering, unlike fraud, is not based primarily on the amount of money involved); United States v. Hildebrand, 152 F.3d 756 (8th Cir.), cert. denied, 525 U.S. 1033 (1998) (finding that money laundering and fraud counts should not be grouped because the fraud and money laundering guidelines do not measure the same types of harm); United States v. Hanley, 190 F.3d 1017 (9th Cir. 1999) (affirming decision not to group money laundering and wire fraud counts under §3D1.2(d) because the guidelines for such offenses measure harm differently); and United States v. Johnson, 971 F.2d 562 (10th Cir. 1992) (district court erred in grouping money laundering and fraud counts under §3D1.2(d) because the measurement of harm for fraud is not the same as that for money laundering).

Finally, this amendment provides that convictions under 18 U.S.C. § 1960 are referenced to §2S1.3 (Structuring Transactions to Evade Reporting Requirements). Operation of money transmitting businesses without an appropriate license is proscribed by 18 U.S.C. § 1960, as are failures to comply with certain reporting requirements issued under 31 U.S.C. § 5330. The Commission determined that offenses involving these regulatory requirements serve many of the same purposes as Currency Transaction Reports, Currency and Monetary Instrument Reports, Reports of Foreign Bank and Financial Accounts, and Reports of Cash Payments over $10,000 Received in a Trade or Business, violations regarding which currently are referenced to §2S1.3, and that, therefore, violations of 18 U.S.C. § 1960 also should be referenced to §2S1.3.

Effective Date: The effective date of this amendment is November 1, 2001.

635. Amendment: The Commentary to §3B1.2 is amended by striking Notes 1 through 4 and the background as follows:

"1. Subsection (a) applies to a defendant who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.

2. It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone

who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.

3. For purposes of §3B1.2(b), a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal.

4. If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

Background: This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.",

and inserting the following:

"1. Definition.—For purposes of this guideline, 'participant' has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).

2. Requirement of Multiple Participants.—This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.

3. Applicability of Adjustment.—

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

A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was

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

(B) Conviction of Significantly Less Serious Offense.—If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 14 under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

(C) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

4. Minimal Participant.—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant. It is intended that the downward adjustment for a minimal participant will be used infrequently.

5. Minor Participant.— Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants, but whose role could not be described as minimal.".

Reason for Amendment: This amendment resolves a circuit conflict regarding whether a

defendant who is accountable under §1B1.3 (Relevant Conduct) only for conduct in which the defendant personally was involved, and who performs a limited function in concerted criminal activity, is precluded from consideration for an adjustment under §3B1.2 (Mitigating Role). Compare United States v. Burnett, 66 F.3d 137 (7th Cir. 1995) ("where a defendant is sentenced only for the amount of drugs he handled, he is not entitled to a §3B1.2 reduction"), with United States v. Rodriguez De Varon, 175 F.3d 930 (11th Cir. 1999) (a defendant is not automatically precluded from consideration for a mitigating role adjustment in a case in which the defendant is held accountable solely for the amount of drugs he personally handled). Although this circuit conflict arose in the context of a drug offense, the amendment resolves it in a manner that makes the rule applicable to all types of offenses.

The amendment adopts the approach articulated by the Eleventh Circuit in United States v. Rodriguez De Varon, supra, that §3B1.2 does not automatically preclude a defendant from being considered for a mitigating role adjustment in a case in which the defendant is held accountable under §1B1.3 solely for the amount of drugs the defendant personally handled. In considering a §3B1.2 adjustment, a court must measure the defendant's role against the relevant conduct for which the defendant is held accountable at sentencing, whether or not other defendants are charged.

In contrast to the holding in United States v. Burnett, supra, this amendment allows the court to apply traditional analysis on the applicability of a reduction pursuant to §3B1.2, even in a case in which a defendant is held liable under §1B1.3 only for conduct (such as drug quantities) in which the defendant was involved personally.

The substantive impact of this amendment in resolving the circuit conflict is to provide, in the context of a drug courier, for example, that the court is not precluded from considering a §3B1.2 adjustment simply because the defendant's role in the offense was limited to transporting or storing drugs, and the defendant was accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored. The amendment does not require that such a defendant receive a reduction under §3B1.2, or suggest that such a defendant can receive a reduction based only on those facts; rather, the amendment provides only that such a defendant is not precluded from consideration for such a reduction if the defendant otherwise qualifies for the reduction pursuant to the terms of §3B1.2.

In addition to resolving the circuit conflict, the amendment makes the following non-substantive revisions to §3B1.2 to clarify guideline application: (1) incorporating commentary from the Introduction to Chapter Three, Part B (Role in the Offense) that there must be more than one participant before application of a mitigating role adjustment may be considered; (2) incorporating into this guideline the definition of "participant" from §3B1.1 (Aggravating Role); (3) moving into an application note significant background commentary that has been cited frequently in appellate decisions; (4) adding a section on fact-based determinations to Application Note 3 that emphasizes the significant judicial role in decision-making on the applicability of §3B1.2; (5) maintaining commentary language that the minimal role adjustment is intended to be used infrequently; and (6) making technical amendments to the Commentary to clarify applicable rules (such as the addition of headings for, and the reordering of, application notes in the commentary) that are intended to have no substantive impact.

The language regarding "average participant" is moved from the Background into

Application Note 3(A) to provide guidance as to the applicability of §3B1.2. For a reduction to apply, the court, at a minimum, must make a factual determination that the defendant's role was significantly less culpable than the average participant.

Effective Date: The effective date of this amendment is November 1, 2001.

636. **Amendment:** The Commentary to §2J1.6 captioned "Application Notes" is amended in Note 3 in the first sentence of the second paragraph by striking "In" and inserting "However, in"; and by inserting "other than a case of failure to appear for service of sentence," after "offense and the failure to appear,".

The Commentary to §2M3.9 captioned "Application Notes" is amended by inserting after Note 2 the following:

"3. A term of imprisonment imposed for a conviction under 50 U.S.C. § 421 shall be imposed consecutively to any other term of imprisonment.".

Reason for Amendment: This amendment makes two minor technical changes. First, the amendment makes an editorial change in the commentary to §2J1.6 (Failure to Appear by Defendant) to improve the transition between the first and second paragraphs of Application Note 3. Second, the amendment adds an application note to §2M3.9 (Disclosure of Information Identifying a Covert Agent) that implements the consecutive sentencing requirement of 50 U.S.C. § 421, relating to the disclosure of information identifying a covert agent.

Effective Date: The effective date of this amendment is November 1, 2001.

637. **Amendment:** The Commentary to §2A1.1 captioned "Statutory Provisions" is amended by inserting ", 2332b(a)(1), 2340A" after "2118(c)(2)".

The Commentary to §2A1.2 captioned "Statutory Provision" is amended by striking "Provision" and inserting "Provisions"; by inserting "§" before "1111"; and by inserting ", 2332b(a)(1), 2340A" after "1111".

The Commentary to §2A1.3 captioned "Statutory Provision" is amended by striking "Provision" and inserting "Provisions"; by inserting "§" before "1112"; and by inserting ", 2332b(a)(1)" after "1112".

The Commentary to §2A1.4 captioned "Statutory Provision" is amended by striking "Provision" and inserting "Provisions"; by inserting "§" before "1112"; and by inserting ", 2332b(a)(1)" after "1112".

The Commentary to §2A2.1 captioned "Statutory Provisions" is amended by inserting ", 1993(a)(6)" after "1751(c)".

The Commentary to §2A2.2 captioned "Statutory Provisions" is amended by inserting ", 1993(a)(6), 2332b(a)(1), 2340A" after "1751(e)".

The Commentary to §2A4.1 captioned "Statutory Provisions" is amended by inserting ", 2340A" after "1751(b)".

Chapter Two, Part A is amended in the heading of Subpart 5 by adding at the end "AND OFFENSES AGAINST MASS TRANSPORTATION SYSTEMS".

Section 2A5.2 is amended in the heading by adding at the end "; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry".

Section 2A5.2(a)(1) is amended by striking "the aircraft and passengers; or" and inserting ": (A) an airport or an aircraft; or (B) a mass transportation facility, a mass transportation vehicle, or a ferry;".

Section 2A5.2(a)(2) is amended by striking "the aircraft and passengers; or" and inserting ": (A) an airport or an aircraft; or (B) a mass transportation facility, a mass transportation vehicle, or a ferry;".

Section 2A5.2 is amended by inserting after subsection (a) the following:

"(b) Specific Offense Characteristic

(1) If (A) subsection (a)(1) or (a)(2) applies; and (B)(i) a firearm was discharged, increase by 5 levels; (ii) a dangerous weapon was otherwise used, increase by 4 levels; or (iii) a dangerous weapon was brandished or its use was threatened, increase by 3 levels. If the resulting offense level is less than level 24, increase to level 24.

(c) Cross References

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

(2) If the offense involved possession of, or a threat to use (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.".

The Commentary to §2A5.2 captioned "Statutory Provisions" is amended by inserting "18 U.S.C. § 1993(a)(4), (5), (6), (b);" before "49 U.S.C. §§"; and by inserting "46503," after "46308,".

Section 2A5.2 is amended by striking the Commentary captioned "Background" as follows:

"Background: An adjustment is provided where the defendant intentionally or recklessly endangered the safety of the aircraft and passengers. The offense of carrying a weapon aboard an aircraft, which is proscribed by 49 U.S.C. § 46505, is covered in §2K1.5 (Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft).",

and inserting the following:

"Application Note:

1. Definitions.—For purposes of this guideline:

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

'Brandished', 'dangerous weapon', 'firearm', and 'otherwise used' have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

'Mass transportation' has the meaning given that term in 18 U.S.C. § 1993(c)(5).".

Section 2A6.1 is amended by redesignating subsection (b)(4) as subsection (b)(5); by striking "and (3)" in subsection (b)(5), as redesignated by this amendment, and inserting "(3), and (4)"; and by inserting after subsection (b)(3) the following:

"(4) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by 4 levels.".

The Commentary to §2A6.1 captioned "Statutory Provisions" is amended by inserting "32(c), 35(b)," before "871"; by inserting ", 1993(a)(7), (8), 2332b(a)(2)" after "879"; and by inserting "; 49 U.S.C. § 46507" after "(C)-(E)".

The Commentary to §2A6.1 captioned "Application Notes" is amended by striking Note 1 as follows:

"1. The Commission recognizes that this offense includes a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. See Chapter Five, Part K (Departures).";

and by redesignating Note 2 as Note 1.

The Commentary to §2A6.1 captioned "Application Notes" is amended in Note 1, as redesignated by this amendment, by inserting "Scope of Conduct to Be Considered.—" before "In determining"; and by striking the last two paragraphs as follows:

"For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving making a threatening or harassing communication to the same victim are

grouped together under §3D1.2 (Groups of Closely Related Counts). Multiple counts involving different victims are not to be grouped under §3D1.2.

If the conduct involved substantially more than two threatening communications to the same victim or a prolonged period of making harassing communications to the same victim, an upward departure may be warranted.".

The Commentary to §2A6.1 captioned "Application Notes" is amended by adding at the end the following:

"2. Grouping.—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving making a threatening or harassing communication to the same victim are grouped together under §3D1.2 (Groups of Closely Related Counts). Multiple counts involving different victims are not to be grouped under §3D1.2.

3. Departure Provisions.—

(A) In General.—The Commission recognizes that offenses covered by this guideline may include a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. See Chapter Five, Part K (Departures).

(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.".

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

"(d) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4) or (5), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "1992, 1993(a)(1), (a)(4)," after "1832,"; by inserting ", 2332b(a)(1)" after "2317"; and by inserting ", 60123(b)" after "46317(a)".

The Commentary to §2B1.1 captioned "Background" is amended by striking the last paragraph as follows:

" Subsection (d) implements the instruction to the Commission in section 805(c) of Public Law 104–132.".

Section 2B2.3(b)(1) is amended by inserting "(A)" after "occurred"; by striking the comma after "government facility" and inserting "; (B) at"; and by striking ", or" after "energy facility" and inserting "; (C) on a vessel or aircraft of the United States; (D) in a secured area of an airport; or (E) at".

Section 2B2.3 is amended by inserting after subsection (b) the following:

"(c) Cross Reference

(1) If the offense was committed with the intent to commit a felony offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above.".

The Commentary to §2B2.3 captioned "Statutory Provisions" is amended by inserting "§" before "1030"; and by inserting ", 1036" after "(a)(3)".

The Commentary to §2B2.3 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:

'Airport' has the meaning given that term in section 47102 of title 49, United States Code.

'Felony offense' 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 a conviction was obtained.".

Section 2K1.4(a)(1)(B) is amended by inserting ", an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, or a ferry" after "dwelling".

Section 2K1.4(a)(2) is amended by striking "a dwelling; or (C) endangered a dwelling, or a structure other than a dwelling" and inserting "(i) a dwelling, or (ii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, or a ferry; or (C) endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an aircraft, a mass transportation vehicle, or a ferry".

The Commentary to §2K1.4 captioned "Statutory Provisions" is amended by inserting "1992, 1993(a)(1), (a)(2), (a)(3), (b)," after "1855,"; and by inserting ", 2332a; 49 U.S.C. § 60123(b)" after "2275".

The Commentary to §2K1.4 captioned "Application Notes" is amended by striking Note 1 as follows:

"1. If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).",

and inserting the following:

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

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

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

'Mass transportation' has the meaning given that term in 18 U.S.C. § 1993(c)(5).".

The Commentary to §2K1.4 captioned "Application Notes" is amended in Note 2 by inserting "Risk of Death or Serious Bodily Injury.—" before "Creating".

The Commentary to §2K1.4 captioned "Application Notes" is amended by striking Notes 3 and 4 as follows:

"3. 'Explosives,' as used in the title of this guideline, includes any explosive, explosive material, or destructive device.

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

and inserting the following:

"3. Upward Departure Provision.—If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).".

The Commentary to §2L1.2 captioned "Application Notes" is amended by inserting at the end of subdivision (B) of Note 1 the following:

"(vi) 'Terrorism offense' means any offense involving, or intending to promote, a 'federal crime of terrorism', as that term is defined in 18 U.S.C. § 2332b(g)(5).".

The Commentary to §2M2.1 captioned "Statutory Provisions" is amended by inserting "; 49 U.S.C. § 60123(b)" after "2284".

The Commentary to §2M2.3 captioned "Statutory Provisions" is amended by inserting "; 49 U.S.C. § 60123(b)" after "2284".

Chapter Two, Part M is amended in the heading of Subpart 5 by adding at the end ", AND PROVIDING MATERIAL SUPPORT TO DESIGNATED FOREIGN TERRORIST ORGANIZATIONS".

Section 2M5.1 is amended in the heading by adding at the end "; Financial Transactions with

Countries Supporting International Terrorism".

Section 2M5.1(a)(1) is amended by inserting "(A)" after "26, if"; and by inserting "; or (B) the offense involved a financial transaction with a country supporting international terrorism" after "evaded".

The Commentary to §2M5.1 captioned "Statutory Provisions" is amended by inserting "18 U.S.C. § 2332d;" before "50 U.S.C.".

The Commentary to §2M5.1 captioned "Application Notes" is amended by adding at the end the following:

"4. For purposes of subsection (a)(1)(B), 'a country supporting international terrorism' means a country designated under section 6(j) of the Export Administration Act (50 U.S.C. App. 2405).".

Chapter Two, Part M, Subpart 5 is amended by adding at the end the following:

"§2M5.3. Providing Material Support or Resources to Designated Foreign Terrorist Organizations

(a) Base Offense Level: 26

(b) Specific Offense Characteristic

(1) If the offense involved the provision of (A) dangerous weapons; (B) firearms; (C) explosives; or (D) funds with knowledge or reason to believe such funds would be used to purchase any of the items described in subdivisions (A) through (C), increase by 2 levels.

(c) Cross References

(1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) otherwise, if the resulting offense level is greater than that determined above.

(2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.

(3) If the offense involved the provision of (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D)

a weapon of mass destruction, apply §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 18 U.S.C. § 2339B.

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

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

2. Departure Provisions.—

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

(B) War or Armed Conflict.—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.".

Section 2M6.1(a)(2) is amended by striking "and" and inserting a comma; by inserting ", (a)(4), and (a)(5)" after "(a)(3)"; and by striking "or".

Section 2M6.1(a) is amended by redesignating subdivision (3) as subdivision (5); by inserting after subdivision (2) the following:

"(3) 22, if the defendant is convicted under 18 U.S.C. § 175b;

(4) 20, if the defendant is convicted under 18 U.S.C. § 175(b); or";

and by striking "by-product" in subdivision (5), as redesignated by this amendment, and inserting "byproduct".

Section 2M6.1(b)(1) is amended by striking "or (a)(3)" and inserting ", (a)(4), or (a)(5)".

Section 2M6.1(b)(2) is amended by inserting ", (a)(3), or (a)(4)" after "(a)(2)".

Section 2M6.1(b)(3) is amended by striking "or" after "(a)(2)" and inserting a comma; and by inserting ", (a)(4), or (a)(5)" after "(a)(3)".

The Commentary to §2M6.1 captioned "Statutory Provisions" is amended by inserting "175b," after "175,"; and by inserting "1993(a)(2), (3), (b)," after "842(p)(2),".

The Commentary to §2M6.1 captioned "Application Notes" is amended in Note 1 by inserting after "18 U.S.C. § 831(f)(1)." the following paragraph:

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

Section 2S1.3 is amended in the heading by adding at the end "; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts".

Section 2S1.3 is amended by striking subsection (a) as follows:

"(a) Base Offense Level: 6 plus the number of offense levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the funds.",

and inserting the following:

"(a) Base Offense Level:

(1) 8, if the defendant was convicted under 31 U.S.C. § 5318 or § 5318A; or

(2) 6 plus the number of offense levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the funds, if subsection (a)(1) does not apply.".

Section 2S1.3(b)(1) is amended by inserting "(A)" after "If"; and by inserting "; or (B) the offense involved bulk cash smuggling" after "promote unlawful activity".

Section 2S1.3(b) is amended by redesignating subdivision (2) as subdivision (3); and by inserting after subdivision (1) the following:

"(2) If the defendant (A) was convicted of an offense under subchapter II of chapter 53 of title 31, United States Code; and (B) committed the offense as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period, increase by 2 levels.".

Section 2S1.3(b)(3), as redesignated by this amendment, is amended by striking "subsection (b)(1) does not apply" and inserting "subsection (a)(2) applies and subsections (b)(1) and (b)(2) do not apply".

The Commentary to §2S1.3 captioned "Statutory Provisions" is amended by inserting "§" before "7203"; by striking "§" before "7206"; by inserting "5318, 5318A(b), 5322," after "5316,"; and by inserting ", 5331, 5332" after "5326".

The Commentary to §2S1.3 captioned "Application Note" is amended by striking "Note" and inserting "Notes"; by inserting "Definition of 'Value of the Funds'.—" before "For purposes of this guideline" in Note 1; and by adding after Note 1 the following:

"2. Bulk Cash Smuggling.—For purposes of subsection (b)(1)(B), 'bulk cash smuggling' means (A) knowingly concealing, with the intent to evade a currency reporting requirement under 31 U.S.C. § 5316, more than $10,000 in currency or other monetary instruments; and (B) transporting or transferring (or attempting to transport or transfer) such currency or monetary instruments into or outside of the United States. 'United States' has the meaning given that term in Application Note 1 of the Commentary to §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States).

3. Enhancement for Pattern of Unlawful Activity.—For purposes of subsection (b)(2), 'pattern of unlawful activity' means at least two separate occasions of unlawful activity involving a total amount of more than $100,000 in a 12-month period, without regard to whether any such occasion occurred during the course of the offense or resulted in a conviction for the conduct that occurred on that occasion.".

The Commentary to §2S1.3 captioned "Background" is amended by striking "The" and inserting "Some of the"; and by adding at the end the following:

" This guideline also covers offenses under 31 U.S.C. §§ 5318 and 5318A, pertaining to records, reporting and identification requirements, prohibited accounts involving certain foreign jurisdictions, foreign institutions, and foreign banks, and other types of transactions and types of accounts.".

Section 2X1.1 is amended by adding after subsection (c) the following:

"(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).".

The Commentary to §2X2.1 captioned "Statutory Provision" is amended by striking the following:

"Statutory Provision: 18 U.S.C. § 2.",

and inserting:

"Statutory Provisions: 18 U.S.C. §§ 2, 2339, 2339A.".

The Commentary to §2X2.1 captioned "Application Note" is amended in Note 1 by striking "'Underlying" and inserting "Definition.—For purposes of this guideline, 'underlying"; and by inserting ", or in the case of a violation of 18 U.S.C. § 2339A, 'underlying offense' means the offense the defendant is convicted of having materially supported prior to or during its commission" after "abetting".

Section 2X3.1(a) is amended by striking "Provided, that where" and inserting "However, in a case in which"; and by striking "offense level shall" and inserting "base offense level under this subsection shall".

The Commentary to §2X3.1 captioned "Statutory Provisions" is amended by inserting ", 2339, 2339A" after "1072".

The Commentary to §2X3.1 captioned "Application Notes" is amended in Note 1 by striking "'Underlying" and inserting "Definition.—For purposes of this guideline, 'underlying"; and by inserting ", or in the case of a violation of 18 U.S.C. § 2339A, 'underlying offense' means the offense the defendant is convicted of having materially supported after its commission (i.e., in connection with the concealment of or an escape from that offense)" after "accessory".

The Commentary to §2X3.1 captioned "Application Notes" is amended in Note 2 by inserting "Application of Mitigating Role Adjustment.—" before "The adjustment".

The Commentary to §3A1.4 captioned "Application Notes" is amended by striking Note 1 as follows:

"1. Subsection (a) increases the offense level if the offense involved, or was intended to promote, a federal crime of terrorism. 'Federal crime of terrorism' is defined at 18 U.S.C. § 2332b(g).",

and inserting the following:

"1. 'Federal Crime of Terrorism' Defined.—For purposes of this guideline, 'federal crime of terrorism' has the meaning given that term in 18 U.S.C. § 2332b(g)(5).".

The Commentary to §3A1.4 captioned "Application Notes" is amended by redesignating Note 2 as Note 3; and by inserting after Note 1 the following:

"2. Harboring, Concealing, and Obstruction Offenses.—For purposes of this guideline, an offense that involved (A) harboring or concealing a terrorist who committed a federal crime of terrorism (such as an offense under 18 U.S.C. § 2339 or § 2339A); or (B) obstructing an investigation of a federal crime of terrorism, shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism.".

The Commentary to §3A1.4 captioned "Application Notes" is amended in Note 3, as redesignated by this amendment, by inserting "Computation of Criminal History Category.—" before "Under subsection (b)".

The Commentary to §3A1.4 captioned "Application Notes" is amended by adding at the end the following:

"4. Upward Departure Provision.—By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4 by striking the period at the end of subdivision (i) and inserting a semicolon; and by inserting after subdivision (i) the following:

"(j) failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p).".

Section 5D1.2(a) is amended by adding at the end the following:

"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.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 175 the following new line:

"18 U.S.C. § 175b 2M6.1";

by inserting after the line referenced to 18 U.S.C. § 1992 the following new lines:

"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)	2A6.1
18 U.S.C. § 1993(b)	2A5.2, 2K1.4, 2M6.1";

by inserting after the line referenced to 18 U.S.C. § 2332a the following new lines:

"18 U.S.C. § 2332b(a)(1)	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A4.1, 2B1.1
18 U.S.C. § 2332b(a)(2)	2A6.1
18 U.S.C. § 2332d	2M5.1
18 U.S.C. § 2339	2X2.1, 2X3.1
18 U.S.C. § 2339A	2X2.1, 2X3.1
18 U.S.C. § 2339B	2M5.3
18 U.S.C. § 2340A	2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A4.1";

by inserting after the line referenced to 30 U.S.C. § 1463 the following new line:

"31 U.S.C. § 5311 note (section 329 of the USA PATRIOT Act of 2001)	2C1.1";

by inserting after the line referenced to 31 U.S.C. § 5316 the following new lines:

"31 U.S.C. § 5318	2S1.3
31 U.S.C. § 5318A(b)	2S1.3";

by inserting after the line referenced to 31 U.S.C. § 5326 the following new lines:

"31 U.S.C. § 5331	2S1.3
31 U.S.C. § 5332	2S1.3";

by inserting after the line referenced to 49 U.S.C. § 46502(a),(b) the following new line:

"49 U.S.C. § 46503	2A5.2"; and

by inserting after the line referenced to 49 U.S.C. § 46506 the following new lines:

"49 U.S.C. § 46507	2A6.1
49 U.S.C. § 60123(b)	2B1.1, 2K1.4, 2M2.1, 2M2.3".

Reason for Amendment: This amendment is a six-part amendment that responds to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. 107–56 (the "Act").

Among its many provisions are appropriately severe penalties for offenses against mass transportation systems and interstate gas or hazardous liquid pipelines. The amendment also increases sentences for threats that substantially disrupt governmental or business operations or result in costly cleanup measures. It expands the guideline coverage of offenses involving bioterrorism, and it creates a new guideline for providing material support to foreign terrorist organizations. It punishes attempts and conspiracies to commit terrorism as if the offense had been carried out and adds an invited upward departure to the guidelines' terrorism enhancement for appropriate cases. Finally, it authorizes a term of supervised release up to life for a defendant convicted of a federal crime of terrorism that resulted in substantial risk of death or serious bodily injury to another person.

First, this amendment makes a number of changes to Appendix A (Statutory Index) and several guidelines in Chapter Two (Offense Conduct) in order to incorporate several new predicate offenses to federal crimes of terrorism. This amendment addresses section 801 of the Act, which added 18 U.S.C. § 1993, generally pertaining to offenses against mass transportation systems and facilities. The amendment also addresses 49 U.S.C. § 46507 pertaining to false information and threats, that heretofore was not listed in the Statutory Index, as well as the new offense at 49 U.S.C. § 46503, pertaining to interference with security screening personnel.

Specifically, the amendment makes a number of changes to §2A5.2 (Interference with Flight Crew Member or Flight Attendant) and the guidelines in Chapter Two, Part A, Subpart 2 (Assault). First, this amendment references violations of 18 U.S.C. § 1993(a)(4), (a)(5), (a)(6), and (b) and 49 U.S.C. § 46503 to §2A5.2 because that guideline presently covers other similar offenses and because the guideline's alternative base offense levels cover offenses that involve reckless or intentional endangerment, conduct which is an element of some of these new offenses.

In order to take into account aggravating conduct which may occur in such offenses, the amendment adds a specific offense characteristic for use of a weapon, borrowing language from §2A2.2 (Aggravated Assault). The specific offense characteristic provides a graduated enhancement with a minimum offense level of level 24 at §2A5.2(b)(1) for the involvement of a dangerous weapon in the offense. This enhancement addresses concerns that the current base offense level of level 18 (in §2A5.2(a)(2)) for reckless endangerment may be inadequate in situations involving a dangerous weapon and reckless disregard for the safety of human life. The minimum offense level of level 24 mirrors the offense level that applies for conduct amounting to reckless endangerment under subsection (b)(1) of §2K1.5

(Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft). A cross reference to the appropriate homicide guideline also is provided for offenses in which death results; death as an aggravating circumstance is included in 18 U.S.C. § 1993(b).

The amendment also amends §2A6.1 (Threatening or Harassing Communications) to incorporate offenses against mass transportation systems under 18 U.S.C. § 1993(a)(7) and (a)(8) and 49 U.S.C. § 46507 and provides corresponding references in the Statutory Index. These three provisions require the same type of threatening conduct or conveyance of false information as two other offenses referenced to §2A6.1, specifically 18 U.S.C. §§ 32(c) and 35(b), which cover aircraft, railroads, and shipping, rather than mass transportation systems. Additionally, a specific offense characteristic is added if the offense resulted in a substantial disruption of public, governmental, or business functions or services, or a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense. This enhancement recognizes that a terrorist threat usually will be directed at a large number of individuals, governmental buildings or operations, or infrastructure. Unless such a terrorist threat is immediately dismissed as not credible, the conduct may result in significant disruption and response costs. This specific offense characteristic is the same as that contained in subsection (b)(3) of §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction). An invited upward departure provision is added for situations in which the offense involved multiple victims, a circumstance which might occur in the context of these new offenses.

This amendment also amends §2K1.4 (Arson; Property Damage by Use of Explosives) and §2B1.1 (Theft, Property Destruction, and Fraud) to cover violations of 18 U.S.C. § 1993(a)(1) and (b). Offenses under 18 U.S.C. § 1993(a)(1) are similar to another offense referenced to these guidelines, 18 U.S.C. § 32(a)(1), with respect to the intent standard required to commit the offense, offense conduct, and resulting harm. The amendment references violations of 18 U.S.C. § 1993(a)(2), (a)(3), and (b) to §§2K1.4 and 2M6.1. These offenses encompass a wide range of conduct. For example, a violation of 18 U.S.C. § 1993(a)(3) may occur if the defendant sets fire to a garage or places a biological agent or toxin for use as a destructive substance near an aircraft and this likely endangered the safety of that aircraft.

The amendment expands §2M6.1 to cover 18 U.S.C. §§ 175(b) and 175b, two new offenses created by section 817 of the Act, involving possession of biological agents, toxins, and delivery systems. Section 2M6.1 is the most appropriate guideline for these offenses because they involve the knowing possession of certain biological substances. A base offense level of level 20 is provided for 18 U.S.C. § 175(b) offenses, the same base offense level as is currently provided for threat cases under that guideline. The current two level increase for particularly dangerous biological agents would be available for the most serious substances.

A base offense level of level 22 is provided for offenses under 18 U.S.C. § 175b, which forbids certain restricted persons (defined in the statute) to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any biological agent or toxin, or to receive any biological agent or toxin that has been shipped or transported in interstate or foreign commerce, if the biological agent or toxin is listed as a select agent (e.g., ebola, anthrax). Because this offense already takes into account the serious nature of a select agent, the amendment treats these offenses separately from offenses under 18 U.S.C. § 175(b), with a higher base offense level and an instruction that the enhancement for select biological

agents does not apply.

The amendment also amends the Statutory Index to reference 18 U.S.C. § 2339 to §§2X2.1 (Aiding and Abetting) and 2X3.1 (Accessory After the Fact). This offense prohibits harboring or concealing any person who the defendant knows, or has reasonable grounds to believe, has committed or is about to commit, one of several enumerated offenses.

Second, this amendment provides Statutory Index references, as well as modifications to various Chapter Two guidelines, for a number of offenses that, prior to enactment of the Act, were enumerated in 18 U.S.C. § 2332b(g)(5) as predicate offenses for federal crimes of terrorism but were not explicitly incorporated in the guidelines.

Specifically, the amendment references 18 U.S.C. § 2332b(a)(1) offenses to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A1.4 (Involuntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), and 2A4.1 (Kidnapping, Abduction, Unlawful Restraint), inasmuch as 18 U.S.C. § 2332b offenses are analogous to offenses currently referenced to those guidelines.

The amendment also provides a Statutory Index reference to §2A6.1 (Threatening or Harassing Communications) for cases under 18 U.S.C. § 2332b(a)(2), which prohibits threats, attempts and conspiracies to commit an offense under 18 U.S.C. § 2332b(a)(1).

This amendment also creates a new guideline, at §2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations), for offenses under 18 U.S.C. § 2339B, which prohibits the provision of material support or resources to a foreign terrorist organization. The amendment references offenses under 18 U.S.C. § 2339A to §§2X2.1 and 2X3.1. Section 2339A offenses concern providing material support to terrorists that the defendant knows or intends will be used in preparation for, or in carrying out, certain specified predicate offenses. Thus, the essence of 18 U.S.C. § 2339A offenses is akin to aiding and abetting or accessory after the fact offenses, which warrants reference to §§2X2.1 and 2X3.1. In contrast, 18 U.S.C. § 2339B offenses are referenced to a new guideline, §2M5.3, primarily because they are not statutorily linked to the commission of any specified predicate offenses. To account for the variety of ways in which such offenses may be committed, the new guideline provides two specific offense characteristics that enhance the sentence for cases in which the material support involved dangerous weapons and in which the material support involved nuclear, biological, or chemical weapons.

The amendment references torture offenses under 18 U.S.C. § 2340A to §§2A1.1, 2A1.2, 2A2.1, 2A2.2, and 2A4.1. The amendment also references 49 U.S.C. § 60123(b), pertaining to damaging or destroying an interstate gas or hazardous liquid pipeline facility, to §§2B1.1, 2K1.4, 2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities), and 2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities).

Third, the amendment responds to section 811 of the Act, which amended a number of offenses to ensure that attempts and conspiracies to commit any of those offenses subject the offender to the same penalties prescribed for the object offense. This amendment provides a special instruction in §2X1.1 (Attempt, Solicitation, or Conspiracy) that the three level reduction in §2X1.1(b) does not apply to these offenses when committed for a terrorist

objective.

Fourth, the amendment adds an encouraged, structured upward departure in §3A1.4 (Terrorism) for offenses that involve terrorism but do not otherwise qualify as offenses that involved or were intended to promote "federal crimes of terrorism" for purposes of the terrorism adjustment in §3A1.4. The amendment provides an upward departure, rather than a specified guideline adjustment, because of the expected infrequency of these terrorism offenses and to provide the court with a viable tool to account for the harm involved during the commission of these offenses on a case-by-case basis. In addition, the structured upward departure provision makes it possible to impose punishment equal in severity to that which would be imposed if the §3A1.4 adjustment actually applied.

The amendment adds an application note to §3A1.4 regarding harboring and concealing offenses to clarify that §3A1.4 may apply in the case of offenses that occurred after the commission of the federal crime of terrorism (e.g., a case in which the defendant, in violation of 18 U.S.C. § 2339A, concealed an individual who had committed a federal crime of terrorism).

Fifth, the amendment amends §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports) to incorporate new money laundering provisions created by the Act.

Specifically, the amendment provides an alternative base offense level of level 8 in §2S1.3(a) in order to incorporate offenses under 31 U.S.C. §§ 5318 and 5318A. The base offense level of level 8 recognizes the heightened due diligence requirements placed on financial institutions with respect to payable-through accounts, correspondent accounts, and shell banks.

The amendment also amends §2S1.3(b)(1), relating to the promotion of unlawful activity, to provide an alternative prong if the offense involved bulk cash smuggling. This amendment addresses 31 U.S.C. § 5332, added by section 371 of the Act, which prohibits concealing, with intent to evade a currency reporting requirement under 31 U.S.C. § 5316, more than $10,000 in currency or other monetary instruments and transporting or transferring such currency or monetary instruments into or outside of the United States. Findings set forth in that section of the Act indicate that bulk cash smuggling typically involves the promotion of unlawful activity.

The amendment also provides an enhancement in §2S1.3(b) to give effect to the enhanced penalty provisions under 31 U.S.C. § 5322(b) for offenses under subchapter II of chapter 53 of title 31, United Stated Code, if such offenses were committed as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period.

Sixth, the amendment addresses a number of miscellaneous issues related to terrorism. Specifically, it provides a definition of terrorism for purposes of the prior conviction enhancement in §2L1.2 (Unlawfully Entering or Remaining in the United States). For consistency, the definition is the same as that found in the current Chapter Three terrorism adjustment.

It also amends §3C1.1 (Obstructing or Impeding the Administration of Justice), in response

to section 319(d) of the Act, which amends the Controlled Substances Act at 21 U.S.C. § 853(e) to require a defendant to repatriate any property that may be seized and forfeited and to deposit that property in the registry of the court or with the United States Marshals Service or the Secretary of the Treasury. Section 319(d) of the Act also states that the failure to comply with a protective order and an order to repatriate property "may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines." Accordingly, the amendment adds Application Note 4(j) to §3C1.1 to provide that failure to comply with an order issued pursuant to 21 U.S.C. § 835(e) is an example of the types of conduct to which the adjustment applies.

It also amends §5D1.2 (Term of Supervised Release), in response to section 812 of the Act, which authorizes a term of supervised release of any term of years or life for a defendant convicted of a federal crime of terrorism the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person.

It also amends §2B1.1 to delete the special instruction pertaining to the imposition of not less than six months' imprisonment for a defendant convicted under 18 U.S.C. § 1030(a)(4) or (5). This amendment is in response to section 814(f) of the Act, which directed the Commission to amend the guidelines "to ensure that any individual convicted of a violation of section 1030 of title 18, United States Code, can be subjected to appropriate penalties, without regard to any mandatory minimum term of imprisonment."

It also adds a reference in the Statutory Index to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), for the new offense created by section 329 of the Act, which prohibits a federal official or employee, in connection with administration of the money laundering provisions of the Act, to corruptly demand, seek, receive, accept, or agree to receive or accept anything of value in return for being influenced in the performance of an official act, being influenced to commit or aid in committing any fraud on the United States, or being induced to do or omit to do any act in violation of official duties.

It also amends §2M5.1 (Evasion of Export Controls) to incorporate 18 U.S.C. § 2332d, which prohibits a United States person, knowing or having reasonable cause to know that a country is designated under the Export Administration Act as a country supporting international terrorism, to engage in a financial transaction with the government of that country. The amendment provides a base offense level of level 26 for these offenses.

Finally, it amends §2B2.3 (Trespass) to incorporate the offense under 18 U.S.C. § 1036. That offense, added by section 2 of the Enhanced Federal Security Act of 2000, Pub. L. 106–547, prohibits, by fraud or pretense, the entering or attempting to enter any real property, vessel, or aircraft of the United States, or secure area of an airport. The amendment amends the existing two level enhancement in §2B2.3(b)(1) to provide an additional ground for application of the enhancement if the trespass involved a vessel, aircraft of the United States, or secure area of an airport. It also adds a cross reference to §2X1.1 if the offense involved the intent to commit another felony.

Effective Date: The effective date of this amendment is November 1, 2002.

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

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

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after "For purposes of this guideline:" the following paragraph:

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

The Commentary to §2B1.1 captioned "Application Notes" is amended in subdivision (F) of Note 2 by adding at the end the following:

"(vii) Value of Cultural Heritage Resources.—In a case involving a cultural heritage resource, loss attributable to that cultural heritage resource shall be determined in accordance with the rules for determining the 'value of the cultural heritage resource' set forth in Application Note 2 of the Commentary to §2B1.5.".

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

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

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

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

(2) If the offense involved a cultural heritage resource from, or that, prior to the offense, was on, in, or in the custody of (A) the national park system; (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery; (F) a museum; or (G) the World Heritage List, increase by 2 levels.

(3) If the offense involved a cultural heritage resource constituting (A) human remains; (B) a funerary object; (C) cultural patrimony; (D) a sacred object; (E) cultural property; (F) designated archaeological or ethnological material; or (G) a pre-Columbian monumental or architectural sculpture or mural, increase by 2 levels.

(4) If the offense was committed for pecuniary gain or otherwise involved a commercial purpose, increase by 2 levels.

(5) If the defendant engaged in a pattern of misconduct involving cultural heritage resources, increase by 2 levels.

(6) If a dangerous weapon was brandished or its use was threatened, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(c) Cross Reference

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

Commentary

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

Application Notes:

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

(A) A historic property, as defined in 16 U.S.C. § 470w(5) (see also section 16(l) of 36 C.F.R. pt. 800).

(B) A historic resource, as defined in 16 U.S.C. § 470w(5).

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

(D) A cultural item, as defined in section 2(3) of the Native American

Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3) (see also 43 C.F.R. § 10.2(d)).

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

(F) An object of cultural heritage, as defined in 18 U.S.C. § 668(a)(2).

(G) Designated ethnological material, as described in 19 U.S.C. §§ 2601(2)(ii), 2601(7), and 2604.

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

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

(i) The archaeological value. (Archaeological value shall be included in the case of any cultural heritage resource that is an archaeological resource.)

(ii) The commercial value.

(iii) The cost of restoration and repair.

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

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

(i) 'Archaeological value' of a cultural heritage resource means the cost of the retrieval of the scientific information which would have been obtainable prior to the offense, including the cost of preparing a research design, conducting field work, conducting laboratory analysis, and preparing reports, as would be necessary to realize the information potential. (See 43 C.F.R. § 7.14(a); 36 C.F.R. § 296.14(a); 32 C.F.R. § 229.14(a); 18 C.F.R. § 1312.14(a).)

(ii) 'Commercial value' of a cultural heritage resource means the fair market value of the cultural heritage resource at the time of the offense. (See 43 C.F.R. § 7.14(b); 36 C.F.R. § 296.14(b); 32 C.F.R. § 229.14(b); 18 C.F.R. § 1312.14(b).)

(iii) 'Cost of restoration and repair' includes all actual and projected costs of curation, disposition, and appropriate reburial of, and consultation with respect to, the cultural heritage resource; and any other actual and projected costs to complete restoration and repair of the cultural heritage resource, including (I) its reconstruction and stabilization; (II) reconstruction and stabilization of ground contour and surface; (III) research necessary to conduct reconstruction and stabilization; (IV) the construction of physical barriers and other protective devices; (V) examination and analysis of the cultural heritage resource as part of efforts to salvage remaining information about the resource; and (VI) preparation of reports. (See 43 C.F.R. § 7.14(c); 36 C.F.R. § 296.14(c); 32 C.F.R. § 229.14(c); 18 C.F.R. § 1312.14(c).)

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

3. Enhancement in Subsection (b)(2).—For purposes of subsection (b)(2):

(A) 'Museum' has the meaning given that term in 18 U.S.C. § 668(a)(1) except that the museum may be situated outside the United States.

(B) 'National cemetery' has the meaning given that term in Application Note 1 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

(C) 'National Historic Landmark' means a property designated as such pursuant to 16 U.S.C. § 470a(a)(1)(B).

(D) 'National marine sanctuary' means a national marine sanctuary designated as such by the Secretary of Commerce pursuant to 16 U.S.C. § 1433.

(E) 'National monument or national memorial' means any national monument or national memorial established as such by Act of Congress or by proclamation pursuant to the Antiquities Act of 1906 (16 U.S.C. § 431).

(F) 'National park system' has the meaning given that term in 16 U.S.C. § 1c(a).

(G) 'World Heritage List' means the World Heritage List maintained by the World Heritage Committee of the United Nations Educational, Scientific, and Cultural Organization in accordance

with the Convention Concerning the Protection of the World Cultural and Natural Heritage.

4. Enhancement in Subsection (b)(3).—For purposes of subsection (b)(3):

(A) 'Cultural patrimony' has the meaning given that term in 25 U.S.C. § 3001(3)(D) (see also 43 C.F.R. 10.2(d)(4)).

(B) 'Cultural property' has the meaning given that term in 19 U.S.C. § 2601(6).

(C) 'Designated archaeological or ethnological material' means archaeological or ethnological material described in 19 U.S.C. § 2601(7) (see also 19 U.S.C. §§ 2601(2) and 2604).

(D) 'Funerary object' means an object that, as a part of the death rite or ceremony of a culture, was placed intentionally, at the time of death or later, with or near human remains.

(E) 'Human remains' (i) means the physical remains of the body of a human; and (ii) does not include remains that reasonably may be determined to have been freely disposed of or naturally shed by the human from whose body the remains were obtained, such as hair made into ropes or nets.

(F) 'Pre-Columbian monumental or architectural sculpture or mural' has the meaning given that term in 19 U.S.C. § 2095(3).

(G) 'Sacred object' has the meaning given that term in 25 U.S.C. § 3001(3)(C) (see also 43 C.F.R. § 10.2(d)(3)).

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

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

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

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

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

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

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

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

9. Upward Departure Provision.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if (A) in addition to cultural heritage resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources); or (B) the offense involved a cultural heritage resource that has profound significance to cultural identity (e.g., the Statue of Liberty or the Liberty Bell).".

Section 2Q2.1 is amended by adding after subsection (b) the following:

"(c) Cross Reference

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

The Commentary to §2Q2.1 captioned "Application Notes" is amended by adding at the end the following:

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

Section 3D1.2(d) is amended by inserting "2B1.5," after "2B1.4,".

Appendix A (Statutory Index) is amended by striking the line referenced to 16 U.S.C. § 433;

by inserting before the line referenced to 16 U.S.C. § 668(a) the following new line:

"16 U.S.C. § 470ee 2B1.5";

in the line referenced to 16 U.S.C. § 668(a) by inserting "2B1.5," before "2Q2.1";

in the line referenced to 16 U.S.C. § 707(b) by inserting "2B1.5," before "2Q2.1";

in the line referenced to 18 U.S.C. § 541 by inserting "2B1.5," before "2T3.1";

in the line referenced to 18 U.S.C. § 542 by inserting "2B1.5," before "2T3.1";

in the line referenced to 18 U.S.C. § 543 by inserting "2B1.5," before "2T3.1";

in the line referenced to 18 U.S.C. § 544 by inserting "2B1.5," before "2T3.1";

in the line referenced to 18 U.S.C. § 545 by inserting "2B1.5," before "2Q2.1";

by inserting after the line referenced to 18 U.S.C. § 545 the following new line:

"18 U.S.C. § 546 2B1.5";

in the line referenced to 18 U.S.C. § 641 by inserting ", 2B1.5" after "2B1.1";

in the line referenced to 18 U.S.C. § 661 by inserting ", 2B1.5" after "2B1.1";

in the line referenced to 18 U.S.C. § 662 by inserting ", 2B1.5" after "2B1.1";

in the line referenced to 18 U.S.C. § 666(a)(1)(A) by inserting ", 2B1.5" after "2B1.1";

in the line referenced to 18 U.S.C. § 668 by striking "2B1.1" and inserting "2B1.5";

by inserting after the line referenced to 18 U.S.C. § 1121 the following new line:

"18 U.S.C. § 1152 2B1.5";

in the line referenced to 18 U.S.C. § 1153 by inserting "2B1.5," after "2B1.1,";

in the line referenced to 18 U.S.C. § 1163 by inserting ", 2B1.5" after "2B1.1";

by inserting after the line referenced to 18 U.S.C. § 1168 the following new line:

"18 U.S.C. § 1170 2B1.5";

in the line referenced to 18 U.S.C. § 1361 by inserting ", 2B1.5" after "2B1.1";

in the line referenced to 18 U.S.C. § 2232 by inserting "2B1.5," before "2J1.2";

in the line referenced to 18 U.S.C. § 2314 by inserting ", 2B1.5" after "2B1.1"; and

in the line referenced to 18 U.S.C. § 2315 by inserting ", 2B1.5" after "2B1.1".

Reason for Amendment: This amendment provides a new guideline at §2B1.5 (Theft of, Damage to, Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) for offenses involving cultural heritage resources. This amendment reflects the Commission's conclusion that the existing sentencing guidelines for economic and property destruction crimes are inadequate to punish in an appropriate and proportional way the variety of federal crimes involving the theft of, damage to, destruction of, or illicit trafficking in, cultural heritage resources. The Commission has determined that a separate guideline, which specifically recognizes both the federal government's long-standing obligation and role in preserving such resources, and the harm caused to both the nation and its inhabitants when its history is degraded through the destruction of cultural heritage resources, is needed.

Cultural heritage resources include national memorials, landmarks, parks, archaeological and other historic and cultural resources, specifically designated by Congress and the President for the preservation of the cultural heritage of this nation and its ancestors. The federal government acts either as a trustee for the public generally, or as a fiduciary on behalf of American Indians, Alaska Natives and Native Hawaiian Organizations, to protect these cultural heritage resources. Because individuals, communities, and nations identify themselves through intellectual, emotional, and spiritual connections to places and objects, the effects of cultural heritage resource crimes transcend mere monetary considerations. Accordingly, this new guideline takes into account the transcendent and irreplaceable value of cultural heritage resources and punishes in a proportionate way the aggravating conduct associated with cultural heritage resource crimes.

This guideline incorporates into the definition of "cultural heritage resource" a broad range of existing federal statutory definitions for various historical, cultural, and archaeological items. If a defendant is convicted of an offense that charges illegal conduct involving a cultural heritage resource, this guideline will apply, irrespective of whether the conviction is obtained under general property theft or damage statutes, such as laws concerning the theft and destruction of government property, 18 U.S.C. § 641, interstate sale or receipt of stolen property, 18 U.S.C. §§ 2314-15, and smuggling, 18 U.S.C. §§ 541 et seq., or under specific cultural heritage statutes, such as the Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470ee (ARPA), the criminal provisions of the Native American Graves Protection and Repatriation Act (NAGPRA) at 18 U.S.C. § 1170, and 18 U.S.C. § 668, which concerns theft from museums. In addition, if a more general offense is charged that is referenced in Appendix A to §2B1.1 (Theft, Property Destruction, and Fraud), this guideline will apply by cross reference if the offense conduct involves a cultural heritage resource and results in a higher offense level.

This new guideline has a base offense level of level 8, which is two levels higher than the base offense level for general economic and property destruction crimes. The higher base offense level represents the Commission's determination that offenses involving cultural heritage resources are more serious because they involve essentially irreplaceable resources and cause intangible harm to society.

The new guideline also provides that the monetary value of the cultural heritage resource is an important, although not the sole, factor in determining the appropriate punishment. The Commission has elected not to use the concept of "loss," which is an integral part of the theft, fraud, and property destruction guideline at §2B1.1, because cultural heritage offenses do not involve the same fungible and compensatory values embodied in "loss." Instead, under this new guideline, value is to be based on commercial value, archaeological value, and the cost of restoration and repair. These methods of valuation are derived from existing federal law. See 16 U.S.C. § 470ee(d); 43 C.F.R. § 7.14.

The Commission has recognized that archaeological value shall be used in calculating the value of archaeological resources but has provided flexibility for the sentencing court to determine whether either commercial value or the cost of restoration and repair, or both, should be added to archaeological value in determining the appropriate value of archaeological resources. For all other types of cultural heritage resources covered by this guideline, the Commission has provided flexibility for the sentencing court regarding whether and when to use all or some of the methods of valuation, as appropriate, for calculating the total value associated with the harm to the particular resource caused by the defendant's offense conduct. The value of the cultural heritage resource is then referenced to the monetary table provided at §2B1.1(b)(1) in order to determine appropriate and proportionate offense levels in a manner consistent with the overall guidelines structure.

The new guideline provides five additional specific offense characteristics to provide proportionate enhancements for aggravating conduct that may occur in connection with cultural heritage resource offenses. In providing enhancements for these non-pecuniary aggravating factors, the Commission seeks to ensure that the nonquantifiable harm caused by the offense to affected cultural groups, and society as a whole, is adequately reflected in the penalty structure.

The first two of these enhancements, at subsections (b)(2) and (b)(3), relate to whether the offense involves a place or resource that Congress has designated for special protection. A two level enhancement attaches if the offense involves a resource from one of eight locations specifically designated by Congress for historic commemoration, resource preservation, or public education. These are the national park system, national historic landmarks, national monuments, national memorials, national marine sanctuaries, national cemeteries, sites contained on the World Heritage List, and museums.

Consistent with the definition in 18 U.S.C. § 668(a)(1), museums are defined broadly to include all organized and permanent institutions, with an essentially educational or aesthetic purpose, which exhibit tangible objects to the public on a regular schedule. Adoption of this definition reflects the Commission's recognition that cultural heritage resource crimes affecting institutions dedicated to the preservation of resources and associated knowledge, irrespective of the institution's size, ownership, or funding, deprive the public and future generations of the opportunity to learn and appreciate the richness of the nation's heritage. Similarly, this enhancement reflects the Commission's assessment that damage to the other

listed places degrades not only the resource itself but also the historical and cultural aspects which the resource commemorates.

An additional two level enhancement attaches to offense conduct that involves any of a number of specified resources, including human remains and other resources that have been designated by Congress for special treatment and heightened protection under federal law. Funerary objects, items of cultural patrimony, and sacred objects are included because they are domestic cultural heritage resources protected under NAGPRA. See 25 U.S.C. § 3001. Cultural property, designated archaeological and ethnological material, and pre-Columbian monumental and architectural sculpture and murals are included in the enhancement because these are cultural heritage resources of foreign provenance for which Congress has chosen, in the implementation of international treaties and bilateral agreements, to impose import restrictions. See 19 U.S.C. §§ 2092, 2606, and 2607.

This guideline also provides a two level enhancement at subsection (b)(4) if the offense was committed for pecuniary gain or otherwise involved a commercial purpose. This increase is based on a determination that offenders who are motivated by financial gain or other commercial incentive are more culpable than offenders who are motivated solely by their personal interest in possessing cultural heritage resources. Those motivated by financial gain contribute to illicit trafficking and support dealers and brokers who earn a livelihood from illegal activities. Mindful of INTERPOL's findings, as reported by the Department of Justice, that the annual dollar value of art and cultural property theft is exceeded only by trafficking in illicit narcotics, money laundering, and arms trafficking, the Commission seeks to ensure that the penalty structure adequately accounts for these increased harms.

This guideline also provides a two level enhancement at subsection (b)(5) if the offense involves a pattern of misconduct, and provides a definition of "pattern of misconduct" that is designed to interact with other requirements of the guidelines regarding relevant conduct and criminal history. "Pattern of misconduct" is defined as "two or more separate instances of offense conduct involving cultural heritage resources that did not occur during the course of the instant offense (i.e., that did not occur during the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct))". Accordingly, under this guideline, separate instances of offense conduct need not result in a criminal conviction or legal adjudication in order for this enhancement to apply. Separate instances of offense conduct involving cultural heritage resources that are included in the defendant's criminal history may also form the factual basis for the application of this enhancement. The Commission considers such increased punishment to be appropriate for offenders who repeatedly disregard cultural heritage resource laws and regulations and the social values underlying them. These repeat offenders cause serious harm, not only to the resources themselves, but to the nation and the individuals who treasure them.

This guideline also provides at subsection (b)(6) a two level enhancement and a minimum offense level of level 14 if a dangerous weapon, including a firearm, is brandished or its use threatened. This enhancement reflects the increased culpability of offenders who pose a threat to law enforcement officers and innocent passersby. Recognizing that there are legitimate uses in remote expanses of tribal and federal land for certain tools and firearms that may otherwise qualify as "dangerous weapons" under the guideline definitions, the Commission has limited the scope of this enhancement by requiring that the dangerous weapon or firearm be brandished or its use threatened, in order for increased punishment to attach under this provision.

In light of the increased potential for the symbols of our nation's heritage and culture to be targets of violent individuals, including terrorists, the Commission also has provided for increased punishment through a cross reference to §2K1.4 (Arson; Property Damage by Use of Explosives), if the offense involved arson or property damage by the use of any explosive, explosive material, or destructive devices, when the resulting offense level is greater under §2K1.4 than the offense level under this guideline.

This guideline also includes a special rule in the Commentary to address multiple counts of cultural heritage resource offenses, as well as multiple counts of conviction involving offenses under this and other guidelines. Consistent with the principles underlying the rules for grouping multiple counts of conviction in §3D1.2 (Groups of Closely Related Counts) and the unique concerns sought to be addressed by this amendment, the new guideline provides that multiple counts of cultural heritage resource offenses are to be grouped under §3D1.2(d). However, because the monetary harm is measured differently, a count of conviction for an offense sentenced under §2B1.5 may not be grouped under this provision with a conviction for an offense sentenced under a different guideline.

This guideline also invites an upward departure if the determined offense level substantially understates the seriousness of the cultural heritage resource offense. Two illustrations of such situations are given. Finally, this amendment provides a cross reference within §2B1.1. Theft, fraud, and property destruction offenses which also involve cultural heritage resources are cross referenced to the new guideline at §2B1.5 if the resulting offense level under it would be greater than under §2B1.1. When a case involving a cultural heritage resource is sentenced under §2B1.1, loss attributable to that cultural heritage resource is to be determined using the definition of "value of the cultural heritage resource" from §2B1.5.
The Commission recognizes that the full implementation of this new guideline for the most serious offenders often will be limited in its application because of the extremely low statutory maxima of some of the potentially applicable statutes, such as the criminal provisions of ARPA, NAGPRA, and 18 U.S.C. § 1163 (covering the theft of tribal property). Currently ARPA has either a one year or two year statutory maximum term of imprisonment for the first offense, depending on whether the value exceeds $500, and NAGPRA has a statutory maximum term of imprisonment of one year for the first offense irrespective of value. These statutes all have five year statutory maximum terms of imprisonment for second and subsequent offenses. Consequently, the statutory ceiling may limit the full range of proportionate guideline sentencing, but the Commission has promulgated this new guideline to cover the wide variety of potential offense conduct that can occur in connection with cultural heritage resources. The Commission has recommended to Congress that the statutory maximum terms of imprisonment for these offenses be raised appropriately.

Effective Date: The effective date of this amendment is November 1, 2002.

639. **Amendment:** The Commentary to §2B4.1 captioned "Statutory Provisions" is amended by striking "15 U.S.C. §§ 78dd-1, 78dd-2;".
The Commentary to §2B4.1 captioned "Application Notes" is amended in Note 1 by inserting ", foreign governments, or public international organizations" after "local government"; and by striking "governmental" and inserting "any such".

The Commentary to §2B4.1 captioned "Background" is amended in the sixth paragraph by striking "to violations of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 and 78dd-2, and".

The Commentary to §2C1.1 captioned "Statutory Provisions" is amended by inserting "15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3;" before "18 U.S.C.".

The Commentary to §2C1.1 captioned "Background" is amended by inserting after the ninth paragraph the following:

> " 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.".

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. § 78dd-1 by striking "2B4.1" and inserting "2C1.1";

in the line referenced to 15 U.S.C. § 78dd-2 by striking "2B4.1" and inserting "2C1.1";

by inserting after the line referenced to 15 U.S.C. § 78dd-2 following new line:

"15 U.S.C. § 78dd-3 2C1.1";

and n the line referenced to 15 U.S.C. § 78ff by striking "2B4.1" and inserting "2C1.1".

Reason for Amendment: This amendment changes the Statutory Index reference for violations of section 30A of the Securities Exchange Act of 1934 (15 U.S.C. § 78dd-1) and sections 104 and 104A of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§ 78dd-2 and 78dd-3), from §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right).

This change is made because violations of 15 U.S.C. §§ 78dd-1 through 78dd-3 involve public corruption of foreign officials and are, therefore, more akin to public corruption cases than commercial bribery cases. Violations of the 15 U.S.C. §§ 78dd-1 through 78dd-3 typically involve payments to foreign officials for the purposes of influencing their official acts or decisions, inducing them to do or omit an act in violation of their lawful duty, inducing them to influence a foreign government, or securing any improper advantage. These cases also involve payments to foreign political parties or officials, candidates for foreign political office, or persons who act as conduits to these individuals. Most cases prosecuted under 15 U.S.C. §§ 78dd-1 through 78dd-3 involve an intent to influence governmental action.

Conversely, commercial bribery cases sentenced under §2B4.1 often involve kickback and gratuity payments made to bank officials or others who accept payments in return for influence or some type of exchange from the other person. These cases typically do not involve bribery of public or governmental officials and indeed, the Commentary to the guideline makes this clear in Application Note 1.

This change also is made to comply with the mandate of a mulitlateral treaty entered into by the United States, the Convention on Combating Bribery of Foreign Public Officials in

International Business Transactions. In part, this Convention requires signatory countries to impose comparable sentences in both domestic and foreign bribery cases. Domestic public bribery cases are referenced to §2C1.1. To comply with the treaty, offenses committed in violation of 15 U.S.C. §§ 78dd-1 through 78dd-3 are now similarly referenced to §2C1.1.

Effective Date: The effective date of this amendment is November 1, 2002.

640. **Amendment:** Section 2D1.1(a)(3) is amended by striking "below." and inserting ", 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.".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 11 in the "TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE" by striking "MDA* 100 mg" and inserting the following:

"MDA	250 mg
MDMA	250 mg".

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

"21. Applicability of Subsection (b)(6).—The applicability of subsection (b)(6) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(6) applies.".

Section 2D1.8(a)(2) is amended by striking "16" and inserting "26".

The Commentary to §3B1.2 captioned "Application Notes" is amended by adding at the end the following:

"6. Application of Role Adjustment in Certain Drug Cases.—In a case in which the court applied §2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(3), the court also shall apply the appropriate adjustment under this guideline.".

Reason for Amendment: This amendment responds to concerns that the guidelines pertaining to drug offenses do not satisfactorily reflect the culpability of certain offenders. The amendment also clarifies the operation of certain provisions in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

First, the amendment increases the maximum base offense level under subsection (a)(2) of §2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy) from level 16 to level 26. This part of the amendment responds to concerns that §2D1.8 did not adequately punish defendants convicted under 21 U.S.C. § 856, pertaining to the establishment of

manufacturing operations. That statute originally was enacted to target defendants who maintain, manage, or control so-called "crack houses" and more recently has been applied to defendants who facilitate drug use at commercial dance clubs, frequently called "raves".

Prior to this amendment, §2D1.8(a)(2) provided a maximum base offense level of level 16 for defendants convicted under 21 U.S.C. § 856 who had no participation in the underlying controlled substance offense other than allowing use of their premises. The Commission determined that the maximum base offense level of level 16 did not adequately reflect the culpability of offenders who permit distribution of drugs in quantities that under §2D1.1 result in offense levels higher than level 16. Such offenders knowingly and intentionally facilitate and profit, at least indirectly, from the trafficking of illegal drugs, even though they may not participate directly in the underlying controlled substance offense.

Second, the amendment modifies §2D1.1(a)(3) to provide a maximum base offense level of level 30 if the defendant receives an adjustment under §3B1.2 (Mitigating Role). The maximum base offense level somewhat limits the sentencing impact of drug quantity for offenders who perform relatively low level trafficking functions, have little authority in the drug trafficking organization, and have a lower degree of individual culpability (e.g., "mules" or "couriers" whose most serious trafficking function is transporting drugs and who qualify for a mitigating role adjustment).

This part of the amendment responds to concerns that base offense levels derived from the Drug Quantity Table in §2D1.1 overstate the culpability of certain drug offenders who meet the criteria for a mitigating role adjustment under §3B1.2. The Commission determined that, ordinarily, a maximum base offense level of level 30 adequately reflects the culpability of a defendant who qualifies for a mitigating role adjustment. Other aggravating adjustments in the trafficking guideline (e.g., the weapon enhancement at §2D1.1(b)(1)), or other general, aggravating adjustments in Chapter Three (Adjustments), may increase the offense level above level 30. The maximum base offense level is expected to apply narrowly, affecting approximately six percent of all drug trafficking offenders.

The amendment also adds an application note in §3B1.2 that instructs the court to apply the appropriate adjustment under that guideline in a case in which the maximum base offense level in §2D1.1(a)(3) operates to reduce the defendant's base offense level under §2D1.1.

Third, the amendment modifies the Typical Weight Per Unit (Dose, Pill, or Capsule) Table in the commentary to §2D1.1 to reflect more accurately the type and weight of ecstasy pills typically trafficked and consumed. Specifically, the amendment adds a reference for MDMA (3,4-methylenedioxymethamphetamine) in the Typical Weight Per Unit Table and lists the typical weight as 250 milligrams per pill. The amendment also revises the typical weight for MDA to 250 milligrams of the mixture or substance containing the controlled substance. Prior to this amendment, the Table listed the typical weight of MDA as 100 milligrams of the actual controlled substance.

Information provided by the Drug Enforcement Administration indicates that ecstasy usually is trafficked and used as MDMA in pills weighing approximately 250 to 350 milligrams.

The absence of MDMA from the Typical Weight Per Unit (Dose, Pill, or Capsule) Table and the listing for MDA of an estimate of the actual weight of the controlled substance created

the potential for misapplying the MDA estimate in a case in which MDMA is involved, which could result in underpunishment in some ecstasy cases. This part of the amendment thus promotes uniform application of §2D1.1 for offenses involving ecstasy by adding a reference for MDMA and revising the estimated weight for MDA.

Fourth, the amendment addresses two application concerns regarding the two level reduction under §2D1.1(b)(6) for defendants who meet the criteria set forth in §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases). The amendment provides an application note that clarifies that the two level reduction under §2D1.1(b)(6) does not depend on whether the defendant is convicted under a statute that carries a mandatory minimum term of imprisonment. The application note also clarifies that §5C1.2(b), which provides a minimum offense level of level 17 for certain offenders, is not applicable to §2D1.1(b)(6).

Effective Date: The effective date of this amendment is November 1, 2002.

641. Amendment: Chapter Two is amended in the heading of Part G by striking "PROSTITUTION" and inserting "COMMERCIAL SEX ACTS".

Chapter Two, Part G is amended in the heading of Subpart 1 by striking "PROSTITUTION" and inserting "A COMMERCIAL SEX ACT".

Section 2G1.1 is amended in the heading by striking "Prostitution" and inserting "A Commercial Sex Act".

Section 2G1.1(b)(1) is amended by striking "prostitution" and inserting "a commercial sex act"; by inserting "fraud," after "force,"; and by striking "by threats or drugs or in any manner".

Section 2G1.1(b)(4) is amended by striking "prostitution" each place it appears and inserting "a commercial sex act".

Section 2G1.1(b)(5) is amended by striking "prostitution" and inserting "a commercial sex act".

Section 2G1.1(c)(3) is amended by striking "prostitution" and inserting "a commercial sex act".

Section 2G1.1(d)(1) is amended by striking "prostitution" and inserting "a commercial sex act".

The Commentary to §2G1.1 captioned "Application Notes" is amended in Note 1 by inserting after "For purposes of this guideline—" the following paragraph:

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

and by striking the last two paragraphs as follows:

> "'Promoting prostitution' means persuading, inducing, enticing, or coercing a person to engage in prostitution, or to travel to engage in, prostitution.

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

and inserting the following:

"'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.".

The Commentary to §2G1.1 captioned "Application Notes" is amended in Note 2 by inserting "fraud," after "force,"; and by striking "prostitution" and inserting "commercial sex act".

The Commentary to §2G1.1 captioned "Application Notes" is amended in Notes 3, 4, 7, 8, and 11 by striking "prostitution" each place it appears and inserting "a commercial sex act".

The Commentary to §2G1.1 captioned "Application Notes" is amended in Note 10 by striking "kidnaping" each place it appears and inserting "kidnapping".

The Commentary to §2G1.1 captioned "Application Notes" is amended by striking Note 12 as follows:

"12. Upward Departure Provisions.—An upward departure may be warranted in either of the following circumstances:

(A) The defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years.

(B) The offense involved more than 10 victims.",

and inserting the following:

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

Reason for Amendment: This amendment ensures that appropriately severe sentences for sex trafficking crimes apply to commercial sex acts such as production of child pornography, in addition to prostitution, and also targets offenders who use fraud to entrap victims. It makes several changes to §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) to address more adequately the portion of section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000 (the "Act"), Pub. L. 106–386, pertaining to the new offense

at 18 U.S.C. § 1591, which prohibits knowingly transporting or harboring any person, or benefitting from such transporting or harboring, knowing either that force, fraud, or coercion will be used to cause that person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be forced to engage in a commercial sex act.

In response to the Act, the Commission in 2001 promulgated an amendment that referenced 18 U.S.C. § 1591 to §§2G1.1 and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material) and provided an encouraged upward departure in those guidelines to address cases in which (1) the defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years; or (2) the offense involved more than 10 victims. (See Supplement to Appendix C, Amendment 612, effective May 1, 2001, and Amendment 627, effective November 1, 2001).

This amendment makes three substantive changes to §2G1.1. First, this amendment broadens the conduct covered by the guideline beyond prostitution to encompass all commercial sex acts, consistent with the scope of the Act. Second, this amendment expands the "force or coercion" prong of §2G1.1(b)(1) to also cover offenses involving fraud. This change addresses the increased punishment provided by 18 U.S.C. § 1591 for offenses effected by force, fraud, or coercion. Third, the amendment deletes the portion of the encouraged upward departure provision in §2G1.1 pertaining to the age of the victim because such conduct already is taken into account by that guideline.

Effective Date: The effective date of this amendment is November 1, 2002.

642. Amendment: Section 2K2.4 is amended by redesignating subsection (b) as subsection (d); and by striking subsection (a) as follows:

"(a) If the defendant, whether or not convicted of another crime, was convicted of violating:

(1) Section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute.

(2) Section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute.",

and inserting the following:

"(a) If the defendant, whether or not convicted of another crime, was convicted of violating section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

(b) Except as provided in subsection (c), if the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.

(c) If the defendant (1) was convicted of violating section 924(c) or section 929(a) of title 18, United States Code; and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). Except for §§3E1.1 (Acceptance of Responsibility), 4B1.1, and 4B1.2 (Definitions of Terms Used in Section 4B1.1), Chapters Three and Four shall not apply to that count of conviction.".

The Commentary to §2K2.4 captioned "Application Notes" is amended by redesignating Notes 2 through 5 as Notes 4 through 7, respectively; and by striking Note 1 as follows:

"1. Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Subsection (a) reflects this distinction. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 844(h) is the term required by the statute, and the guideline sentence for a defendant convicted under 18 U.S.C. § 924(c) or § 929(a) is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 844(h), 924(c), and 929(a) requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

A sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history, particularly in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense and has at least two prior felony convictions for a crime of violence or a controlled substance offense that would have resulted in application of §4B1.1 (Career Offender) if that guideline applied to these offenses. See Application Note 3.",

and inserting the following:

"1. Application of Subsection (a).—Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 844(h) is the term required by that statute. Section 844(h) of title 18, United State Code, also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

2. Application of Subsection (b).—

(A) In General.—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. § 924(c) or § 929(a), the guideline sentence is the minimum term required

by the relevant statute. Each of 18 U.S.C. §§ 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.

(B) Upward Departure Provision.—In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense but is not determined to be a career offender under §4B1.1.

3. Application of Subsection (c).—In a case in which the defendant (A) was convicted of violating 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a); and (B) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction).".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4, as redesignated by this amendment, by inserting "Weapon Enhancement.—" before "If a sentence under"; and by inserting in the last paragraph "in which the defendant is determined not to be a career offender" after "In a few cases".

The Commentary to §2K2.4 captioned "Application Notes" is amended by striking Note 5, as redesignated by this amendment, as follows:

"5. Do not apply Chapter Three (Adjustments) and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of these 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).",

and inserting the following:

"5. Chapters Three and Four.—Except for those cases covered by subsection (c), do not apply Chapter Three (Adjustments) and Chapter 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. In determining the guideline sentence for those cases covered by subsection (c): (A) the adjustment in §3E1.1 (Acceptance of Responsibility) may apply, as provided in §4B1.1(c); and

(B) no other adjustments in Chapter Three and no provisions of Chapter Four, other than §§4B1.1 and 4B1.2, shall apply.".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 6, as redesignated by this amendment, by inserting "Terms of Supervised Release.—" before "Imposition of a term".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 7, as redesignated by this amendment, by inserting "Fines.—" before "Subsection"; by striking "(b)" and inserting "(d)"; and by striking "Note 2" and inserting "Note 4".

Section 4B1.1 is amended by striking the following:

"A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.",

and inserting the following:

"(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

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

Section 4B1.1 is amended by adding after "corresponding to that adjustment." the following:

"(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

(1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

(2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—

(A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

(3) Career Offender Table for 18 U.S.C. § 924(c) or § 929(a) Offenders

§3E1.1 Reduction	Guideline Range for the 18 U.S.C. § 924(c) or § 929(a) Count(s)
No reduction	360-life
2-level reduction	292-365
3-level reduction	262-327.".

The Commentary to §4B1.1 captioned "Application Notes" is amended by adding at the end the following:

"3. Application of Subsection (c).—

(A) In General.—Subsection (c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1(a).

(B) Subsection (c)(2).—To determine the greater guideline range under subsection (c)(2), the court shall use the guideline range with the highest minimum term of imprisonment.

(C) 'Otherwise Applicable Guideline Range'.—For purposes of subsection (c)(2)(A), 'otherwise applicable guideline range' for the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) is determined as follows:

(i) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) does not qualify the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined using: (I) the Chapter Two and Three offense level for that count(s); and (II) the appropriate criminal history category determined under §§4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).

(ii) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) qualifies the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined for that count(s) under §4B1.1(a) and (b).

(D) Imposition of Consecutive Term of Imprisonment.—In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction).

(E) Example.—The following example illustrates the application of subsection (c)(2) in a multiple count situation:

The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(B) (5 year mandatory minimum, 40 year statutory maximum). Applying subsection (c)(2)(A), the court determines that the drug count (without regard to the 18 U.S.C. § 924(c) count) qualifies the defendant as a career offender under §4B1.1(a). Under §4B1.1(a), the otherwise applicable guideline range for the drug count is 188-235 months (using offense level 34 (because the statutory maximum for the drug count is 40 years), minus 3 levels for acceptance of responsibility, and criminal history category VI). The court adds 60 months (the minimum required by 18 U.S.C. § 924(c)) to the minimum and the maximum of that range, resulting in a guideline range of 248-295 months. Applying subsection (c)(2)(B), the court then determines the career offender guideline range from the table in subsection (c)(3) is 262-327 months. The range with the greatest minimum, 262-327 months, is used to impose the sentence in accordance with §5G1.2(e).".

The Commentary to §4B1.1 captioned "Background" is amended by adding at the end the following:

" Subsection (c) provides rules for determining the sentence for career offenders who have been convicted of 18 U.S.C. § 924(c) or § 929(a). The Career Offender Table in subsection (c)(3) provides a sentence at or near the statutory maximum for these offenders by using guideline ranges that correspond to criminal history category VI and offense level 37 (assuming §3E.1.1 (Acceptance of Responsibility) does not apply), offense level 35 (assuming a 2-level reduction under §3E.1.1 applies), and offense level 34 (assuming a 3-level reduction under §3E1.1 applies).".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 by striking the following:

"A prior conviction for violating 18 U.S.C. § 924(c) or § 929(a) is a 'prior felony conviction' for purposes of applying §4B1.1 (Career Offender) if the prior offense

of conviction established that the underlying offense was a 'crime of violence' or 'controlled substance offense.' (Note that if the defendant also was convicted of the underlying offense, the two convictions will be treated as related cases under §4A1.2 (Definitions and Instruction for Computing Criminal History)).",

and inserting the following:

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

The Commentary to §4B1.2 captioned "Application Notes" is amended by striking Note 2 as follows:

"2. The guideline sentence for a conviction under 18 U.S.C. § 924(c) or § 929(a) is determined only by the statute and is imposed independently of any other sentence. See §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), 3D1.1 (Procedure for Determining Offense Level on Multiple Counts), and subsection (a) of §5G1.2 (Sentencing on Multiple Counts of Conviction). Accordingly, do not apply this guideline if the only offense of conviction is for violating 18 U.S.C. § 924(c) or § 929(a). For provisions pertaining to an upward departure from the guideline sentence for a conviction under 18 U.S.C. § 924(c) or § 929(a), see Application Note 1 of §2K2.4.";

and by redesignating Notes 3 and 4 as Notes 2 and 3, respectively.

Section 5G1.2(a) is amended by striking "The" and inserting "Except as provided in subsection (e), the"; and by inserting a comma after "other term of imprisonment".

Section 5G1.2 is amended by adding after subsection (d) the following:

"(e) In a case in which subsection (c) of §4B1.1 (Career Offender) applies, to the extent possible, the total punishment is to be apportioned among the counts of conviction, except that (1) the sentence to be imposed on a count requiring a minimum term of imprisonment shall be at least the minimum required by statute; and (2) the sentence to be imposed on the 18 U.S.C. § 924(c) or § 929(a) count shall be imposed to run consecutively to any other count.".

The Commentary to §5G1.2 is amended by striking the first paragraph as follows:

"This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ("total punishment") is determined by the adjusted combined offense level. To the extent possible, the total punishment is to be imposed on each count.

Sentences on all counts run concurrently, except as required to achieve the total sentence, or as required by law.",

and inserting the following:

"Application Notes:

1. In General.—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ('total punishment') is determined by the court after determining the adjusted combined offense level and the Criminal History Category. Except as otherwise required by subsection (e) or any other law, the total punishment is to be imposed on each count and the sentences on all counts are to be imposed to run concurrently to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.";

by indenting the second and third paragraphs 2 ems from the left margin; and by striking the fourth paragraph as follows:

" Subsection (a) applies if a 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. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, to run consecutively to any other term of imprisonment). The term of years to be imposed consecutively is determined by the statute of conviction, and is independent of a guideline sentence on any other count. See, e.g., Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. 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). Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.",

and inserting the following:

"2. Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by Subsection (e)).—Subsection (a) applies if a 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. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment). Except for certain career offender situations in which subsection (c) of §4B1.1 (Career Offender) applies, the term of years to be

imposed consecutively is the minimum required by the statute of conviction and is independent of the guideline sentence on any other count. See, e.g., the Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding the determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. 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). Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.

3. Career Offenders Covered under Subsection (e).—

(A) Imposing Sentence.—The sentence imposed for a conviction under 18 U.S.C. § 924(c) or § 929(a) shall, under that statute, consist of a minimum term of imprisonment imposed to run consecutively to the sentence on any other count. Subsection (e) requires that the total punishment determined under §4B1.1(c) be apportioned among all the counts of conviction. In most cases this can be achieved by imposing the statutory minimum term of imprisonment on the 18 U.S.C. § 924(c) or § 929(a) count, subtracting that minimum term of imprisonment from the total punishment determined under §4B1.1(c), and then imposing the balance of the total punishment on the other counts of conviction. In some cases covered by subsection (e), a consecutive term of imprisonment longer than the minimum required by 18 U.S.C. § 924(c) or § 929(a) will be necessary in order both to achieve the total punishment determined by the court and to comply with the applicable statutory requirements.

(B) Examples.—The following examples illustrate the application of subsection (e) in a multiple count situation:

(i) The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 300 months is appropriate (applicable guideline range of 262-327). The court then imposes a sentence of 60 months on the 18 U.S.C. § 924(c) count, subtracts that 60 months from the total punishment of 300 months and imposes the remainder of 240 months on the 21 U.S.C. § 841 count. As required by statute, the sentence on the 18 U.S.C. § 924(c) count is imposed to run consecutively.

(ii) The defendant is convicted of one count of 18 U.S.C. § 924(c) (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 327 months is appropriate (applicable guideline range of 262-327). The court then imposes a sentence of 240 months on the 21 U.S.C. § 841 count and a sentence of 87 months on the 18 U.S.C. § 924(c) count to run consecutively to the sentence on the 21 U.S.C. § 841 count.

(iii) The defendant is convicted of two counts of 18 U.S.C. § 924(c) (5 year mandatory minimum on first count, 25 year mandatory minimum on second count) and one count of violating 18 U.S.C. § 2113(a) (20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 400 months is appropriate (applicable guideline range of 360-life). The court then imposes (I) a sentence of 60 months on the first 18 U.S.C. § 924(c) count; (II) a sentence of 300 months on the second 18 U.S.C. § 924(c) count; and (III) a sentence of 40 months on the 18 U.S.C. § 2113(a) count. The sentence on each count is imposed to run consecutively to the other counts.".

Reason for Amendment: This amendment is intended to comply with the statutory directive in 28 U.S.C. § 994(h) by providing a guideline sentence at or near the statutory maximum of life imprisonment for cases in which certain serious firearm offenses establish the defendant as a career offender.

This amendment provides special rules in §§4B1.1 (Career Offender) and 5G1.2 (Sentencing on Multiple Counts of Conviction) for determining and imposing a guideline sentence in a case in which the defendant is convicted of an offense under 18 U.S.C. § 924(c) or § 929(a) and, as a result of that conviction, is determined to be a career offender under §§4B1.1 and 4B1.2 (Definitions of Terms Used in Section 4B1.1). The amendment supplements Amendment 600 (effective November 1, 2000) in which the Commission first addressed implementation of the statutory changes in penalties for 18 U.S.C. §§ 924(c) and 929(a) offenses made by the Act to Throttle the Criminal Use of Guns, Pub. L. 105–386. At that time, the Commission deferred addressing the more complicated issues of whether convictions under 18 U.S.C. §§ 924(c) and 929(a) can qualify as instant offenses for purposes of §4B1.1, and if they do so qualify, how the sentence would be imposed. Promulgation of this amendment reflects the Commission's decision that the amendment, while somewhat complex, is necessary to comply appropriately with 28 U.S.C. § 994(h).

Operationally, this amendment achieves two goals. First, it permits 18 U.S.C. § 924(c) or § 929(a) offenses, whether as the instant or prior offense of conviction, to qualify for career offender purposes. Second, it ensures that, in a case in which such an instant offense establishes the defendant as a career offender, the resulting guideline sentence is determined under §4B1.1 using a count of conviction that has a statutory maximum of life imprisonment. The special rule necessarily is somewhat more complex because of the need to address certain anomalies that infrequently would occur in the absence of such a rule, i.e., that a very

serious offender could receive a lower sentence by virtue of the application of §4B1.1 than that which would otherwise be received by imposing the statutorily required minimum sentence consecutively to the otherwise applicable guideline range.

This amendment does not change the current guideline rules precluding application of guideline weapon enhancements in a case in which the defendant is convicted of a 18 U.S.C. § 924(c) or § 929(a) offense. Furthermore, under this amendment, in a case in which the defendant is convicted of a 18 U.S.C. § 924(c) or § 929(a) offense but that offense, together with any prior convictions, does not establish the defendant as a career offender, the current guideline rules for sentencing on that 18 U.S.C. § 924(c) or § 929(a) count continue to apply. Accordingly, under §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), the guideline sentence on that count is the statutory minimum, and that sentence is imposed independently and consecutively to the sentence on other counts. No adjustments in Chapter Three (Adjustments) or Chapter Four (Criminal History and Criminal Livelihood) apply to adjust the guideline sentence for that 18 U.S.C. § 924(c) or § 929(a) count.

However, under this amendment, in a case in which the 18 U.S.C. § 924(c) or § 929(a) count establishes the defendant as a career offender, which the court will determine under §§4B1.1 and 4B1.2, new special rules and instructions will apply. To determine the guideline sentence on the 18 U.S.C. § 924(c) or § 929(a) count, the court moves directly from §2K2.4 to §4B1.1 and applies the new special instruction therein. New special instructions for imposing sentence in these cases also have been added to §5G1.2.

Effective Date: The effective date of this amendment is November 1, 2002.

643. Amendment: Chapter Three, Part A, is amended by striking §3A1.2 as follows:

"§3A1.2. Official Victim

If --

(a) the victim was a government officer or employee; a former government officer or employee; or a member of the immediate family of any of the above, and the offense of conviction was motivated by such status; or

(b) during the course of the offense or immediate flight therefrom, the defendant or a person for whose conduct the defendant is otherwise accountable, knowing or having reasonable cause to believe that a person was a law enforcement or corrections officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury,

increase by 3 levels.",

and inserting the following:

"§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.".

The Commentary to §3A1.2 captioned "Application Notes" is amended in Note 1 by inserting "Applicability to Certain Victims.—" before "This guideline applies".

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

"2. 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 by redesignating Notes 3 through 6 as Notes 2 through 5, respectively.

The Commentary to §3A1.2 captioned "Application Notes" is amended in Note 2, as redesignated by this amendment, by inserting "Nonapplicability in Case of Incorporation of Factor in Chapter Two.—" before "Do not apply".

The Commentary to §3A1.2 captioned "Application Notes" is amended in Note 3, as redesignated by this amendment, by inserting "Application of Subsection (a).—" before "'Motivated by such"; and by striking "subdivision" and inserting "subsection".

The Commentary to §3A1.2 captioned "Application Notes" is amended by striking Note 4, as redesignated by this amendment, as follows:

"4. Subdivision (b) applies in circumstances tantamount to aggravated assault

against a law enforcement or corrections officer, committed in the course of, or in immediate flight following, another offense, such as bank robbery. While this subdivision may apply in connection with a variety of offenses that are not by nature targeted against official victims, its applicability is limited to assaultive conduct against law enforcement or corrections officers that is sufficiently serious to create at least a 'substantial risk of serious bodily injury' and that is proximate in time to the commission of the offense.",

and inserting the following:

"4. Application of Subsection (b).—

(A) In General.—Subsection (b) applies in circumstances tantamount to aggravated assault (i) against a law enforcement officer, committed in the course of, or in immediate flight following, another offense; or (ii) against a prison 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. While subsection (b) may apply in connection with a variety of offenses that are not by nature targeted against official victims, its applicability is limited to assaultive conduct against such official victims that is sufficiently serious to create at least a 'substantial risk of serious bodily injury'.

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

'Custody and control' includes 'non-secure custody', i.e., custody with no significant physical restraint. For example, a defendant is in the custody and control of a prison or other correctional facility if the defendant (i) is on a work detail outside the security perimeter of the prison or correctional facility; (ii) is physically away from the prison or correctional facility while on a pass or furlough; or (iii) is in custody at a community corrections center, community treatment center, 'halfway house', or similar facility. The defendant also shall be deemed to be in the custody and control of a prison or other correctional facility while the defendant is in the status of having escaped from that prison or correctional facility.

'Prison official' means any individual (including a director, officer, employee, independent contractor, or volunteer, but not including an inmate) authorized to act on behalf of a prison or correctional facility. For example, this enhancement would be applicable to any of the following: (i) an individual employed by a prison as a corrections officer; (ii) an individual employed by a prison as a work detail supervisor; and (iii) a nurse who, under contract, provides medical services to prisoners in a prison health facility.

'Substantial risk of serious bodily injury' includes any more serious

injury that was risked, as well as actual serious bodily injury (or more serious injury) if it occurs.".

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

"5. The phrase 'substantial risk of serious bodily injury' in subdivision (b) is a threshold level of harm that includes any more serious injury that was risked, as well as actual serious bodily injury (or more serious harm) if it occurs.",

and inserting the following:

"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.".

Reason for Amendment: This amendment expands the category of persons who may be considered official victims for purposes of triggering the two level enhancement at §3A1.2 (Official Victim). This amendment is promulgated in response to concerns expressed by the Bureau of Prisons regarding United States v. Walker, 202 F.3d 181 (3d Cir. 2000). Walker held that an individual employed by the prison to supervise food service functions who was attacked by an inmate subordinate was not a "corrections officer" within the scope of §3A1.2. The Bureau of Prisons advised the Commission that the Bureau uses a variety of employees, contractors, and volunteers to supervise inmates and that maintenance of a safe and stable institutional environment is fostered by knowledge on the part of inmates that anyone in prison employment or performing an authorized role within a prison is afforded the protection of §3A1.2. In accord with the Bureau's recommendation, the amendment includes a broad definition of "prison official" to include prison employees, as well as independent contractors and volunteers on prison premises with official authorization, but does not include inmates.

Effective Date: The effective date of this amendment is November 1, 2002.

644. Amendment: Section 5B1.3(a) is amended by striking the period at the end of subdivision (9) and inserting a semicolon; and by adding after subdivision (9) the following:

"(10) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).".

Section 5D1.3(a) is amended by striking the period at the end of subdivision (7) and inserting a semicolon; and by adding after subdivision (7) the following:

"(8) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA

Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).".

Reason for Amendment: This amendment adds a mandatory condition to §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) that the defendant provide a DNA sample if the defendant is required to do so by the DNA Analysis Backlog Elimination Act of 2000, Pub. L. 106–546. Pursuant to section 3 of the Act, a defendant is required to provide a DNA sample if the defendant is convicted of certain offenses (e.g., murder, kidnapping).

Effective Date: The effective date of this amendment is November 1, 2002.

645. Amendment: The Commentary to §5G1.3 captioned "Application Notes" is amended by adding at the end the following:

"7. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if subsection (b) would have applied to that term of imprisonment had the term been undischarged. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.".

Reason for Amendment: This amendment modifies §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) to include certain discharged terms of imprisonment. Specifically, the amendment adds commentary to §5G1.3 to provide that courts are not prohibited from considering a downward departure in a case in which §5G1.3(b) would have applied if the term of imprisonment had not been discharged. In the case of undischarged terms of imprisonment, §5G1.3(b) currently authorizes a court to adjust the sentence if the conduct underlying the undischarged term of imprisonment has been fully taken into account in the offense level for the instant federal offense. See Application Note 2 of the Commentary to §5G1.3. By adding the new commentary, the Commission makes clear that discharged terms of imprisonment may merit a downward departure for a similar reason. The amendment thereby addresses a circuit conflict regarding the propriety of a downward departure under such circumstances. Compare, e.g., United States v. O'Hagan, 139 F.3d 641, 657 (8th Cir. 1998) (holding that a sentencing court could downwardly depart to adjust for time served on a discharged state sentence); United States v. Blackwell, 49 F.3d 1232, 1241-42 (7th Cir. 1995) (same) with United States v. McHan, 101 F.3d 1027, 1040 (4th Cir. 1996) (holding that downward departure to allow an adjustment for a discharged term was based on an error of law and therefore an abuse of discretion), cert. denied, 520 U.S. 1281 (1997).

Effective Date: The effective date of this amendment is November 1, 2002.

646. Amendment: The Commentary to §2B1.1 captioned "Application Notes" is amended in subdivision (A) of Note 7 by striking "18 U.S.C. 1028(d)(3)" and inserting "18 U.S.C. 1028(d)(4)".

Section 2B4.1 is amended by striking subsection (b)(2) as follows:

"(2) If the offense --

(A) substantially jeopardized the safety and soundness of a

financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.",

and inserting the following:

"(2) (Apply the greater) If—

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or

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

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

The Commentary to §2B4.1 captioned "Application Notes" is amended by striking Notes 4 and 5 as follows:

"4. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

5. 'The defendant derived more than $1,000,000 in gross receipts from the offense,' as used in subsection (b)(2)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000. 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).",

and inserting the following:

"4. Gross Receipts Enhancement under Subsection (b)(2)(A).—

(A) In General.—For purposes of subsection (b)(2)(A), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.

(B) Definition.—'Gross receipts from the offense' includes all

property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

5. Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(2)(B).—For purposes of subsection (b)(2)(B), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of any of subdivisions (A) through (D) of this note.".

The Commentary to §2D1.9 captioned "Statutory Provision" is amended by striking "(e)" and inserting "(d)".

Section 2D1.11(a) is amended by striking "below" and inserting "or (e), as appropriate".

Section 2D1.11(e) is amended in Note (A) of the Notes following the "CHEMICAL QUANTITY TABLE" by striking "of this guideline" and inserting "or (e) of this guideline, as appropriate".

The Commentary to §2D1.11 captioned "Statutory Provisions" is amended by striking "841(d)(1)" and inserting "841(c)(1)"; and by striking "(g)(1)" and inserting "(f)(1)".

The Commentary to §2D1.13 captioned "Statutory Provisions" is amended by striking "841(d)(3)" and inserting "841(c)(3)"; and by striking "(g)(1)" and inserting "(f)(1)".

The Commentary to §2N2.1 captioned "Application Notes" is amended in Note 2 by striking "theft, property destruction, or".

Section 2Q1.6(a)(3) is amended by inserting "or" after "(Aggravated Assault);".

Section 2T1.1(c) is amended in Note (D) of subdivision (1) by striking "subdivisions" and inserting "subdivision".

Amendment 568 (effective November 1, 1997) is repromulgated with the following changes:

Section 4B1.4(b)(3)(A) is amended to read as follows:

"(3) (A) 34, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or";

and §4B1.4(c)(2) is amended to read as follows:

"(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or".

Section 5C1.1(c)(2) is amended by inserting an asterisk after "confinement".

Section 5C1.1(d)(2) is amended by inserting an asterisk after "confinement".

The Commentary to §5C1.1 captioned "Application Notes" is amended in the first sentence of subdivision (C) of Note 3 by inserting an asterisk after "confinement".

The Commentary to §5C1.1 captioned "Application Notes" is amended in the first sentence of subdivision (B) of Note 4 by inserting an asterisk after "confinement".

The Commentary to §5C1.1 captioned "Application Notes" is amended in the first sentence of Note 6 by inserting an asterisk after "confinement".

The Commentary to §5C1.1 captioned "Application Notes" is amended by inserting after Application Note 8 the following:

"*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 5D1.2(c) is amended by inserting "(Policy Statement)" before "If the".

Section 5D1.3 is amended by inserting an asterisk after "Confinement" in the heading of subsection (e)(1); and by inserting after subsection (e)(1) the following:

"*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 §5E1.2 captioned "Application Notes" is amended in Note 5 by inserting "and" before "42 U.S.C. § 6928(d)"; and by striking "; and 42 U.S.C. § 7413(c), which authorizes a fine of up to $25,000 per day for violations of the Clean Air Act".

Section 5F1.1 is amended by striking "release." and inserting the following:

"release.*

*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 §5F1.5 captioned "Background" is amended in the first paragraph by striking "(b)(6)" each place it appears and inserting "(b)(5)".

The Commentary to §5F1.5 captioned "Background" is amended by striking the last paragraph as follows:

> " The appellate review provisions permit a defendant to challenge the imposition of a probation condition under 18 U.S.C. § 3563(b)(6) if 'the sentence includes . . . a more limiting condition of probation or supervised release under section 3563(b)(6) . . . than the maximum established in the guideline.' 18 U.S.C. § 3742(a)(3)(A). The government may appeal if the sentence includes a 'less limiting' condition of probation than the minimum established in the guideline. 18 U.S.C. § 3742(b)(3)(A).",

and inserting the following:

> " The appellate review provisions permit a defendant to challenge the imposition of a probation condition under 18 U.S.C. § 3563(b)(5) if the sentence includes a more limiting condition of probation or supervised release than the maximum established in the guideline. See 18 U.S.C. § 3742(a)(3). The government may appeal if the sentence includes a less limiting condition of probation than the minimum established in the guideline. See 18 U.S.C. § 3742(b)(3).".

The Commentary to §5F1.7 is amended in the first paragraph by inserting "Background:" before "Section 4046"; and by striking "Title" and inserting "title".

Chapter Seven, Part A, Subpart 2 is amended in the second paragraph of subdivision (b) by striking "intermittent confinement," and inserting "residency in, or participation in the program of, a community corrections facility,*"; and by inserting after subdivision (b) the following:

> *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 in Note 5 by striking "(11). Intermittent confinement is not authorized as a condition of supervised release. 18 U.S.C. § 3583(d)." and inserting the following:

"(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.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 16 U.S.C. § 1417(a)(5),(6),(b)(2) the following new line:

"16 U.S.C. § 1437(c) 2A2.4";

by inserting after the line referenced to 18 U.S.C. § 2244 the following new line:

"18 U.S.C. § 2245 2A1.1";

in the line referenced to 21 U.S.C. § 841(d)(1),(2) by striking "(d)" and inserting "(c)";

in the line referenced to 21 U.S.C. § 841(d)(3) by striking "(d)" and inserting "(c)";

in the line referenced to 21 U.S.C. § 841(e) by striking "(e)" and inserting "(d)";

in the line referenced to 21 U.S.C. § 841(g)(1) by striking "(g)" and inserting "(f)";

by inserting after the line referenced to 42 U.S.C. § 5157(a) the following new line:

"42 U.S.C. § 5409 2N2.1"; and

by inserting after the line referenced to 42 U.S.C. § 9603(d) the following new line:

"42 U.S.C. § 14905 2B1.1".

Reason for Amendment: This thirteen-part amendment makes several technical and conforming changes to various guideline provisions.

First, the amendment conforms the language concerning offenses that "affected a financial institution" in subsection (b)(2) of §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) with subsection (b)(12) of §2B1.1 (Theft, Property Destruction, and Fraud).

Second, the amendment: (1) updates statutory references in §§2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy), 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), and 2D1.13 (Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements; Presenting False or Fraudulent Identification to Obtain a Listed Chemical; Attempt or Conspiracy) and Appendix A (Statutory Index) to correspond to statutory redesignations made by the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. 106–172; and (2) corrects references to the new chemical quantity tables in §2D1.11.

Third, the amendment corrects a change to the commentary of §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) that was inadvertently made as part of the conforming package of amendments in the Economic Crime Package (see Supplement to Appendix C, Amendment 617, effective November 1, 2001).

Fourth, the amendment inserts a missing "or" in subsection (a)(3) of §2Q1.6 (Hazardous or Injurious Devices on Federal Lands).

Fifth, the amendment corrects a grammatical error in Note (D) of subsection (c)(1) of §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents) by replacing "subdivisions (A), (B), or (C)" with "subdivision (A), (B), or (C)".

Sixth, the amendment repromulgates amendment 568, effective November 1, 1997, to correct an inadvertent omission of a conforming amendment to §4B1.4 (Armed Career Criminal) from amendment 568.

Seventh, the amendment conforms §§5C1.1 (Imposition of a Term of Imprisonment), 5D1.3 (Conditions of Supervised Release), and 5F1.1 (Community Confinement), Part A of Chapter Seven (Violations of Probation and Supervised Release), and §7B1.3 (Revocation of Probation or Supervised Release) to current statutory provisions at 18 U.S.C. §§ 3563 and 3583 and provides an explanatory note concerning the status of intermittent confinement and

community confinement as conditions of supervised release.

Eighth, the amendment clarifies that language in subsection (c) of §5D1.2 (Term of Supervised Release) is a policy statement (because it recommends the maximum term of supervised release for sex offenders rather than requires it).

Ninth, the amendment deletes from Application Note 5 of §5E1.2 (Fines for Individual Defendants) an incorrect statement concerning the Clean Air Act.

Tenth, the amendment updates statutory references in §5F1.5 (Occupational Restrictions).

Eleventh, the amendment inserts a missing "Background" heading in §5F1.7 (Shock Incarceration Program).

Twelfth, the amendment references 18 U.S.C. § 2245, which covers sexual abuse resulting in death, to §2A1.1 (First Degree Murder) in Appendix A (Statutory Index) because the offense requires the death of a person.

Finally, the amendment responds to new legislation as follows:

(1) It updates, in §2B1.1, a statutory reference in the definition of "means of identification" to correspond to a redesignation made by the Internet False Identification Prevention Act of 2000, Pub. L. 106–578.

(2) It provides guideline references in Appendix A for two new offenses created by the American Homeownership and Economic Opportunity Act of 2000, Pub. L. 106–569 ("the Act"). First, section 608 of the Act amends section 610(a) of the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. § 5409(a)) which makes it unlawful to fail to comply with a state's installation program. Under section 611 of the National Housing Construction and Safety Standard Act of 1974 (42 U.S.C.§ 5410(b)), knowing and willful violations of subsection 610(a) are punishable by imprisonment of not more than one year. The amendment references this provision to §2N2.1. Second, section 708 of the Act created section 543 in Title V of the Housing Act of 1949 (42 U.S.C. § 1490(s)(a)), which provides a criminal penalty of not more than five years' imprisonment for equity skimming. The amendment references this provision to §2B1.1.

(3) It references offenses under section 307(c) of the National Marine Sanctuaries Act (16 U.S.C. § 1437(c)) to §2A2.4 (Obstructing or Impeding Officers). Section 307(c) of the National Marine Sanctuaries Act, as amended by the National Marine Sanctuaries Amendments Act of 2000, Pub. L. 106–513, prohibits the interference with the enforcement of conservation activities authorized in title 16, United States Code, including refusing to permit any officer authorized to enforce such title to board a vessel for purposes of conducting a search or inspection in connection with the enforcement of such title.

Effective Date: The effective date of this amendment is November 1, 2002.

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

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

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

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

(A) (i) involved more than 10, but less than 50, victims; or (ii) was committed through mass-marketing, increase by 2 levels; or

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

and inserting the following:

"(2) (Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by 2 levels;

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

(C) involved 250 or more victims, increase by 6 levels.".

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

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

and inserting the following:

"(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by 4 levels.".

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

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

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

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by adding

after "Resources)." the following new paragraph:

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

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

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

and by adding at the end the following:

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

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

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

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

> "(A) Definitions.— For purposes of subsection (b)(2):
>
> (i) 'Mass-marketing' means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (I) purchase goods or services; (II) participate in a contest or sweepstakes; or (III) invest for financial profit. 'Mass-marketing' includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.
>
> (ii) 'Victim' means (I) any person who sustained any part of the actual loss determined under subsection (b)(1); or (II) any individual who sustained bodily injury as a result of the offense. 'Person' includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.",

and inserting the following:

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

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

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

The Commentary to §2B1.1 captioned "Application Notes" is amended by redesignating Notes 11 through 15 as Notes 12 through 16, respectively.

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

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

and inserting the following:

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

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

(i) The financial institution became insolvent.

(ii) The financial institution substantially reduced benefits to pensioners or insureds.

(iii) The financial institution was unable on demand to refund fully any deposit, payment, or investment.

(iv) The financial institution was so depleted of its assets as to be forced to merge with another institution in order to

continue active operations.

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

(i) Definition.—For purposes of this subsection, 'organization' has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).

(ii) In General.—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1000 employees was substantially endangered:

(I) The organization became insolvent or suffered a substantial reduction in the value of its assets.

(II) The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).

(III) The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.

(IV) The organization substantially reduced its workforce.

(V) The organization substantially reduced its employee pension benefits.

(VI) The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.

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

(A) Definition.—For purposes of this subsection, 'securities law' (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.

(B) In General.—A conviction under a securities law is not required in

order for subsection (b)(13) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.

(C) Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)(13) applies, do not apply §3B1.3.".

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

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

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

The Commentary to §2B1.1 captioned "Background" is amended in the last paragraph by inserting "(i)" after "(B)".

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

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

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

and inserting the following:

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

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

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

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

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

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

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

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

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

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

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

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

"18 U.S.C. § 1512(c)	2J1.2".

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

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

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

offenses that involve the destruction of evidence.

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

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

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

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

note could be considered by the court as appropriate.

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

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

Third, the amendment addresses the directive contained at section 1104(a)(2) of the Act to "consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses." The amendment implements this directive by providing a new, four level enhancement at §2B1.1(b)(13) that applies if the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company. The Commission concluded that a four level enhancement appropriately reflects that an officer or director of a publicly traded company who commits such an offense violates certain heightened fiduciary duties imposed by securities law upon such individuals. Accordingly, the court is not required to determine specifically whether the defendant abused a position of trust in order for the enhancement to apply, and a corresponding application note provides that, in cases in which the new, four level enhancement applies, the existing two level enhancement for abuse of position of trust at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) shall not apply.

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

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

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

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

The amendment implements these directives by making two modifications to §2J1.2. First, the amendment increases the base offense level in §2J1.2 from level 12 to level 14. Second, the amendment adds a new two level enhancement to §2J1.2. This enhancement applies if the offense (i) involved the destruction, alteration, or fabrication of a substantial number of records, documents or tangible objects; (ii) involved the selection of any essential or especially probative record, document, or tangible object to destroy or alter; or (iii) was otherwise extensive in scope, planning, or preparation. The Commission determined that existing adjustments in Chapter Three for aggravating role, §3B1.1, and abuse of position of trust or use of special skill, §3B1.3, adequately account for those particular factors described in section 805(a) of the Act.

Sixth, the amendment addresses new offenses created by the Act. Section 1520 of title 18, United States Code, relating to destruction of corporate audit records, is referenced to §2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act; Destruction and Failure

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

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

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

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

" Introductory Commentary

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

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

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

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

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

(2) (Apply the greater) If the offense involved, directly or indirectly, an illegal transaction made by or received from—

(A) a foreign national, increase by 2 levels; or

(B) a government of a foreign country,

increase by 4 levels.

(3) If (A) the offense involved the contribution, donation, solicitation, expenditure, disbursement, or receipt of governmental funds; or (B) the defendant committed the offense for the purpose of obtaining a specific, identifiable non-monetary Federal benefit, increase by 2 levels.

(4) If the defendant engaged in 30 or more illegal transactions, increase by 2 levels.

(5) If the offense involved a contribution, donation, solicitation, or expenditure made or obtained through intimidation, threat of pecuniary or other harm, or coercion, increase by 4 levels.

(c) Cross Reference

(1) If the offense involved a bribe or gratuity, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than the offense level determined above.

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

2. Application of Subsection (b)(3)(B).—Subsection (b)(3)(B) provides an enhancement for a defendant who commits the offense for the purpose of achieving a specific, identifiable non-monetary Federal benefit that does not rise to the level of a bribe or a gratuity. Subsection (b)(3)(B) is not intended to apply to offenses under this guideline in which the defendant's only motivation for commission of the offense is generally to achieve increased visibility with, or heightened access to, public officials. Rather, subsection (b)(3)(B) is intended to apply to defendants who commit the offense to obtain a specific, identifiable non-monetary Federal benefit, such as a Presidential pardon or information proprietary to the government.

3. Application of Subsection (b)(4).—Subsection (b)(4) shall apply if the defendant engaged in any combination of 30 or more illegal transactions during the course of the offense, whether or not the illegal transactions resulted in a conviction for such conduct.

4. Departure Provision.—In a case in which the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted.".

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

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

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

There may be cases in which the defendant has entered into a conciliation agreement with the Federal Election Commission under section 309 of the Federal Election Campaign Act of 1971 in order to correct or prevent a violation of such Act by the defendant. The existence of a conciliation agreement between the defendant and Federal Election Commission, and the extent of compliance with that conciliation agreement, may be appropriate factors in determining at what point within the

applicable fine guideline range to sentence the defendant, unless the defendant began negotiations toward a conciliation agreement after becoming aware of a criminal investigation".

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

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

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

"18 U.S.C. § 607 2C1.8".

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

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

The new guideline has a base offense level of level 8, which reflects the fact that these

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

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

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

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

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

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

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

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

Finally, §5E1.2 (Fines for Individual Defendants) has been amended to specifically reflect fine provisions unique to the FECA. This part of the amendment also provides that the defendant's participation in a conciliation agreement with the Federal Election Commission

may be an appropriate factor for use in determining the specific fine within the applicable fine guideline range unless the defendant began negotiations with the Federal Election Commission after the defendant became aware that he or it was the subject of a criminal investigation.

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

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

"(6) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by 2 levels;

(B) at least 150 images, but fewer than 300, increase by 3 levels;

(C) at least 300 images, but fewer than 600, increase by 4 levels; and

(D) 600 or more images, increase by 5 levels.".

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

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

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

"(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

(5) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by 2 levels;

(B) at least 150 images, but fewer than 300, increase by 3 levels;

(C) at least 300 images, but fewer than 600, increase by 4 levels; and

(D) 600 or more images, increase by 5 levels.".

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

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

Section 3E1.1(b) is amended by inserting "upon motion of the government stating that" before "the defendant has assisted authorities"; and by striking the following:

"taking one or more of the following steps:

(1) timely providing complete information to the government

concerning his own involvement in the offense; or

(2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,

decrease the offense level by 1 additional level",

and inserting "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level".

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

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

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

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

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

"(i) In General.—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if—

(I) on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor; and

(II) there were at least two minor victims of the prohibited sexual conduct.

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

and inserting:

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

separate occasions, the defendant engaged in prohibited sexual conduct with a minor.".

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

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

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

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

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

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

"Commentary

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

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

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

and by adding at the end the following:

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

(1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;

(2) has not adequately been taken into consideration by the Sentencing

Commission in formulating the guidelines; and

(3) should result in a sentence different from that described.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Age may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by §5H1.1.

(2) An extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by §5H1.4.

(3) Drug, alcohol, or gambling dependence or abuse is not a reason for imposing a sentence below the guidelines.

Commentary

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

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

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

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

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

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

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

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

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

and inserting the following:

"(5) If the victim was sexually exploited:

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

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

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

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

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

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

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

651. Amendment: Chapter One is amended by striking the heading as follows:

" CHAPTER ONE - INTRODUCTION
AND GENERAL APPLICATION PRINCIPLES";

and by inserting:

" CHAPTER ONE - AUTHORITY
AND GENERAL APPLICATION PRINCIPLES".

Chapter One is amended by striking Part A as follows:

" 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 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.";

and inserting:

" 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.";

and adding an editorial note following the guideline.

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

"1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

(a) 'Abducted' means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction.

(b) 'Bodily injury' means any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.

(c) 'Brandished' with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.

(d) 'Dangerous weapon' means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but

(I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (e.g. a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

(e) 'Firearm' means (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. A weapon, commonly known as a 'BB' or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.

(f) 'Otherwise used' with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.

(g) 'Permanent or life-threatening bodily injury' means injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent. In the case of a kidnapping, for example, maltreatment to a life-threatening degree (e.g., by denial of food or medical care) would constitute life-threatening bodily injury.

(h) 'Physically restrained' means the forcible restraint of the victim such as by being tied, bound, or locked up.

(i) 'Serious bodily injury' means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, 'serious bodily injury' is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

(j) 'Destructive device' means any article described in 26 U.S.C. § 5845(f) (including an 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).

(k) 'Offense' means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term 'instant' is used in connection with 'offense,' 'federal offense,' or 'offense of conviction,' as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent

offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).",

and inserting the following:

"1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

(A) 'Abducted' means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction.

(B) 'Bodily injury' means any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.

(C) 'Brandished' with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.

(D) 'Dangerous weapon' means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (e.g. a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

(E) 'Departure' means (i) for purposes other than those specified in subdivision (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. 'Depart' means grant a departure.

'Downward departure' means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. 'Depart downward' means grant a downward departure.

'Upward departure' means departure that effects a sentence greater

than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. 'Depart upward' means grant an upward departure.

(F) 'Destructive device' means any article described in 26 U.S.C. § 5845(f) (including an 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).

(G) 'Firearm' means (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. A weapon, commonly known as a 'BB' or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.

(H) 'Offense' means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term 'instant' is used in connection with 'offense,' 'federal offense,' or 'offense of conviction,' as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).

(I) 'Otherwise used' with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.

(J) 'Permanent or life-threatening bodily injury' means injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent. In the case of a kidnapping, for example, maltreatment to a life-threatening degree (e.g., by denial of food or medical care) would constitute life-threatening bodily injury.

(K) 'Physically restrained' means the forcible restraint of the victim such as by being tied, bound, or locked up.

(L) 'Serious bodily injury' means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, 'serious bodily injury' is deemed to have occurred if the offense

involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.".

Section 2A4.1 is amended by striking:

"(a) Base Offense Level:

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

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

and inserting:

"(a) Base Offense Level: 32".

Section 2A4.1(b)(4) is amended by striking:

"(C) If the victim was released before twenty-four hours had elapsed, decrease by 1 level (effective before, but not on or after, May 30, 2003).".

Section 2A4.1(b) is amended by striking:

"(5) If the victim was sexually exploited:

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

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

and inserting:

"(5) If the victim was sexually exploited, increase by 6 levels.".

The Commentary to §2A4.1 captioned "Application Notes" is amended by striking Note 3 as follows:

"3. For the purpose of subsection (b)(4)(C), 'released' includes allowing the victim to escape or turning him over to law enforcement authorities without resistance (effective before, but not on or after, May 30, 2003).";

and by redesignating Notes 4 and 5 and Notes 3 and 4, respectively.

The Commentary to §4A1.1 captioned "Background" is amended by striking "permits information about the significance or similarity of past conduct underlying prior convictions to be used as a basis for imposing a sentence outside the applicable guideline range." and inserting "authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances.".

Chapter Four, Part A, Subpart One is amended by striking the following guideline and accompanying commentary:

"§4A1.3. Adequacy of Criminal History Category (Policy Statement)

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

(a) prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses);

(b) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;

(c) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;

(d) whether the defendant was pending trial or sentencing on another charge at the time of the instant offense;

(e) prior similar adult criminal conduct not resulting in a criminal conviction.

A departure under this provision is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes. Examples might include the case of a defendant who (1) had several previous foreign sentences for serious offenses, (2) had received a prior consolidated sentence of ten years for a series of serious assaults, (3) had a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding, (4) committed the instant offense while on bail or pretrial release for another serious offense, or (5) for appropriate reasons, such as cooperation in the prosecution of other defendants, had previously received an extremely lenient sentence for a serious offense. The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines. However, a prior arrest record itself shall not be considered under §4A1.3.

There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might

include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category (Category II), and therefore consider a downward departure from the guidelines.

In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with Criminal History Category IV, the court should look to the guideline range specified for a defendant with Criminal History Category IV to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses. On the other hand, a defendant with nine prior 60-day jail sentences for offenses such as petty larceny, prostitution, or possession of gambling slips has a higher number of criminal history points (18 points) than the typical Criminal History Category VI defendant, but not necessarily a more serious criminal history overall. Where the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

However, this provision is not symmetrical. The lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be

appropriate.

Commentary

Background: This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.",

and inserting:

"§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

(a) UPWARD DEPARTURES.—

(1) STANDARD FOR UPWARD DEPARTURE.—If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) TYPES OF INFORMATION FORMING THE BASIS FOR UPWARD DEPARTURE.—The information described in subsection (a) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.

(C) Prior similar misconduct established by a

civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(3) PROHIBITION.—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.

(4) DETERMINATION OF EXTENT OF UPWARD DEPARTURE.—

(A) IN GENERAL.—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.

(B) UPWARD DEPARTURES FROM CATEGORY VI.—In a case in which the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

(b) DOWNWARD DEPARTURES.—

(1) STANDARD FOR DOWNWARD DEPARTURE.—If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

(2) PROHIBITIONS.—

(A) CRIMINAL HISTORY CATEGORY I.—A departure below the lower limit of the applicable guideline range for Criminal History Category I is

prohibited.

(B) ARMED CAREER CRIMINAL AND REPEAT AND DANGEROUS SEX OFFENDER.—A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) LIMITATIONS.—

(A) LIMITATION ON EXTENT OF DOWNWARD DEPARTURE FOR CAREER OFFENDER.—The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

(B) LIMITATION ON APPLICABILITY OF §5C1.2 IN EVENT OF DOWNWARD DEPARTURE TO CATEGORY I.—A defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category).

(c) WRITTEN SPECIFICATION OF BASIS FOR DEPARTURE.—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:

(1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

(2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

Commentary

Application Notes:

1. Definitions.—For purposes of this policy statement, the terms 'depart', 'departure', 'downward departure', and 'upward departure' have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. Upward Departures.—

   (A) Examples.—An upward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

      (i) A previous foreign sentence for a serious offense.

      (ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.

      (iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.

      (iv) Commission of the instant offense while on bail or pretrial release for another serious offense.

   (B) Upward Departures from Criminal History Category VI.—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

3. Downward Departures.—A downward departure from the defendant's criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(B), due to the fact that the lower limit of the guideline

range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.

Background: This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.".

Section 5C1.2 is amended in subsection (a)(1) by inserting "before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category)" after "guidelines".

The Commentary to §5C1.2 captioned "Application Notes" is amended in Note 1 by inserting "before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category)" after "Category)".

Chapter Five, Part H is amended by striking the Introductory Commentary as follows:

" Introductory Commentary

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

The Commission has determined that certain factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such factors as necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of various other incidents of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release). Furthermore, although these factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. See §5K2.0 (Grounds for Departure).

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

and inserting:

" Introductory Commentary

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

The Commission has determined that certain circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of various other incidents of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. See §5K2.0 (Grounds for Departure).

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

by striking:

"§5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse (Policy Statement)

Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly

than, imprisonment.

Drug or alcohol dependence or abuse is not a reason for imposing a sentence below the guidelines. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (see §5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program.

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

and inserting:

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

Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a departure may be warranted. However, an extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (see §5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program.

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

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

by striking:

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

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

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

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

Commentary

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

and inserting:

"§5H1.6. Family Ties and Responsibilities (Policy Statement)

Family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

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

Commentary

Application Note:

1. Circumstances to Consider.—

(A) In General.—In determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances:

(i) The seriousness of the offense.

(ii) The involvement in the offense, if any, of members of the defendant's family.

(iii) The danger, if any, to members of the defendant's family as a result of the offense.

(B) Departures Based on Loss of Caretaking or Financial Support.—A departure under this policy statement based on the loss of caretaking or financial support of the defendant's family requires, in addition to the court's consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:

(i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.

(ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.

(iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.

(iv) The departure effectively will address the loss of caretaking or financial support.",

by striking:

"§5H1.7. Role in the Offense (Policy Statement)

A defendant's role in the offense is relevant in determining the appropriate sentence. See Chapter Three, Part B (Role in the Offense).",

and inserting:

"§5H1.7. Role in the Offense (Policy Statement)

A defendant's role in the offense is relevant in determining the applicable guideline range (see Chapter Three, Part B (Role in the Offense)) but is not a basis for departing from that range (see subsection (d) of §5K2.0 (Grounds for Departures)).";

and by striking:

"§5H1.8. Criminal History (Policy Statement)

A defendant's criminal history is relevant in determining the appropriate sentence. See Chapter Four (Criminal History and Criminal Livelihood).",

and inserting:

"§5H1.8. Criminal History (Policy Statement)

A defendant's criminal history is relevant in determining the applicable criminal history category. See Chapter Four (Criminal History and Criminal Livelihood). For grounds of departure based on the defendant's criminal history, see §4A1.3 (Departures Based on Inadequacy of Criminal History Category).".

Chapter Five Part K, Subpart Two is amended by striking the following guideline and accompanying commentary in its entirety:

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

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

circumstances, the weight attached to that factor under the guidelines is inadequate or excessive.

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

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

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

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

(1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;

(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(3) should result in a sentence different from that described.

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

Commentary*

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

The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. Koon v. United States, 518 U.S. 81 (1996). Furthermore,'[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District Courts have an institutional advantage over

appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.' Id. at 98.

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

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

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

and inserting:

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

(a) UPWARD DEPARTURES IN GENERAL AND DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.—

(1) IN GENERAL.—The sentencing court may depart from the applicable guideline range if—

(A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(1), that there exists an aggravating or mitigating circumstance; or

(B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i), that there exists an aggravating circumstance,

of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. §

3553(a)(2), should result in a sentence different from that described.

(2) DEPARTURES BASED ON CIRCUMSTANCES OF A KIND NOT ADEQUATELY TAKEN INTO CONSIDERATION.—

(A) IDENTIFIED CIRCUMSTANCES.—This subpart (Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in determining the applicable guideline range (e.g., as a specific offense characteristic or other adjustment). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with 18 U.S.C. § 3553(b) and the provisions of this subpart may be warranted.

(B) UNIDENTIFIED CIRCUMSTANCES.—A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.

(3) DEPARTURES BASED ON CIRCUMSTANCES PRESENT TO A DEGREE NOT ADEQUATELY TAKEN INTO CONSIDERATION.—A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

(4) DEPARTURES BASED ON NOT ORDINARILY RELEVANT OFFENDER CHARACTERISTICS AND OTHER CIRCUMSTANCES.—An offender characteristic or other circumstance identified in Chapter Five, Part H (Offender Characteristics) or elsewhere in

the guidelines as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.

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

(1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;

(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(3) should result in a sentence different from that described.

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

(c) LIMITATION ON DEPARTURES BASED ON MULTIPLE CIRCUMSTANCES.—The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—

(1) such offender characteristics or other circumstances, taken together, make the case an

exceptional one; and

(2) each such offender characteristic or other circumstance is—

(A) present to a substantial degree; and

(B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.

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

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

(2) The defendant's acceptance of responsibility for the offense, which may be taken into account only under §3E1.1 (Acceptance of Responsibility).

(3) The defendant's aggravating or mitigating role in the offense, which may be taken into account only under §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role), respectively.

(4) The defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea

Agreement).

(5) The defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines (i.e., a departure may not be based on unexceptional efforts to remedy the harm caused by the offense).

(6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.

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

Commentary

Application Notes:

1. Definitions.—For purposes of this policy statement:

'Circumstance' includes, as appropriate, an offender characteristic or any other offense factor.

'Depart', 'departure', 'downward departure', and 'upward departure' have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. Scope of this Policy Statement.—

(A) Departures Covered by this Policy Statement.—This policy statement covers departures from the applicable guideline range based on offense characteristics or offender characteristics of a kind, or to a degree, not adequately taken into consideration in determining that range. See 18 U.S.C. § 3553(b).

Subsection (a) of this policy statement applies to upward departures in all cases covered by the guidelines and to downward departures in all such cases except for downward departures in child crimes and sexual offenses.

Subsection (b) of this policy statement applies only to downward departures in child crimes and sexual offenses.

(B) Departures Covered by Other Guidelines.—This policy statement

does not cover the following departures, which are addressed elsewhere in the guidelines: (i) departures based on the defendant's criminal history (see Chapter Four (Criminal History and Criminal Livelihood), particularly §4A1.3 (Departures Based on Inadequacy of Criminal History Category)); (ii) departures based on the defendant's substantial assistance to the authorities (see §5K1.1 (Substantial Assistance to Authorities)); and (iii) departures based on early disposition programs (see §5K3.1 (Early Disposition Programs)).

3. Kinds and Expected Frequency of Departures under Subsection (a).—As set forth in subsection (a), there generally are two kinds of departures from the guidelines based on offense characteristics and/or offender characteristics: (A) departures based on circumstances of a kind not adequately taken into consideration in the guidelines; and (B) departures based on circumstances that are present to a degree not adequately taken into consideration in the guidelines.

(A) Departures Based on Circumstances of a Kind Not Adequately Taken into Account in Guidelines.—Subsection (a)(2) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), of a kind not adequately taken into consideration in the guidelines.

(i) Identified Circumstances.—This subpart (Chapter Five, Part K, Subpart 2) identifies several circumstances that the Commission may have not adequately taken into consideration in setting the offense level for certain cases. Offense guidelines in Chapter Two (Offense Conduct) and adjustments in Chapter Three (Adjustments) sometimes identify circumstances the Commission may have not adequately taken into consideration in setting the offense level for offenses covered by those guidelines. If the offense guideline in Chapter Two or an adjustment in Chapter Three does not adequately take that circumstance into consideration in setting the offense level for the offense, and only to the extent not adequately taken into consideration, a departure based on that circumstance may be warranted.

(ii) Unidentified Circumstances.—A case may involve circumstances, in addition to those identified by the guidelines, that have not adequately been taken into consideration by the Commission, and the presence of any such circumstance may warrant departure from the guidelines in that case. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to take into consideration

relevant circumstances in sentencing, it is expected that departures based on such unidentified circumstances will occur rarely and only in exceptional cases.

(B) Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration in Guidelines.—

(i) In General.—Subsection (a)(3) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), to a degree not adequately taken into consideration in the guidelines. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to determine the most appropriate weight to be accorded the mitigating and aggravating circumstances specified in the guidelines, it is expected that departures based on the weight accorded to any such circumstance will occur rarely and only in exceptional cases.

(ii) Examples.—As set forth in subsection (a)(3), if the applicable offense guideline and adjustments take into consideration a circumstance identified in this subpart, departure is warranted only if the circumstance is present to a degree substantially in excess of that which ordinarily is involved in the offense. Accordingly, a departure pursuant to §5K2.7 for the disruption of a governmental function would have to be substantial to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the guideline covering the mailing of injurious articles is applicable, however, and the offense caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure may be warranted if several persons were injured.

(C) Departures Based on Circumstances Identified as Not Ordinarily Relevant.—Because certain circumstances are specified in the guidelines as not ordinarily relevant to sentencing (see, e.g., Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of such

circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

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

4. Downward Departures in Child Crimes and Sexual Offenses.—

(A) Definition.—For purposes of this policy statement, the term 'child crimes and sexual offenses' means offenses under any of the following: 18 U.S.C. § 1201 (involving a minor victim), 18 U.S.C. § 1591, or chapter 71, 109A, 110, or 117 of title 18, United States Code.

(B) Standard for Departure.—

(i) Requirement of Affirmative and Specific Identification of Departure Ground.—The standard for a downward departure in child crimes and sexual offenses differs from the standard for other departures under this policy statement in that it includes a requirement, set forth in 18 U.S.C. § 3553(b)(2)(A)(ii)(I) and subsection (b)(1) of this guideline, that any mitigating circumstance that forms the basis for such a downward departure be affirmatively and specifically identified as a ground for downward departure in this part (i.e., Chapter Five, Part K).

(ii) Application of Subsection (b)(2).—The commentary in Application Note 3 of this policy statement, except for the commentary in Application Note 3(A)(ii) relating to unidentified circumstances, shall apply to the court's determination of whether a case meets the requirement, set forth in subsection 18 U.S.C. § 3553(b)(2)(A)(ii)(II) and subsection (b)(2) of this policy statement, that the mitigating circumstance forming the basis for a downward departure in child crimes and sexual offenses be of kind, or to a degree, not adequately taken into consideration by the Commission.

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

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

Background: This policy statement sets forth the standards for departing from the applicable guideline range based on offense and offender characteristics of a kind, or to a degree, not adequately considered by the Commission. Circumstances the Commission has determined are not ordinarily relevant to determining whether a departure is warranted or are prohibited as bases for departure are addressed in Chapter Five, Part H (Offender Characteristics) and in this policy statement. Other departures, such as those based on the defendant's criminal history, the defendant's substantial assistance to authorities, and early disposition programs, are addressed elsewhere in the guidelines.

As acknowledged by Congress in the Sentencing Reform Act and by the Commission when the first set of guidelines was promulgated, 'it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.' (See Historical Note to §1A1.1 (Authority)). Departures, therefore, perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing. Departures also help maintain 'sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.' 28 U.S.C. § 991(b)(1)(B). By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, along with appellate cases reviewing these departures, the Commission can further refine the guidelines to specify more precisely when departures should and should not be permitted.

As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the 'PROTECT Act', Public Law 108–21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.

In order for appellate courts to fulfill their statutory duties under 18 U.S.C. § 3742 and for the Commission to fulfill its ongoing responsibility to refine the guidelines in light of information it receives on departures, it is essential that sentencing courts state with specificity the reasons for departure, as required by the PROTECT Act.

This policy statement, including its commentary, was substantially revised,

effective October 27, 2003, in response to directives contained in the PROTECT Act, particularly the directive in section 401(m) of that Act to—

'(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and

(2) promulgate, pursuant to section 994 of title 28, United States Code—

(A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced;

(B) a policy statement authorizing a departure pursuant to an early disposition program; and

(C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by the Act, including a revision of ...section 5K2.0'.

The substantial revision of this policy statement in response to the PROTECT Act was intended to refine the standards applicable to departures while giving due regard for concepts, such as the 'heartland', that have evolved in departure jurisprudence over time.

Section 401(b)(1) of the PROTECT Act directly amended this policy statement to add subsection (b), effective April 30, 2003.";

by striking:

"§5K2.10. Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

(a) the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;

(b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;

(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;

(d) the danger actually presented to the defendant by the victim; and

(e) any other relevant conduct by the victim that substantially contributed to the danger presented.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A.3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.",

and inserting:

"§5K2.10. Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding whether a sentence reduction is warranted, and the extent of such reduction, the court should consider the following:

(1) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.

(2) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.

(3) The danger reasonably perceived by the defendant, including the victim's reputation for violence.

(4) The danger actually presented to the defendant by the victim.

(5) Any other relevant conduct by the victim that substantially contributed to the danger presented.

(6) The proportionality and reasonableness of the defendant's response to the victim's provocation.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.";

by striking:

"§5K2.12. Coercion and Duress (Policy Statement)

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. The Commission considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in sentence.",

and inserting:

"§5K2.12. Coercion and Duress (Policy Statement)

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions, on the proportionality of the defendant's actions to the seriousness of coercion, blackmail, or duress involved, and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. Notwithstanding this policy statement, personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure.";

by striking:

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

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the

defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Commentary

Application Note:

1. For purposes of this policy statement—

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

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

and inserting:

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

A sentence below the applicable guideline range may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

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

Commentary

Application Note:

1. For purposes of this policy statement—

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

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

and by striking:

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

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

Commentary

Application Notes:

1. For purposes of this policy statement—

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

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

'Serious drug trafficking offense' means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that, because the defendant does not meet the criteria under §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum

Sentences in Certain Cases), results in the imposition of a mandatory minimum term of imprisonment upon the defendant.

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

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

and inserting:

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

(a) IN GENERAL.—Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, a downward departure may be warranted in an exceptional case if (1) the defendant's criminal conduct meets the requirements of subsection (b); and (2) the departure is not prohibited under subsection (c).

(b) REQUIREMENTS.—The court may depart downward under this policy statement only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.

(c) PROHIBITIONS BASED ON THE PRESENCE OF CERTAIN CIRCUMSTANCES.—The court may not depart downward pursuant to this policy statement if any of the following circumstances are present:

(1) The offense involved serious bodily injury or death.

(2) The defendant discharged a firearm or otherwise used a firearm or a dangerous weapon.

(3) The instant offense of conviction is a serious drug trafficking offense.

(4) The defendant has either of the following: (A) more than one criminal history point, as determined under Chapter Four (Criminal History

and Criminal Livelihood) before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); or (B) a prior federal or state felony conviction, or any other significant prior criminal behavior, regardless of whether the conviction or significant prior criminal behavior is countable under Chapter Four.

Commentary

Application Notes:

1. Definitions.—For purposes of this policy statement:

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

'Serious drug trafficking offense' means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that provides for a mandatory minimum term of imprisonment of five years or greater, regardless of whether the defendant meets the criteria of §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases).

2. Repetitious or Significant, Planned Behavior.—Repetitious or significant, planned behavior does not meet the requirements of subsection (b). For example, a fraud scheme generally would not meet such requirements because such a scheme usually involves repetitive acts, rather than a single occurrence or single criminal transaction, and significant planning.

3. Other Circumstances to Consider.—In determining whether the court should depart under this policy statement, the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense.

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

Chapter 5, Part K, is amended by adding at the end the following:

"3. EARLY DISPOSITION PROGRAMS

§5K3.1. Early Disposition Programs (Policy Statement)

Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the

United States Attorney for the district in which the court resides.

Commentary

Background: This policy statement implements the directive to the Commission in section 401(m)(2)(B) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the 'PROTECT Act', Public Law 108–21).".

Section 6B1.2 is amended in subsection (a) by striking "[Rule 11(e)(1)(A)]" and inserting "(Rule 11(c)(1)(A))".

Section 6B1.2 is amended in subsection (b) by striking "[Rule 11(e)(1)(B)]" and inserting "(Rule 11(c)(1)(B))"; and by striking subdivision (2) as follows:

"(2) the recommended sentence departs from the applicable guideline range for justifiable reasons.",

and inserting the following:

"(2) (A) the recommended sentence departs from the applicable guideline range for justifiable reasons; and (B) those reasons are specifically set forth in writing in the statement of reasons or judgment and commitment order.".

Section 6B1.2 is amended in subsection (c) by striking "[Rule 11(e)(1)(C)]" and inserting "(Rule 11(c)(1)(C))"; and by striking subdivision (2) as follows:

"(2) the agreed sentence departs from the applicable guideline range for justifiable reasons.",

and inserting the following:

"(2) (A) the agreed sentence departs from the applicable guideline range for justifiable reasons; and (B) those reasons are specifically set forth in writing in the statement of reasons or judgment and commitment order.".

The Commentary to §6B1.2 is amended in the second paragraph by striking ". See generally Chapter 1, Part A, Subpart 4(b)(Departures)." and inserting "and those reasons are specifically set forth in writing in the statement of reasons or the judgment and commitment order. As set forth in subsection (d) of §5K2.0 (Grounds for Departure), however, the court may not depart below the applicable guideline range merely because of the defendant's decision to plead guilty to the offense or to enter a plea agreement with respect to the offense.".

Reason for Amendment: This emergency amendment continues the Commission's work in the area of departures and implements the directive in section 401(m) of the "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003" or "PROTECT Act," Pub. L. 108–21. The PROTECT Act was enacted on April 30, 2003, and directs the Commission, not later than 180 days after the enactment of the Act, to promulgate: (1) appropriate amendments to the sentencing guidelines, policy statements, and

official commentary to ensure that the incidence of downward departures is substantially reduced; (2) a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney for the district in which the court resides; (3) any other necessary conforming amendments, including a revision of paragraph 4(b) of Part A of Chapter One and a revision of §5K2.0 (Grounds for Departure). The analysis underlying this amendment will be set forth more fully in a forthcoming report to Congress.

The Commission anticipates that this amendment will substantially reduce the incidence of downward departures by prohibiting several factors as grounds for departure, restricting the availability of certain departures, clarifying when certain departures are appropriate, and limiting the extent of departure permissible for certain offenders. The amendment also reduces the incidence of downward departures generally by restructuring departure provisions throughout the Guidelines Manual to track more closely both the statutory criteria for imposing a sentence outside the guideline sentencing range and the newly enacted statutory requirement that reasons for departure be stated with specificity in the written order of judgment and commitment. See 18 U.S.C. §§ 3553 (Imposition of a sentence), 3742(e) (Review of a sentence). The Commission determined that requiring sentencing courts to document reasons for departure with greater specificity complements the findings required of sentencing courts by the PROTECT Act, increases the accountability of sentencing courts for departures by facilitating appellate review, and improves the Commission's ability to monitor departure decisions and refine the guidelines as necessary.

The eight-part amendment makes modifications to §§5K2.0 (Grounds for Departure), 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), 5H1.6 (Family Ties and Responsibilities), 5H1.7 (Role in the Offense), 5H1.8 (Criminal History), 5K2.10 (Victim's Conduct), 5K2.12 (Coercion and Duress), 5K2.13 (Diminished Capacity), 5K2.20 (Aberrant Behavior), 4A1.3 (Departures Based on Inadequacy of Criminal History Category), and 6B1.2 (Standards for Acceptance of Plea Agreements). The amendment also creates one new policy statement, §5K3.1 (Early Disposition Programs), and one new guideline, §1A1.1 (Authority), among other changes.

First, this amendment makes several significant modifications to §5K2.0 (Grounds for Departure) to limit, and in certain circumstances, to prohibit downward departures. The amendment generally restructures §5K2.0 to set forth more clearly the standards governing departures in order to facilitate and emphasize the analysis required of the court. The amendment does so by: (1) integrating throughout the policy statement the statutory language of 18 U.S.C. §§ 3553(b) and 3742(e), as amended by the PROTECT Act, which provide the statutory criteria for sentencing outside the guideline range; (2) adopting, when provided in the policy statement, a uniform qualitative description of the type of case in which a departure may be warranted, the "exceptional case"; (3) restating in the application notes and background commentary to §5K2.0 longstanding commentary in the Guidelines Manual, which was reaffirmed by the PROTECT Act, that the frequency of departures under §5K2.0 generally should be rare, and that certain types of departures under §5K2.0 should be extremely rare; and (4) deleting certain language in the commentary taken from Koon v. United States, 518 U.S. 81 (1996) that effectively was overruled by the PROTECT Act.

Accordingly, §5K2.0(a) sets forth the general governing principle that, in cases other than child crimes and sexual offenses, the sentencing court may depart if the court finds pursuant

to 18 U.S.C. § 3553(b)(1) that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from a sentence within the applicable guideline range.

The amendment also prohibits several grounds for departure, in addition to the departure prohibitions in §5K2.0 for child crimes and sexual offenses enacted by the PROTECT Act, and other prohibitions elsewhere in the Guidelines Manual. The amendment creates a new subsection, §5K2.0(d), that clearly lists the forbidden departure grounds. These include several longstanding prohibitions, as well as a number of new prohibitions added by the amendment, specifically: (1) the defendant's acceptance of responsibility; (2) the defendant's aggravating or mitigating role in the offense; (3) the defendant's decision, in itself, to plead guilty to the offense or to enter into a plea agreement with respect to the offense; and (4) the defendant's fulfillment of restitution only to the extent required by law, including the guidelines. The Commission determined that these circumstances are never appropriate grounds for departure.

The amendment also revises §5K2.0 to restrict the availability of departures based on multiple circumstances, often referred to as a "combination of factors." The Commission determined that heightened criteria are appropriate for cases in which no single offender characteristic or other circumstance independently is sufficient to provide a basis for departure. Under §5K2.0(c) a departure based on multiple circumstances can be based only on offender characteristics or other circumstances that are identified in the guidelines as permissible grounds for departure. Circumstances unmentioned in the guidelines, therefore, can no longer be used for a departure based on multiple circumstances pursuant to §5K2.0(c). In addition, in order to support a departure based on a combination of circumstances, each offender characteristic or other circumstance must be present individually to a substantial degree and must make the case exceptional when considered together. Emphasizing the Commission's expectation as to the infrequency of such departures, the accompanying application note retains previously existing guidance and states that departures under §5K2.0(c) based on a combination of not ordinarily relevant circumstances should occur extremely rarely.

In addition, the amendment clarifies when a departure may be based on a circumstance present to a degree not adequately taken into consideration. Section 5K2.0(a)(3) provides that a departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration, only if the court determines that such circumstance is present to a degree substantially different from that ordinarily involved in that kind of offense.

The amendment also modifies §5K2.0 in two additional ways to underscore the need for courts to state with specificity their reasons for departure. First, §5K2.0(e) provides that if the court departs, it shall state, pursuant to 18 U.S.C. § 3553(c), as amended by the PROTECT Act, its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those factors with specificity in the written judgment and commitment order. Second, Application Note 5 provides that in cases in which the court departs based on reasons set forth in a plea agreement, the court must state the reasons for departure with specificity in the written judgment and commitment order.

Second, the amendment limits several departure provisions in Chapter Five, Part H (Specific Offender Characteristics). First, the amendment adds a prohibition to §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction) against departures based on addiction to gambling and renames the policy statement accordingly. The Commission determined that addiction to gambling is never a relevant ground for departure.

The amendment limits the availability of departures pursuant to §5H1.6 (Family Ties and Responsibilities) by requiring the court to conduct certain more rigorous analyses. In determining whether a departure is warranted under this policy statement, a new application note instructs the court to consider the seriousness of the offense; the involvement in the offense, if any, of members of the defendant's family; and the danger, if any to members of the defendant's immediate family as a result of the offense.

In addition to considering those factors, the amendment further restricts family ties departures by adding an application note that establishes heightened criteria for departures based on loss of caretaking or financial support. In such cases, the court must find all of the following four circumstances: (1) that a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking or essential financial support to the defendant's family; (2) that such loss exceeds the harm ordinarily incident to incarceration; (3) that there are no effective remedial or ameliorative programs reasonably available, making the defendant's caretaking or financial support irreplaceable to the defendant's family; and (4) that the departure effectively will address the loss of caretaking or financial support. The Commission determined that these heightened criteria are appropriate and necessary in order to distinguish hardship or suffering that is ordinarily incident to incarceration from that which is exceptional.

The amendment also eliminates community ties as a separate ground for departure and renames §5H1.6 accordingly.

The amendment makes conforming modifications to §5H1.7 (Role in the Offense), reiterating that a defendant's role in the offense is not a basis for departure, and to §5H1.8 (Criminal History), providing that the only grounds for departure based on the defendant's criminal history are set forth in §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

Third, the amendment limits several departure provisions in Chapter Five, Part K (Departures). The amendment adds a factor to §5K2.10 (Victim's Conduct) that the court should consider when determining whether a departure is warranted based on victim's conduct. The amendment provides that, in addition to five previously existing factors, the court should consider the proportionality and reasonableness of the defendant's response to the victim's provocation.

The amendment adds a similar factor to §5K2.12 (Coercion and Duress). The amendment provides that the extent of a departure based on coercion and duress ordinarily should depend on several considerations, including the proportionality of the defendant's actions to the seriousness of the coercion, blackmail, or duress involved.

The amendment limits the availability of departures pursuant to §5K2.13 (Diminished Capacity) by adding a causation element. The amendment provides that in order to receive

a departure for diminished capacity, the significantly reduced mental capacity must have contributed substantially to the commission of the offense. The amendment similarly limits the extent of departure by stating that the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

The amendment significantly restructures §5K2.20 (Aberrant Behavior) and further restricts the availability of departures based on aberrant behavior. The Commission promulgated §5K2.20 effective November 1, 2000, in order to resolve a longstanding circuit conflict and more properly define when a departure based on aberrant behavior may be warranted. See Appendix C, amendment 603. A departure based on aberrant behavior may be warranted only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.

The amendment provides greater emphasis to these strict requirements by moving them from an application note to the body of the policy statement. The amendment also gives the court greater guidance in applying these requirements with a new application note that clarifies that repetitious or significant, planned behavior does not meet the requirements for receiving a departure under §5K2.20. A fraud scheme, for example, generally would be prohibited from receiving a departure pursuant to §5K2.20 because such a scheme usually involves repetitive acts, rather than a single occurrence or single criminal transaction, as well as significant planning.

The amendment also further restricts the availability of departures based on aberrant behavior by adding several strict prohibitions to the list that has existed in §5K2.20 since its initial promulgation. Prior to this amendment, §5K2.20 prohibited the court from departing based on aberrant behavior if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood); or (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter Four.

The amendment gives greater prominence to those previously existing prohibitions and expands them in significant ways. The amendment eliminates defendants who have any significant prior criminal behavior from consideration for a departure pursuant to §5K2.20, regardless of whether such behavior is countable under Chapter Four, and even if such behavior is not a state or federal felony. In addition, the amendment expands the class of drug trafficking defendants prohibited from consideration for a departure pursuant to §5K2.20 by expanding the definition of "serious drug trafficking offense." Specifically, the amendment expands the definition of "serious drug trafficking offense" in the accompanying application note to include any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that provides a mandatory minimum term of imprisonment of five years or greater, regardless of whether the defendant meets the criteria of §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases). Prior to this amendment, only drug trafficking defendants who were subject to such mandatory minimum penalties and who did not meet the criteria set forth in §5C1.2 were precluded categorically from consideration for a departure under §5K2.20.

Fourth, the amendment substantially restructures §4A1.3 (Departures Based on Inadequacy of Criminal History Category) to set forth more clearly the standards governing departures based on criminal history, to prohibit and limit the extent of departures based on criminal history for certain offenders with significant criminal history, and to require written specification of the basis for a criminal history departure.

Section 4A1.3(a) provides that an upward departure may be warranted if reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes. Section 4A1.3(a) also more clearly sets forth previously existing guidance regarding determination of the extent of an upward departure based on criminal history. Similarly, §4A1.3(b) provides that a downward departure may be warranted if reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

The amendment, however, adds several prohibitions and limitations to the availability of downward departures based on criminal history. It prohibits a downward departure based on §4A1.3(b) if the defendant is an armed career criminal within the meaning of §4B1.3 (Armed Career Criminal) or a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors). The Commission determined that such offenders should never receive a criminal history-based downward departure.

Section 4A1.3(b) reiterates the longstanding prohibition against a departure below the lower limit of the applicable guideline range for Criminal History Category I.

Section 4A1.3(b) also contains certain limitations on the extent of departure available under this provision. Specifically, a downward departure pursuant to this section for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

In addition, the amendment provides that a defendant whose criminal history category is Category I after receipt of a downward departure under §4A1.3(b) does not meet the criterion of subsection (a)(1) of §5C1.2 if, before receipt of the departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category). Thus, a departure to Category I cannot qualify an otherwise ineligible defendant for relief from an applicable mandatory minimum sentence under §5C1.2, which is consistent with case law.

The amendment adds a new subsection, §4A1.3(c), that requires the court, in departing based on criminal history, to set forth in writing the specific reasons why the applicable criminal history category under-represents or over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes. This specificity requirement is consistent with the PROTECT Act and is intended to facilitate both the necessary statutory and guideline departure analysis, as well as to improve the Commission's ability to refine the criminal history guidelines in light of criminal history departure decisions.

The amendment also makes conforming modifications to §4A1.1 and §5C1.2.

The amendment implements the directive at section 401(m)(2)(B) of the PROTECT Act by adding a new policy statement at §5K3.1 entitled Early Disposition Programs. The provision restates the language contained in the directive and provides that, upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides. The Commission determined that implementing the directive in this manner is appropriate at this time, pending further study and monitoring of the implementation of early disposition programs.

The amendment revises subsections (b) and (c) of §6B1.2 (Standards for Acceptance of Plea Agreements) to require greater specificity in the sentencing documentation in a case involving a departure either recommended or agreed to in a Rule 11(c)(1)(B) or Rule 11(c)(1)(C) plea agreement. Specifically, if the court accepts such a plea agreement, and the recommended or agreed to sentence departs from the applicable guideline range for justifiable reasons, the amendment requires the court to set forth specifically those reasons in writing in the statement of reasons or judgment and commitment order. This specificity requirement is consistent with the PROTECT Act and is intended to facilitate the necessary statutory and guideline departure analysis, as well as to improve the Commission's ability to understand the underlying reasons for departures in cases involving plea agreements.

The amendment creates a new guideline, §1A1.1 (Authority), that clearly sets forth the Commission's authority to promulgate guidelines, policy statements, and commentary and implements the Protect Act directive requiring conforming amendments to paragraph 4(b) of Part A of Chapter One. In addition, the amendment moves in toto Part A of Chapter One, as in effect on November 1, 1987, to the commentary as a historical note. Part A of Chapter One 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. The Commission determined that in order to preserve its historical significance and context, the introduction should be returned to its original form and placed in a historical note. The Commission encourages review of this material. The amendment also incorporates relevant portions of paragraph 4(b) of Part A of the former introduction regarding departures in the background commentary to §5K2.0.

The amendment amends §1B1.1 (Application Instructions) to provide uniform definitions of departure, upward departure, and downward departure.

The amendment also makes technical amendments to §2A4.1 (Kidnapping, Abduction, Unlawful Restraint).

This amendment complements other significant policy initiatives affecting sentencing, including the statutory changes in sentencing law and guideline changes directly made by the PROTECT Act, and recent policies implemented by the Department of Justice. The Commission believes that these general policy changes, working together, will substantially reduce the incidence of downward departures. In addition to the significant modifications made by this amendment, the Commission has identified several aspects of the guidelines affecting departures that it intends to continue studying during the current amendment cycle and beyond, including aberrant behavior, criminal history, immigration, early disposition, or "fast track," programs, and collateral consequences, among others.

Effective Date: The effective date of this amendment is October 27, 2003.

652. Amendment: Section 2A1.4(a)(1) is amended by striking "10" and inserting "12".

Section 2A1.4(a)(2) is amended by striking "14" and inserting "18".

Reason for Amendment: This amendment responds to a concern that the federal sentencing guidelines do not adequately reflect the seriousness of involuntary manslaughter offenses. Specifically, the Department of Justice, some members of Congress, and an ad hoc advisory group formed by the Commission to address Native American sentencing guideline issues expressed concern that most federal involuntary manslaughter cases involve vehicular homicides, which analysis of Commission data confirmed. These commentators also indicated that these offenses appear to be underpunished, particularly when compared to comparable cases arising under state law. This disparity with state punishments has been confirmed by studies undertaken by the Commission. In addition, Congress increased the maximum statutory penalty for involuntary manslaughter from three to six years' imprisonment in 1994.

In response to these concerns and the Commission's analysis, this amendment increases the base offense level in §2A1.4(a)(2) for reckless involuntary manslaughter offenses from level 14 to level 18. This four level increase corresponds to an approximate 50 percent increase in sentence length for these offenses. This amendment also increases the base offense level in §2A4.1(a)(1) for criminally negligent involuntary manslaughter offenses from level 10 to level 12. The two level increase represents an approximate 25 percent increase in the sentence length for these offenses.

Effective Date: The effective date of this amendment is November 1, 2003.

653. Amendment: Sections 2B1.1, 2E5.3, 2J1.2, and 2T4.1, effective January 25, 2003 (see USSC Guidelines Manual Appendix C (Volume II), Amendment 647), are repromulgated with the following changes:

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

"(a) Base Offense Level: 6",

and inserting the following:

"(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.".

Section 2B1.1(b)(12) is amended by striking "If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.";

and inserting after subdivision (B) the following:

"(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(12)(B) shall not exceed 8 levels, except as provided in subdivision (D).

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

Section 2B1.1(b) is amended by striking the following:

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

and inserting the following:

"(14) If the offense involved—

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

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

increase by 4 levels.".

The Commentary to §2B1.1 captioned "Application Notes" is amended by redesignating Notes 2 through 9 as Notes 3 through 10, respectively; by redesignating Notes 11 through 16 as Notes 13 through 18, respectively; by inserting after Note 1 the following:

"2. Application of Subsection (a)(1).—

(A) 'Referenced to This Guideline'.—For purposes of subsection (a)(1), an offense is 'referenced to this guideline' if (i) this guideline is the applicable Chapter Two guideline determined under the provisions of §1B1.2 (Applicable Guidelines) for the offense of conviction; or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which §2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.

(B) Definition of 'Statutory Maximum Term of Imprisonment'.—For purposes of this guideline, 'statutory maximum term of imprisonment' means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.

(C) Base Offense Level Determination for Cases Involving Multiple Counts.—In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.";

and by striking "10. Application of Subsection (b)(12)(B).—" and inserting "11. Application of Subsection (b)(12)(B).—".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 4, as redesignated by this amendment, in subdivision (B), by striking subdivision (i) as follows:

"(i) In General.—In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, 'victim' means any person (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.",

and inserting the following:

"(i) In General.—In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, 'victim' means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.";

and in subdivision (ii)(IV) by striking "or more".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 13, as redesignated by this amendment, by striking "(b)(13)" each place it appears and inserting "(b)(14)"; by striking subdivision (A) as follows:

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

and inserting the following:

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

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

'Commodity pool operator' has the meaning given that term in section 1a(4) of the Commodities Exchange Act (7 U.S.C. § 1a(4)).

'Commodity trading advisor' has the meaning given that term in section 1a(5) of the Commodities Exchange Act (7 U.S.C. § 1a(5)).

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

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

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

'Person associated with a broker or dealer' has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(18)).

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

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

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

and in subdivision (B) by inserting "or commodities law" after "securities law" each place it appears.

The Commentary to §2B1.1 captioned "Background" is amended in the first paragraph by striking the last sentence as follows:

"It also covers offenses involving altering or removing motor vehicle identification numbers, trafficking in automobiles or automobile parts with altered or obliterated identification numbers, odometer laws and regulations, obstructing correspondence, the falsification of documents or records relating to a benefit plan covered by the Employment Retirement Income Security Act, and the failure to maintain, or falsification of, documents required by the Labor Management Reporting and Disclosure Act.".

The Commentary to §2C1.1 captioned "Application Notes" is amended in Note 2 by striking "Note 2" and inserting "Note 3".

The Commentary to §2C1.7 captioned "Application Notes" is amended in Note 3 by striking

"Note 2" and inserting "Note 3".

The Commentary to §2J1.1 captioned "Application Notes" is amended in Note 1 by inserting "In General.—" before "Because".

The Commentary to §2J1.1 captioned "Application Notes" is amended in Note 2 by inserting "Willful Failure to Pay Court-Ordered Child Support.—" before "For offenses".

The Commentary to §2J1.1 captioned "Application Notes" is amended by adding at the end the following:

> "3. Violation of Judicial Order Enjoining Fraudulent Behavior.—In a case involving a violation of a judicial order enjoining fraudulent behavior, the most analogous guideline is §2B1.1. In such a case, §2B1.1(b)(7)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply.".

The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 1 by inserting before the paragraph that begins "'Substantial interference" the following:

> "Definitions.—For purposes of this guideline:
>
> 'Records, documents, or tangible objects' includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.".

The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 2 by inserting "Nonapplicability of Chapter Three, Part C.—" before "For offenses"; by inserting ", prosecution," after "investigation"; and by striking "trial" and inserting "sentencing".

The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 3 by inserting "Convictions for the Underlying Offense.—" before "In the event"; and by inserting "of an offense sentenced" after "convicted".

The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 4 by inserting "Upward Departure Considerations.—" before "If a weapon"; by striking "a departure" and inserting "an upward departure"; and by inserting at the end the following:

> "In a case involving an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness's face), an upward departure would be warranted.".

The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 5 by inserting "Subsection (b)(1).—" before "The inclusion".

Section 2J1.3(a) is amended by striking "12" and inserting "14".

Appendix A (Statutory Index), effective January 25, 2003 (see USSC Guidelines Manual Appendix C (Volume II), Amendments 647 and 648; see also this document, Amendment

656), is repromulgated without change.

Reason for Amendment: With this amendment the Commission continues its work to deter and punish economic and white collar crimes, building on its Economic Crime Package of 2001 and subsequent formation in early 2002 of an Ad Hoc Advisory Group on the Organizational Guidelines for sentencing corporations and other organizations. This 2003 amendment also implements directives in sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107–204 (the "Act"), by making several modifications to §§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), 2J1.2 (Obstruction of Justice), and 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), as well as conforming changes to §§2J1.1 (Contempt), 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), and 2T4.1 (Tax Table). The amendment also responds to increased statutory penalties for existing crimes and several severely punished new crimes created by the Act.

The directives in the Act generally pertain to serious fraud and related offenses and obstruction of justice offenses. Congress gave the Commission emergency amendment authority to promulgate amendments addressing, among other things, officers and directors of publicly traded companies who commit fraud and related offenses, fraud offenses that endanger the solvency or financial security of a substantial number of victims, fraud offenses that involve significantly greater than 50 victims, and obstruction of justice offenses that involve the destruction of evidence. This amendment expands upon the temporary emergency amendment effective January 25, 2003, and repromulgates it as a permanent amendment.

First, the amendment modifies the base offense level in §2B1.1 to implement more fully the directive contained in section 905(b)(2) of the Act to consider whether the guidelines "for violations of the sections amended by this Act are sufficient to deter and punish such offenses, and specifically, are adequate in view of the statutory increases in penalties contained in this Act." Section 903 of the Act, for example, quadrupled the statutory maximum penalties for wire fraud and mail fraud from five to 20 years' imprisonment, while section 902 made attempts and conspiracies subject to these same heightened penalties. Specifically, the amendment provides a new higher alternative base offense level of level 7 if the defendant was convicted of an offense referenced to §2B1.1 and the offense carries a statutory maximum term of imprisonment of 20 years or more. The alternative base offense levels are intended to calibrate better the base guideline penalty to the seriousness of the wide variety of offenses referenced to that guideline, as reflected by statutory maximum penalties established by Congress.

For those offenses to which the higher alternative base offense will apply (including wire fraud and mail fraud), the effect of the amendment is to limit the availability of a probation only sentence in Zone A of the sentencing table to offenses involving loss amounts of $10,000 or less, assuming a two level reduction for acceptance of responsibility. Prior to the amendment, a Zone A sentence was available for all offenses sentenced under §2B1.1 involving loss amounts of $30,000 or less. Similarly, for those offenses for which the higher

alternative base offense level will apply, the effect of the amendment is to require an imprisonment sentence in Zone D for offenses involving loss amounts of more than $70,000. Prior to the amendment, a Zone D sentence was required for all offenses sentenced under §2B1.1 involving loss amounts of more than $120,000.

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

The amendment also adds a new factor to the general, enumerated factors that the court may consider in determining the amount of loss under §2B1.1(b)(1). Specifically, the amendment adds the reduction in the value of equity securities or other corporate assets that resulted from the offense to the list of general factors set forth in Application Note 3(C) of §2B1.1. This factor was added to provide courts additional guidance in determining loss in certain cases, particularly in complex white collar cases.

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

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

these directives by expanding the scope of the existing enhancement at §2B1.1(b)(12)(B).

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

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

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

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

cases, however, the Commission added a provision at subsection (b)(12)(C) that limits the cumulative impact of subsections (b)(2) and (b)(12)(B) to eight levels, except for application of the minimum offense level of level 24.

Fifth, the amendment addresses the directive contained at section 1104(a)(2) of the Act to "consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses." The emergency amendment implemented this directive by providing a new, four level enhancement that applies if the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company.

The amendment expands the scope of this enhancement to cover registered brokers and dealers, associated persons of a broker or dealer, investment advisers, and associated persons of an investment adviser. The amendment also expands the scope of this enhancement to apply if the offense involves a violation of commodities law and, at the time of the offense, the defendant was an officer or director of a futures commission merchant or introducing broker, a commodities trading advisor, or a commodity pool operator. The Commission concluded that a four level enhancement appropriately reflects the culpability of offenders who occupy such positions and who are subject to heightened fiduciary duties imposed by securities law or commodities law similar to duties imposed on officers and directors of publicly traded corporations. Accordingly, the court is not required to determine specifically whether the defendant abused a position of trust in order for the enhancement to apply, and a corresponding application note provides that, in cases in which the new, four level enhancement applies, the existing two level enhancement for abuse of position of trust at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) shall not apply.

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

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

The amendment implements these directives by making two modifications to §2J1.2. First, the amendment increases the base offense level in §2J1.2 from level 12 to level 14. Second, the amendment adds a new two level enhancement to §2J1.2. This enhancement applies if the offense (1) involved the destruction, alteration, or fabrication of a substantial number of

records, documents or tangible objects; (2) involved the selection of any essential or especially probative record, document, or tangible object to destroy or alter; or (3) was otherwise extensive in scope, planning, or preparation. The amendment also adds an upward departure provision for offenses sentenced under §2J1.2 that involve extreme acts of violence, for example, retaliating against a government witness by throwing acid in the witness's face. The Commission determined that existing adjustments in Chapter Three for aggravating role, §3B1.1, and abuse of position of trust or use of special skill, §3B1.3, adequately account for those particular factors described in section 805(a) of the Act.

Seventh, the amendment also increases the base offense level in the perjury guideline, §2J1.3, from level 12 to level 14 in order to maintain the longstanding proportional relationship between the offense levels provided in the guidelines for perjury and obstruction of justice.

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

Finally, the amendment amends the contempt guideline, §2J1.1, by adding an application note clarifying that (1) §2B1.1 is the most analogous guideline in a case involving a violation of a judicial order enjoining fraudulent behavior; and (2) the enhancement at §2B1.1(b)(7)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply in such a case.

Effective Date: The effective date of this amendment is November 1, 2003.

654. Amendment: Section 2B1.1(b) is amended by inserting after subsection (b)(12) the following:

"(13) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved (I) a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security; or (II) an intent to obtain personal information, increase by 2 levels.

(ii) 18 U.S.C. § 1030(a)(5)(A)(i), increase by 4 levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial

disruption of a critical infrastructure, increase by 6 levels.

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

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting ", 2701" after "2332b(a)(1)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3(A)(v), as redesignated by Amendment 653, by striking subdivision (III) as follows:

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

and inserting the following:

"(III) Offenses Under 18 U.S.C. § 1030.—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.".

The Commentary to §2B1.1 captioned "Application Notes" is amended by inserting before Note 13, as redesignated by Amendment 653, the following:

"12. Application of Subsection (b)(13).—

(A) Definitions.—For purposes of subsection (b)(13):

'Critical infrastructure' means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

'Government entity' has the meaning given that term in 18 U.S.C.

§ 1030(e)(9).

'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.

(B) Subsection (b)(13)(iii).—If the same conduct that forms the basis for an enhancement under subsection (b)(13)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(12)(B), do not apply the enhancement under subsection (b)(12)(B).".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 18, as redesignated by Amendment 653, by adding at the end of subdivision (A)(ii) the following:

"An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted.";

by redesignating subdivision (B) as subdivision (C); and by inserting after subdivision (A) the following:

"(B) Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)(13)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.".

The Commentary to §2B1.1 captioned "Background" is amended by adding at the end the following paragraph:

" Subsection (b)(13) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(13)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.".

Section 2B2.3(b)(1) is amended by striking "or " after "airport;" and by inserting after "residence" the following:

"; or (F) on a computer system used (i) to maintain or operate a critical infrastructure; or (ii) by or for a government entity in furtherance of the administration of justice, national defense, or national security".

The Commentary to §2B2.3 captioned "Application Notes" is amended in Note 1 by

inserting after "United States Code." the following paragraph:

> "'Critical infrastructure' means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.";

and by inserting after "Instructions)." the following paragraph:

> "'Government entity' has the meaning given that term in 18 U.S.C. § 1030(e)(9).".

Section 2B3.2(b)(3) is amended by striking subdivision (B) as follows:

> "(B) If the offense involved preparation to carry out a threat of (i) death, (ii) serious bodily injury, (iii) kidnapping, or (iv) product tampering; or if the participant(s) otherwise demonstrated the ability to carry out such threat, increase by 3 levels.",

and inserting the following:

> "(B) If (i) the offense involved preparation to carry out a threat of (I) death; (II) serious bodily injury; (III) kidnapping; (IV) product tampering; or (V) damage to a computer system used to maintain or operate a critical infrastructure, or by or for a government entity in furtherance of the administration of justice, national defense, or national security; or (ii) the participant(s) otherwise demonstrated the ability to carry out a threat described in any of subdivisions (i)(I) through (i)(V), increase by 3 levels.".

The Commentary to §2B3.2 captioned "Application Notes" is amended by striking Note 1 as follows:

> "1. 'Firearm,' 'dangerous weapon,' 'otherwise used,' 'brandished,' 'bodily injury,' 'serious bodily injury,' 'permanent or life-threatening bodily injury,' 'abducted,' and 'physically restrained' are defined in the Commentary to §1B1.1 (Application Instructions).",

and inserting the following:

> "1. Definitions.—For purposes of this guideline:
>
> 'Abducted,' 'bodily injury,' 'brandished,' 'dangerous weapon,' 'firearm,' 'otherwise used,' 'permanent or life-threatening bodily injury,' 'physically restrained,' and 'serious bodily injury' have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

'Critical infrastructure' means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

'Government entity' has the meaning given that term in 18 U.S.C. § 1030(e)(9).".

The Commentary to §2M3.2 captioned "Statutory Provisions" is amended by inserting "§" before "793(a)"; and by inserting ", 1030(a)(1)" after "(g)".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 2512 the following:

"18 U.S.C. § 2701 2B1.1".

Reason for Amendment: This amendment addresses the serious harm and invasion of privacy that can result from offenses involving the misuse of, or damage to, computers. It implements the directive in section 225(b) of the Homeland Security Act of 2002, Pub. L. 107–296, which required the Commission to review, and if appropriate amend, the guidelines and policy statements applicable to persons convicted of offenses under 18 U.S.C. § 1030 (fraud and related activity in connection with computers) to ensure that the guidelines and policy statements reflect the serious nature and growing incidence of such offenses and the need for an effective deterrent and appropriate punishment. The directive further requires the Commission to consider the extent to which eight specific factors were or were not accounted for by the guidelines. The amendment responds to the directive by making several changes 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), 2B2.3 (Trespass), and 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage). These changes are designed to supplement existing guidelines and policy statements and thereby ensure that offenses under 18 U.S.C. § 1030 are adequately addressed and punished.

First, the amendment adds a new specific offense characteristic at §2B1.1(b)(13) with three alternative enhancements of two, four, and six levels. The first enhancement provides a two level increase for convictions under 18 U.S.C. § 1030 that involve either (1) a computer system used to maintain or operate a critical infrastructure or used in furtherance of the administration of justice, national defense, or national security; or (2) an intent to obtain private personal information. The second enhancement provides a four level increase for a conviction under 18 U.S.C. § 1030(a)(5)(A)(i), which requires a heightened showing of intent to cause damage. The third enhancement provides a six level increase, with a minimum offense level of level 24, for a conviction under 18 U.S.C. § 1030 that resulted in a substantial disruption of a critical infrastructure. The graduated levels ensure incremental

punishment for increasingly serious conduct, and were chosen in recognition of the fact that conduct supporting application of a more serious enhancement frequently will encompass behavior relevant to a lesser enhancement as well. Accordingly, the most serious applicable enhancement will apply in any particular case.

The minimum offense level of level 24 applicable to the third such enhancement was chosen to maintain parity with the minimum offense level that applies to an offense that substantially jeopardized the safety and soundness of a financial institution, substantially endangered the solvency or financial security of a publicly traded company or an organization of at least 1,000 employees, or substantially endangered the solvency or financial security of 100 or more victims. See §2B1.1(b)(12)(B). Because of the potential overlap in certain cases, the commentary provides that the enhancement at §2B1.1(b)(12)(B) will not apply in a case in which the conduct supporting the six level critical infrastructure enhancement is the only conduct that forms the basis for the §2B1.1(b)(12)(B) enhancement.

The minimum offense level of level 24 applicable to the third enhancement also reflects the fact that some offenders to whom the enhancement may apply will be subject to a statutory maximum penalty of five years' imprisonment, i.e., those convicted of an offense under 18 U.S.C. § 1030(a)(5)(A)(ii). To ensure that the most egregious cases involving critical infrastructure are adequately addressed, the amendment also provides an encouraged upward departure for cases in which the disruption of the critical infrastructure has a debilitating impact on national security, national economic security, national public health or safety, or any combination of these matters.

A definition of critical infrastructure is provided in the commentary. This definition is derived in part from the definition of critical infrastructure in the USA PATRIOT Act (see Pub. L. 107–56, section 1016; 42 U.S.C. § 5195c(e)) but was modified to ensure that the enhancement will apply to substantial disruptions of critical infrastructure that are regional, rather than national, in scope. Examples of critical infrastructures are provided.

Second, the amendment modifies the rule of construction relating to the calculation of loss in protected computer cases. This change was made to incorporate more fully the statutory definition of loss at 18 U.S.C. § 1030(e)(11), added as part of the USA PATRIOT Act, and to clarify its application to all 18 U.S.C. § 1030 offenses sentenced under §2B1.1.

Third, the amendment expands the upward departure note in §2B1.1. That note provides that an upward departure may be warranted if an offense caused or risked substantial non-monetary harm, including physical harm. The amendment adds a provision that expressly states that an upward departure would be warranted for an offense under 18 U.S.C. § 1030 involving damage to a protected computer that results in death.

Fourth, the amendment modifies §2B2.3, to which 18 U.S.C. § 1030(a)(3) (misdemeanor trespass on a government computer) offenses are referenced, and §2B3.2, to which 18 U.S.C. § 1030(a)(7) (extortionate demand to damage protected computer) offenses are referenced, to provide enhancements relating to computer systems used to maintain or operate a critical infrastructure, or by or for a government entity in furtherance of the administration of justice, national defense, or national security. The amendment expands the scope of existing enhancements to ensure that trespasses and extortions involving these types of important computer systems are addressed.

Finally, the amendment references offenses under 18 U.S.C. § 2701 (unlawful access to stored communications) to §2B1.1. Prior to the Act, a first offense under section 2701 was classified as a misdemeanor offense, and the guidelines did not reference the statute in Appendix A (Statutory Index). Given that the Act increased the penalties available for 18 U.S.C. § 2701 offenses, the amendment references the statute in Appendix A. Section 2701 offenses are referenced to §2B1.1 because such offenses involve the obtaining, altering, or denial of authorized access to stored wire or electronic communications, conduct that is related to fraud, theft, and property damage, which are covered by §2B1.1.

Effective Date: The effective date of this amendment is November 1, 2003.

655. **Amendment**: The Commentary to §2B1.1 captioned "Application Notes", as amended by Amendment 654, is further amended in subdivision (A)(ii) of Note 18, as redesignated by Amendment 653, by adding at the end the following:

> "An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.".

Section 2K1.3(a) is amended by redesignating subdivisions (3) and (4) as subdivisions (4) and (5), respectively; and by inserting after subdivision (2) the following:

> "(3) 18, if the defendant was convicted under 18 U.S.C. § 842(p)(2);".

Section 2K1.3(b)(3) is amended by inserting "(A) was convicted under 18 U.S.C. § 842(p)(2); or (B)" after "defendant".

Section 2K1.3(c)(1) is amended by inserting "(A) was convicted under 18 U.S.C. § 842(p)(2); or (B)" after "defendant".

The Commentary to §2K1.3 captioned "Application Notes" is amended in Note 3 by striking "(3)" and inserting "(4)".

The Commentary to §2K1.3 captioned "Application Notes" is amended in the second paragraph of Note 9 by striking "(3)" and inserting "(4)".

The Commentary to §2K1.3 captioned "Application Notes" is amended in Note 11 by adding at the end the following new paragraph:

> "In addition, for purposes of subsection (c)(1)(A), 'that other offense' means, with respect to an offense under 18 U.S.C. § 842(p)(2), the underlying Federal crime of violence.".

Section 2K1.4(a)(1)(B) is amended by striking "or a ferry" and inserting "a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use".

Section 2K1.4(a) is amended by striking subdivision (2) as follows:

"(2) 20, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than (i) a dwelling, or (ii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, or a ferry; or (C) endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an aircraft, a mass transportation vehicle, or a ferry; or",

and inserting the following:

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

The Commentary to §2K1.4 captioned "Statutory Provisions" is amended by inserting ", 2332f" after "2332a".

The Commentary to §2K1.4 captioned "Application Notes" is amended in Note 1 by adding at the end the following new paragraph:

"'State or government facility', 'infrastructure facility', 'place of public use', and 'public transportation system' have the meaning given those terms in 18 U.S.C. § 2332f(e)(3), (5), (6), and (7), respectively.".

Section 2M5.3 is amended in the heading by adding "or For a Terrorist Purpose" after "Organizations".

Section 2M5.3(b)(1) is amended in subdivision (C) by striking "or" after "explosives;"; in subdivision (D) by inserting "the intent," after "with" and by inserting a comma after "knowledge"; and by inserting "; or (E) funds or other material support or resources with the intent, knowledge, or reason to believe they are to be used to commit or assist in the commission of a violent act" after "(A) through (C)".

The Commentary to §2M5.3 captioned "Statutory Provision" is amended by striking "Provision" and inserting "Provisions"; by inserting "§" before "2339B"; and by inserting ", 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(B))" after "2339B".

The Commentary to §2M5.3 captioned "Application Notes" is amended in Note 2(A) by inserting "funds or other" after "volume of the".

Section 2M6.1(a)(2) is amended by inserting "and" after "(a)(3),"; and by striking ", and (a)(5)".

Section 2M6.1(a)(3) is amended by inserting "or" after the semicolon.

Section 2M6.1(a)(4) is amended by inserting "(A)" after "if"; and by inserting "(B) the offense (i) involved a threat to use a nuclear weapon, nuclear material, or nuclear byproduct material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (ii) did not involve any conduct evidencing an intent or ability to carry out the threat." after "or".

Section §2M6.1(a) is amended by striking subdivision (5) as follows:

"(5) 20, if the offense (A) involved a threat to use a nuclear weapon, nuclear material, or nuclear byproduct material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (B) did not involve any conduct evidencing an intent or ability to carry out the threat.".

Section 2M6.1(b)(1) is amended by striking the comma after "(a)(2)" and inserting "or"; and by striking ", or (a)(5)".

Section 2M6.1(b)(2) is amended by inserting "(A)" after "(a)(4)".

Section 2M6.1(b)(3) is amended by inserting "or" after "(a)(3),"; and by striking ", or (a)(5)".

The Commentary to §2M6.1 captioned "Statutory Provisions" is amended by inserting "(only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D))," after "842(p)(2)"; and by striking ", but including any biological agent, toxin, or vector".

The Commentary to §2M6.1 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "'Select biological agent'" by inserting "(A)" after "identified"; by inserting "and maintained" after "established"; and by striking "511(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104–132. See 42 C.F.R. part 72." and inserting "351A of the Public Health Service Act (42 U.S.C. § 262a); or (B) by the Secretary of Agriculture on the list established and maintained pursuant to section 212 of the Agricultural Bioterrorism Protection Act of 2002 (7 U.S.C. § 8401).".

The Commentary to §2M6.1 captioned "Application Notes" is amended in Note 2 by striking "(a)(3)" each place it appears and inserting "(a)(4)(B)".

Chapter Two, Part Q, is amended by striking §2Q1.4 in its entirety as follows:

"§2Q1.4. Tampering or Attempted Tampering with Public Water System

(a) Base Offense Level: 18

(b) Specific Offense Characteristics

(1) If a risk of death or serious bodily injury was created, increase by 6 levels.

(2) If the offense resulted in disruption of a public water system or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(3) If the offense resulted in an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time, increase by 2 levels.

(4) If the purpose of the offense was to influence government action or to extort money, increase by 6 levels.

Commentary

Statutory Provision: 42 U.S.C. § 300i-1.

Application Note:

1. 'Serious bodily injury' is defined in the Commentary to §1B1.1 (Application Instructions).",

and inserting the following new guideline:

"§2Q1.4. Tampering or Attempted Tampering with a Public Water System; Threatening to Tamper with a Public Water System

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

(1) 26;

(2) 22, if the offense involved (A) a threat to tamper with a public water system; and (B) any conduct evidencing an intent to carry out the threat; or

(3) 16, if the offense involved a threat to tamper with a public water system but did not involve any conduct evidencing an intent to carry out the threat.

(b) Specific Offense Characteristics

(1) If (A) any victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) any victim sustained serious bodily injury, increase by 2 levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

(2) If the offense resulted in (A) a substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by 4 levels.

(3) If the offense resulted in an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time, increase by 2 levels.

(c) Cross References

(1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) in any other case, if the resulting offense level is greater than that determined above.

(2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) if the resulting offense level is greater than that determined above.

(3) If the offense involved extortion, 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

(1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim.

Commentary

Statutory Provision: 42 U.S.C. § 300i-1.

Application Notes:

1. Definitions.—For purposes of this guideline, 'permanent or life-threatening

bodily injury' and 'serious bodily injury' have the meaning given those terms in Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. Application of Special Instruction.—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under this guideline or under another guideline in Chapter Two (Offense Conduct) by use of a cross reference under subsection (c).

3. Departure Provisions.—

(A) Downward Departure Provision.—The base offense level in subsection (a)(1) reflects that offenses covered by that subsection typically pose a risk of death or serious bodily injury to one or more victims, or cause, or are intended to cause, bodily injury. In the unusual case in which such an offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.

(B) Upward Departure Provisions.—If the offense caused extreme psychological injury, or caused substantial property damage or monetary loss, an upward departure may be warranted.

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 §3A1.4 (Terrorism).".

Chapter Two, Part Q, is amended by striking §2Q1.5 in its entirety as follows:

"§2Q1.5. Threatened Tampering with Public Water System

(a) Base Offense Level: 10

(b) Specific Offense Characteristic

(1) If the threat or attempt resulted in disruption of a public water system or evacuation of a community or a substantial public expenditure, increase by 4 levels.

(c) Cross Reference

(1) If the purpose of the offense was to influence government action or to extort money, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

Commentary

Statutory Provision: 42 U.S.C. § 300i-1.".

Section §2S1.1(b)(1)(B)(iii) is amended by striking "terrorism,".

The Commentary to §2S1.1 captioned "Statutory Provisions" is amended by inserting ", 1960 (but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. § 1960(b)(1)(C))" after "1957".

The Commentary to §2S1.3 captioned "Statutory Provisions" is amended by inserting "(but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. § 1960(b)(1)(A) and (B))" after "1960".

The Commentary to §2X2.1 captioned "Statutory Provisions" is amended by inserting ", 2339C(a)(1)(A)" after "2339A".

The Commentary to §2X2.1 captioned "Application Notes" is amended in Note 1 by inserting "or § 2339C(a)(1)(A)" after "2339A"; and by inserting ", or provided or collected funds for, "after "supported".

Section 2X3.1 is amended by striking the following:

"(a) Base Offense Level: 6 levels lower than the offense level for the underlying offense, but in no event less than 4, or more than 30. However, in a case in which the conduct is limited to harboring a fugitive, the base offense level under this subsection shall not be more than level 20.",

and inserting the following:

"(a) Base Offense Level:

(1) 6 levels lower than the offense level for the underlying offense, except as provided in subdivisions (2) and (3).

(2) The base offense level under this guideline shall be not less than level 4.

(3) (A) The base offense level under this guideline shall be not more than level 30, except as provided in subdivision (B).

(B) In any case in which the conduct is limited to harboring a fugitive, other than a case described in subdivision (C), the base offense level under this guideline shall be not more than level 20.

(C) The limitation in subdivision (B) shall not apply in any case in which (i) the defendant is convicted under 18 U.S.C. § 2339 or § 2339A; or (ii) the conduct involved

harboring a person who committed any offense listed in 18 U.S.C. § 2339 or § 2339A or who committed any offense involving or intending to promote a federal crime of terrorism, as defined in 18 U.S.C. § 2332b(g)(5). In such a case, the base offense level under this guideline shall be not more than level 30, as provided in subdivision (A).".

The Commentary to §2X3.1 captioned "Statutory Provisions" is amended by inserting ", 2339C(c)(2)(A), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C (a)(1)(A))" after "2339A".

The Commentary to §2X3.1 captioned "Application Notes" is amended in Note 1 by inserting ", or in the case of a violation of 18 U.S.C. § 2339C(c)(2)(A), 'underlying offense' means the violation of 18 U.S.C. § 2339B with respect to which the material support or resources were concealed or disguised" after "that offense)".

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 1960 by inserting "2S1.1," before "2S1.3";

by inserting after the line referenced to 18 U.S.C. § 2332d the following new line:

"18 U.S.C. § 2332f	2K1.4, 2M6.1";

by inserting after the line referenced to 18 U.S.C. § 2339B the following new lines:

"18 U.S.C. § 2339C(a)(1)(A)	2X2.1
18 U.S.C. § 2339C(a)(1)(B)	2M5.3
18 U.S.C. § 2339C(c)(2)(A)	2X3.1
18 U.S.C. § 2339C(c)(2)(B)	2M5.3, 2X3.1";

and in the line referenced to 42 U.S.C. § 300i-1 by striking ", 2Q1.5".

Reason for Amendment: This amendment is a three part amendment that (1) further responds to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. 107–56; (2) responds to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107–188; and (3) responds to the Terrorist Bombings Preparedness and Response Act of 2002, Pub. L. 107–197.

First, this amendment makes changes to the money laundering and transactions structuring guidelines to complete work begun in 2002 to address the provisions of the USA PATRIOT Act. The amendment eliminates the six level enhancement for terrorism in §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity) because such conduct is adequately accounted for by the terrorism adjustment at §3A1.4 (Terrorism). The terrorism adjustment at §3A1.4 applies if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5). Therefore, if the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote, an offense involving terrorism, as defined in §3A1.4, that adjustment will apply. This amendment also provides for the treatment of certain offenses under 18 U.S.C. § 1960. The

amendment changes Appendix A (Statutory Index) to refer violations of 18 U.S.C. § 1960 to both §§2S1.1 and 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Case or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). Referring violations of 18 U.S.C. § 1960(b)(1)(C) to §2S1.1 is appropriate because the essence of this offense is money laundering, rather than structuring transactions to evade reporting requirements.

The amendment also raises the maximum offense level in §2X3.1 (Accessory After the Fact) from level 20 to level 30 for offenses in which the conduct involves harboring or concealing a fugitive involved in a terrorism offense. The Commission determined that the heightened maximum offense level of level 30 is appropriate for offenses involving the harboring of terrorists because of the relative seriousness of those offenses. Specifically, the heightened maximum offense level applies in any case in which the defendant is convicted under 18 U.S.C. § 2339 or § 2339A or in which the conduct involved harboring a person who committed any offense listed under those statutes, or who committed any offense involving or intending to promote a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5).

Second, the amendment responds to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. The amendment refers certain new offenses involving biological agents and toxins to the guideline covering nuclear, biological, and chemical weapons and materials, §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 amendment also responds to amendments made to the Safe Drinking Water Act (42 U.S.C. § 300i-1(a)) made by section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. Section 1432(a) of the Safe Drinking Water Act prohibits any person from tampering with a public water system. The statutory maximum penalty was increased from five years' imprisonment to 20 years' imprisonment. Section 1432(b) of the Act prohibits anyone from attempting or threatening to tamper with a public water system. The statutory maximum penalty was increased from three years' imprisonment to ten years' imprisonment.

The amendment consolidates §§2Q1.5 (Threatened Tampering with Public Water System) and 2Q1.4 (Tampering or Attempted Tampering with Public Water System). This consolidation reflects the similar manner in which threats to carry out a nuclear, biological, or chemical weapons offense are treated under §2M6.1. Three alternative base offense levels are provided for the substantive offense and for a threat to carry out the substantive offense, either accompanied or unaccompanied by other conduct evidencing an intent to carry out the threat.

The amendment also increases the base offense level for offenses involving tampering and threatened tampering with a public water system. The amendment increases the base offense level for tampering with a public water system from level 18 to level 26. The six level enhancement for the risk of death or serious bodily injury (in the predecessor guideline) is incorporated into the base offense level, as are two levels for bodily injury (similar to the treatment of this aggravated conduct in the consumer product tampering guideline). A graduated enhancement for serious or life-threatening bodily injury, modeled after the

nuclear, biological, and chemical guideline and the consumer product tampering guideline, is added. Likewise, the base offense level for threatening to tamper with a public water system, without conduct evidencing an intent to carry out the threat, is increased from level 10 to level 16. A base offense level of level 22 is provided if there is conduct evidencing an intent to carry out the threat. For point of comparison, the existing base offense levels for threatening communications under §2A6.1 (Threatening or Harassing Communications) is level 12, and for threatened use of nuclear, biological, and chemical weapons under §2M6.1 is level 20. These substantial increases in the base offense levels for threatened tampering of a public water system are provided to ensure proportionality with similar offenses and to respond to the increased statutory maximum penalties made by section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. Additionally, the enhancement in subsection (b)(2) regarding the disruption of the public water system has been expanded slightly to make it consistent with similar enhancements in other related guidelines, such as the nuclear, biological, and chemical guideline, §2M6.1.

This amendment adds an invited upward departure provision 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), to account for aggravating conduct that may occur in connection with an animal enterprise offense under 18 U.S.C. § 43. While reference only to that guideline generally continues to be appropriate for violations under 18 U.S.C. § 43, that guideline fails to account for aggravated situations in which serious bodily injury or death results. Although the property damage guideline contains an enhancement for the risk of serious bodily injury or death, there is no enhancement or cross reference in that guideline that would provide a higher offense level if actual serious bodily injury or death resulted. Given the highly unusual occurrence of death or serious bodily injury in property damage cases generally and the infrequency of these specific offenses, the amendment adds an invited upward departure provision in the commentary of §2B1.1 if death or serious bodily injury occurs in an offense under 18 U.S.C. § 43, or if substantial or significant scientific information or research is lost as part of such an offense.

Third, the amendment amends Appendix A (and the Statutory Provisions of the pertinent Chapter Two guidelines) to add three new offenses created by the Terrorist Bombings Convention Implementation Act of 2002, and provides conforming amendments within a number of Chapter Two guidelines to incorporate more fully the new offenses into the offense guidelines. Section 102 of the Act created a new offense at 18 U.S.C. § 2332f, which provides in subsection (a) that "whoever unlawfully delivers, places, discharges, or detonates an explosive or other lethal device in, into, or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility (1) with the intent to cause death or serious bodily injury, or (2) with the intent to cause extensive destruction of such a place, facility, or system, where such destruction results in or is likely to result in major economic loss" and in subsection (b) that "whoever attempts or conspires to commit [such] an offense" shall be punished as provided under 18 U.S.C. § 2332a(a). Section 2332a offenses currently are referenced to §§2K1.4 (Arson; Property Damage by Use of Explosives) and 2M6.1. The amendment refers this new offense to those guidelines as well. In addition, the amendment amends the alternative base offense levels in §2K1.4(a)(1) so that the base offense level of level 24 applies to targets of 18 U.S.C. § 2332f offenses, namely, state or government facilities, infrastructure facilities, public transportation systems and "places of public use".

Section 202 of the Act created a new offense at 18 U.S.C. § 2339C. The amendment refers the new offense at 18 U.S.C. § 2339C(1)(A) to §2X2.1 (Aiding and Abetting). The new offense involves providing or collecting funds knowing or intending that the funds would be used to carry out any of a number of specified offenses. Accordingly, the amendment treats these offenses in the same manner as 18 U.S.C. § 2339A offenses, which aid and abet a predicate offense listed in the statute. An amendment is also made in §2X2.1 to provide a definition for the "underlying offense" that is aided and abetted.

The amendment also refers the new offense at 18 U.S.C. § 2339C(a)(1)(B) to §2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations). Reference to §2M5.3 is appropriate because this offense involves generally providing or collecting funds knowing or intending that the funds would be used to carry out an act which by its nature is a terrorist act (because it is meant to intimidate a civilian population or to compel a government or international organization to do something or to refrain from doing something). Therefore, the essence of the offense is the provision of material support to terrorists, which appropriately is referenced to §2M5.3. The amendment expands §2M5.3 to include not only designated foreign terrorist organizations but other terrorists as well.

Additionally, 18 U.S.C. § 2339C(c)(2) makes it unlawful in the United States, or outside the United States by a national of the United States or an entity organized under the laws of the United States, to knowingly conceal or disguise the nature, location, source, ownership, or control of any material support, resources, or funds knowing or intending that they were (1) provided in violation of 18 U.S.C. § 2339B, or (2) provided or collected in violation of 18 U.S.C. § 2339C(a)(1) or (2). The maximum term of imprisonment for a violation of subsection 18 U.S.C. § 2339C(c) is 10 years. The amendment references offenses under 18 U.S.C. § 2339C(c)(2)(A) to §2X3.1 (Accessory After the Fact), because the essence of such an offense is the concealment of resources that were known or intended to have been provided in violation of another substantive offense, namely, 18 U.S.C. § 2339B. An amendment is made in §2X3.1 to provide a definition of the "underlying offense" to which the defendant is an accessory.

The amendment references offenses under 18 U.S.C. § 2339C(c)(2)(B) to §§2M5.3 and 2X3.1. To the extent the offense involved knowingly concealing or disguising the nature, location, source, ownership, or control of any funds knowing or intending that they were provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(A), the offense should be sentenced under §2X3.1. This is because the concealment occurs with respect to funds the defendant knows are to be used, in full or in part, in order to carry out an act which constitutes any number of specified offenses. To the extent the offense involved knowingly concealing or disguising the nature, location, source, ownership, or control of any funds knowing or intending that they were provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(B), the offense should be sentenced under §2M5.3. This is because the concealment occurs with respect to material support the defendant knows is to be used, in full or in part, in order to carry out an act which by its nature is a terrorist act (because it is meant to intimidate a civilian population or to compel a government or international organization to do something or to refrain from doing something). A conforming amendment is added to the Statutory Provisions of §§2M5.3 and 2X3.1.

Finally, an amendment is made to §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transaction Involving Explosive Materials) to add an additional base offense level of level 18 for certain offenses committed under 18 U.S.C. §

842(p)(2) involving explosives, destructive devices, or weapons of mass destruction. The statute is referenced in Appendix A to §§2K1.3 and 2M6.1. The applicable offense levels at §2M6.1 are levels 42 and 28. The applicable base offense level at §2K1.3 is level 12. The base offense level of level 12 appears to be disproportionately low compared with other 20 year offenses and compared with the treatment of 18 U.S.C. § 842(p)(2) offenses under §2M6.1. This is especially true in light of the definition of destructive device, defined at 18 U.S.C. § 921(a)(4) to include any explosive, incendiary, or poison gas (1) bomb; (2) grenade; (3) rocket having a propellant charge of more than four ounces; (4) missile having an explosive or incendiary charge of more than one-quarter ounce; (5) mine; or (6) device similar to any of the devices described in the preceding clauses.

The amendment makes the enhancement at §2K1.3(b)(3) and the cross reference at §2K1.3(c)(1) applicable to 18 U.S.C. § 842(p)(2) offenses. In cases in which the defendant used or possessed any explosive material in connection with another felony offense or possessed or transferred any explosive material with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, subsection (b)(3) provides a four level enhancement and a minimum offense level of level 18. Alternatively, the cross reference at subsection (c)(1) references such cases either to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Guideline)), or to the most analogous homicide guideline if death resulted, if the resulting offense level is greater. Application of both subsection (b)(3) and subsection (c)(1) to 18 U.S.C. § 842(p)(2) offenses is appropriate because of the defendant's knowledge and/or intent that the defendant's teaching would be used to carry out another felony.

Effective Date: The effective date of this amendment is November 1, 2003.

656. Amendment: The heading of Part C of Chapter Two, amendments to the Introductory Commentary of Part C of Chapter Two, §§2C1.8, 3D1.2 and 5E1.2, effective January 25, 2003 (see USSC Guidelines Manual Appendix C (Volume II), Amendment 648), are repromulgated without change. Appendix A, effective January 25, 2003 (see USSC Guidelines Manual Appendix C (Volume II), Amendments 647 and 648; see also this document, Amendment 653), is repromulgated without change.

Reason for Amendment: The Commission promulgated an emergency amendment addressing the directive from Congress contained in the Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155, (the "BCRA"), with an effective date of January 25, 2003. (See Amendment 648.) This amendment repromulgates without change the emergency amendment as a permanent amendment.

This amendment implements the directive from Congress contained in the BCRA to the effect that the Commission "promulgate a guideline, or amend an existing guideline ... , for penalties for violations of the Federal Election Campaign Act of 1971 [the "FECA"] and related election laws ... ." The BCRA significantly increased statutory penalties for campaign finance crimes, formerly misdemeanors under the FECA. The new statutory maximum term of imprisonment for even the least serious of these offenses is now two years, and for more serious offenses, the maximum term of imprisonment is five years.

To punish these offenses effectively, the Commission chose to create a new guideline at §2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign

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

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

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

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

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

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

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

The new guideline also provides a cross reference, at subsection (c), which directs the sentencing court to apply either §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the offense involved a bribe or a gratuity and the resulting offense level would be greater than that determined under §2C1.8.

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

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

Effective Date: The effective date of this amendment is November 1, 2003.

657. **Amendment**: Section 2D1.1(c) is amended in Note (B) of the "*Notes to Drug Quantity Table" by adding at the end the following new paragraph:

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

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 9 by striking "or " after "amphetamine,"; and by inserting ", or oxycodone" after "methamphetamine".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10, in the Drug Equivalency Tables, in the subdivision captioned "Schedule I or II Opiates*" by striking "1 gm of Oxycodone = 500 gm of marihuana" and inserting "1 gm of Oxycodone (actual) = 6700 gm of marihuana".

Reason for Amendment: This amendment responds to proportionality issues in the sentencing of oxycodone trafficking offenses. Oxycodone is an opium alkaloid found in certain prescription pain relievers such as Percocet and OxyContin. This prescription drug generally is sold in pill form and, prior to this amendment, the sentencing guidelines established penalties for oxycodone trafficking based on the entire weight of the pill. The proportionality issues arise (1) because of the formulations of the different medicines; and (2) because different amounts of oxycodone are found in pills of identical weight.

As an example of the first issue, the drug Percocet contains, in addition to oxycodone, the non-prescription pain reliever acetaminophen. The weight of the oxycodone component accounts for a very small proportion of the total weight of the pill. In contrast, the weight of the oxycodone accounts for a substantially greater proportion of the weight of an OxyContin pill. To illustrate this difference, a Percocet pill containing five milligrams (mg) of oxycodone weighs approximately 550 mg with oxycodone accounting for 0.9 percent of the total weight of the pill. By comparison, the weight of an OxyContin pill containing 10

mg of oxycodone is approximately 135 mg with oxycodone accounting for 7.4 percent of the total weight. Consequently, prior to this amendment, trafficking 364 Percocet pills or 1,481 OxyContin pills resulted in the same five year sentence of imprisonment. Additionally, the total amount of the narcotic oxycodone involved in this example is vastly different depending on the drug. The 364 Percocets produce 1.8 grams of actual oxycodone while the 1,481 OxyContin pills produce 14.8 grams of oxycodone.

The second issue results from differences in the formulation of OxyContin. Three different amounts of oxycodone (10, 20, and 40 mg) are contained in pills of identical weight (135 mg). As a result, prior to this amendment, an individual trafficking in a particular number of OxyContin pills would receive the same sentence regardless of the amount of oxycodone contained in the pills.

To remedy these proportionality issues, the amendment changes the Drug Equivalency Tables in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide sentences for oxycodone offenses using the weight of the actual oxycodone instead of calculating the weight of the entire pill. The amendment equates 1 gram of actual oxycodone to 6,700 grams of marihuana. This equivalency keeps penalties for offenses involving 10 mg OxyContin pills identical to levels that existed prior to the amendment, substantially increases penalties for all other doses of OxyContin, and decreases somewhat the penalties for offenses involving Percocet.

Effective Date: The effective date of this amendment is November 1, 2003.

658. Amendment: Section 2L1.2(b)(1)(A)(vii) is amended by striking "committed for profit".

The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 1 by striking subdivision (A)(iv) as follows:

"(iv) If all or any part of a sentence of imprisonment was probated, suspended, deferred, or stayed, "sentence imposed" refers only to the portion that was not probated, suspended, deferred, or stayed.",

and inserting the following:

"(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.".

The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 1 by striking subdivision (B) as follows:

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

(i) 'Committed for profit' means committed for payment or expectation of payment.

(ii) 'Crime of violence'—

(I) means an 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

(II) includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.

(iii) 'Drug trafficking offense' means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(iv) 'Felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

(v) 'Firearms offense' means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).

(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).

(III) A violation of 18 U.S.C. § 844(h).

(IV) A violation of 18 U.S.C. § 924(c).

(V) A violation of 18 U.S.C. § 929(a).

(vi) 'Terrorism offense' means any offense involving, or intending to promote, a 'federal crime of terrorism', as that term is defined in 18 U.S.C. § 2332b(g)(5),

and inserting the following:

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

(i) 'Alien smuggling offense' has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).

(ii) 'Child pornography offense' means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) 'Crime of violence' means any of the following: 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.

(iv) 'Drug trafficking offense' means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(v) 'Firearms offense' means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).

(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).

(III) A violation of 18 U.S.C. § 844(h).

(IV) A violation of 18 U.S.C. § 924(c).

(V) A violation of 18 U.S.C. § 929(a).

(VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vi) 'Human trafficking offense' means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime

and territorial jurisdiction of the United States.

(vii) 'Sentence imposed' has the meaning given the term 'sentence of imprisonment' in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

(viii) 'Terrorism offense' means any offense involving, or intending to promote, a 'Federal crime of terrorism', as that term is defined in 18 U.S.C. § 2332b(g)(5).".

Section 2L1.2 captioned "Application Notes" is amended by striking Note 2 as follows:

"2. Application of Subsection (b)(1)(C).—For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction of the aggravated felony.",

and inserting the following:

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

Section 2L1.2 captioned "Application Notes" is amended by redesignating Notes 4 and 5 as Notes 5 and 6, respectively; and

by redesignating Note 3 as Note 4; and by inserting after Note 2 the following:

"3. Application of Subsection (b)(1)(C).—

(A) Definitions.—For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).".

Section 2L1.2 captioned "Application Notes" is amended in Note 4, as redesignated by this amendment, by striking subdivision (B) as follows:

"(B) 'Three or more convictions' means at least three convictions for offenses that (i) were separated by an intervening arrest; (ii) did not occur on the same occasion; (iii) were not part of a single common scheme or plan; or (iv) were not consolidated for trial or sentencing.",

and inserting the following:

"(B) 'Three or more convictions' means at least three convictions for offenses that are not considered 'related cases', as that term is defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).".

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

"8 U.S.C. § 1252(e) 2L1.2",

and inserting the following:

"8 U.S.C. § 1253 2L1.2".

Reason for Amendment: In 2001 the Commission comprehensively revised §2L1.2 (Unlawfully Entering or Remaining in the United States) to provide more graduated enhancements at subsection (b)(1) for illegal re-entrants previously deported after criminal convictions. In response to application issues raised by a number of judges, probation officers, defense attorneys, and prosecutors, particularly along the southwest border between the United States and Mexico, this amendment builds upon the 2001 amendment by clarifying the meaning of some of the terms used in §2L1.2(b)(1).

First, the amendment adds commentary to define the following offenses: "alien smuggling", "child pornography", and "human trafficking." Prior to the amendment, these offenses received a 16 level increase but were not defined. The lack of definitions led to litigation regarding the meaning and scope of some of these terms. The Commission has determined that these offenses warrant application of the 16 level enhancement even though some of these offenses, as defined by the amendment, may not meet the statutory definition of an aggravated felony in 8 U.S.C. § 1101(a)(43).

The amendment provides a definition of "alien smuggling offense" in a manner consistent with the "aggravated felony" definition in 8 U.S.C. § 1101(a)(43)(N). This statutory definition excludes "a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other person)". This definition generally is consistent with the guideline's previous terminology of "alien smuggling offense committed for profit," and results in a 16 level increase only for the most serious of such offenses. The new definition also responds to concerns about whether an alien smuggling offense includes the offenses of harboring or transporting aliens. By explicitly incorporating the statutory definition of alien smuggling within the guideline definition, the amendment, in effect, adopts the Fifth Circuit's interpretation of "alien smuggling". See United States v. Solis-Campozano, 312 F.3d 164 (5th Cir. 2002) (holding that "alien smuggling offense" was not limited to the "offense of alien smuggling" but includes transporting aliens brought into the country as well).

Second, the amendment adds commentary that clarifies the meaning of the term "crime of violence" by providing that the term "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." The previous definition often led to confusion over whether the specified offenses listed in that definition, particularly sexual abuse of a minor and residential burglary, also had to include as an element of the offense "the use, attempted use, or threatened use of physical force against the person of another." The amended definition makes clear that the enumerated offenses 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.

Third, the amendment adds commentary at Application Note 1(B)(vii) explaining that the term "sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence of imprisonment includes any term of imprisonment given upon revocation of probation, parole, or supervised release. The Commission's approach in clarifying this definition is consistent with the case law interpreting the term and the use of the term in Chapter Four of the guidelines. See, e.g., United States v. Moreno-Cisneros, 319 F.3d 456 (9th Cir. 2003) (holding that the length of the sentence of imprisonment includes any term of imprisonment given upon revocation of probation, parole, or supervised release); United States v. Compian-Torres, 320 F.3d 514 (5th Cir. 2003) (same). Compare United States v. Hidalgo-Macias, 300 F.3d 281 (2d Cir. 2002) (holding that the imposition of a sentence of imprisonment following revocation of probation is a modification of the original sentence and must be considered part of the sentence imposed for the original offense), with United States v. Rodriguez-Arreola, 313 F.3d 1064 (8th Cir. 2002) (holding that the term "sentence imposed" when applied to an indeterminate sentence is the maximum term that a defendant may serve).

Fourth, the amendment adds commentary providing that the enhancements in subsection (b)(1) do not apply to a conviction for an offense committed before the defendant was eighteen years of age, unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted. This provision is consistent with the approach in Chapter Four of the guidelines.

The amendment also makes other minor technical and clarifying changes.

Effective Date: The effective date of this amendment is November 1, 2003.

659. Amendment: Chapter Three, Part B, is amended by adding at the end the following new guideline:

"§3B1.5. Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence

If—

(1) the defendant was convicted of a drug trafficking crime or a crime of violence; and

(2) (apply the greater)—

(A) the offense involved the use of body armor, increase by 2 levels; or

(B) the defendant used body armor during the commission of the offense, in preparation for the offense, or in an attempt to avoid apprehension for the offense, increase by 4 levels.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

'Body armor' means any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment. See 18 U.S.C. § 921(a)(35).

'Crime of violence' has the meaning given that term in 18 U.S.C. § 16.

'Drug trafficking crime' has the meaning given that term in 18 U.S.C. § 924(c)(2).

'Offense' has the meaning given that term in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

'Use' means (A) active employment in a manner to protect the person from gunfire; or (B) use as a means of bartering. 'Use' does not mean mere possession (e.g., 'use' does not mean that the body armor was found in the trunk of the car but not used actively as protection). 'Used' means put into 'use' as defined in this paragraph.

2. Application of Subdivision (2)(B).—Consistent with §1B1.3 (Relevant Conduct), the term 'defendant', for purposes of subdivision (2)(B), 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.

Background: This guideline implements the directive in the James Guelff and Chris McCurley Body Armor Act of 2002 (section 11009(d) of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273).".

Reason for Amendment: This amendment responds to the directive in section 11009 of the 21st Century Department of Justice Appropriations Authorization Act (the "Act"), Pub. L. 107–273. The directive requires the Sentencing Commission to review and amend the guidelines, as appropriate, to provide an appropriate sentencing enhancement for any crime

of violence (as defined in 18 U.S.C. § 16) or drug trafficking crime (as defined in 18 U.S.C. § 924(c)) (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) in which the defendant used body armor. The Act included a sense of Congress that any such enhancement should be at least two levels.

In response to the directive, the amendment creates a new Chapter Three adjustment at §3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence). The new adjustment provides for the greater of a two level adjustment if the defendant was convicted of a crime of violence or a drug trafficking crime and the offense involved the use of body armor, or a four level adjustment if the defendant used body armor in preparation for, during the commission of, or in an attempt to avoid apprehension for, the offense.

An application note defines "drug trafficking crime" (as defined in 18 U.S.C. § 924(e)(2)). This definition includes any felony punishable under the Controlled Substances Act. The application note also defines "crime of violence" (as defined in 18 U.S.C. § 16). This definition includes offenses that involve the use or attempted use of physical force against property as well as persons. Both of these definitions are somewhat broader than the definitions of "crime of violence" and "drug trafficking offense" used in a number of other guidelines. The definition of "body armor" is the same as the statutory definition provided in 18 U.S.C. § 921(a)(35).

An application note makes clear that in order for §3B1.5 to apply, the body armor must be used, i.e., actively employed either in a manner to protect the person from gunfire or as a means of bartering. Mere possession is insufficient to trigger the adjustment.

Another application note explains that in order for the heightened, four level adjustment to apply, the defendant must have used the body armor or aided, abetted, counseled, commanded, induced, procured, or willfully caused someone else to use the body armor.

Effective Date: The effective date of this amendment is November 1, 2003.

660. Amendment: Section 5G1.3 is amended by striking subsection (b) as follows:

> "(b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.",

and inserting the following:

> "(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.".

Section 5G1.3(c) is amended by inserting "involving an undischarged term of imprisonment" after "case".

The Commentary to §5G1.3 captioned "Application Notes" is amended by striking Notes 2 through 7 as follows:

"2. Adjusted concurrent sentence - subsection (b) cases. When a sentence is imposed pursuant to subsection (b), the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if the court determines that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons. Example: The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guideline range because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody that will not be credited to the federal sentence under 18 U.S.C. § 3585(b).

3. Concurrent or consecutive sentence - subsection (c) cases. In circumstances not covered under subsection (a) or (b), subsection (c) applies. Under this subsection, the court may impose a sentence concurrently, partially concurrently, or consecutively. To achieve a reasonable punishment and avoid unwarranted disparity, the court should consider the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a)) and be cognizant of:

(a) the type (e.g., determinate, indeterminate/parolable) and length of

the prior undischarged sentence;

(b) the time served on the undischarged sentence and the time likely to be served before release;

(c) the fact that the prior undischarged sentence may have been imposed in state court
rather than federal court, or at a different time before the same or different federal court; and

(d) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

4. Partially concurrent sentence. In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence (A) when the defendant is released from the prior undischarged sentence, or (B) on a specified date, whichever is earlier. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

5. Complex situations. Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

6. Revocations. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See §7B1.3 (Revocation of Probation or Supervised Release) (setting forth a policy that any imprisonment penalty imposed for violating probation or supervised release should be consecutive to any sentence of imprisonment being served or subsequently imposed).

7. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if subsection (b) would have applied to that term of imprisonment had the term been undischarged. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.",

and inserting the following:

"2. Application of Subsection (b).—

(A) In General.—Subsection (b) applies in cases in which all of the prior offense (i) is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct); and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense increased the Chapter Two or Three offense level for the instant offense but was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (e.g., the prior offense is an aggravated felony for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).

(C) Imposition of Sentence.—If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgement in a Criminal Case Order (i) the applicable subsection (e.g., §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.

(D) Example.—The following is an example in which subsection (b) applies and an adjustment to the sentence is appropriate:

The defendant is convicted of a federal offense charging the sale of 40 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12-18 months (Chapter Two offense level of level 16 for sale of 55 grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to

run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

3. Application of Subsection (c).—

(A) In General.—Under subsection (c), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

(i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));

(ii) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;

(iii) the time served on the undischarged sentence and the time likely to be served before release;

(iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and

(v) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

(B) Partially Concurrent Sentence.—In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

(C) Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—Subsection (c) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the

sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

(D) Complex Situations.—Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

(E) Downward Departure.—Unlike subsection (b), subsection (c) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (c), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(c), rather than as a credit for time served.

4. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. See §5K2.23 (Discharged Terms of Imprisonment).".

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

"§5K2.23. Discharged Terms of Imprisonment (Policy Statement)

A sentence below the applicable guideline range may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of §5G1.3 (Imposition of a

Sentence on a Defendant Subject to Undischarged Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.".

Reason for Amendment: This amendment addresses a number of issues in §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment).

First, this amendment clarifies the rule for application of subsection (b) (mandating a concurrent term of imprisonment) with respect to a prior term of imprisonment by stating that subsection (b) shall apply only to prior offenses that are relevant conduct to the instant offense of conviction and that resulted in an increase in the offense level for the instant offense. By clarifying the application of subsection (b), this amendment addresses conflicting litigation regarding the meaning of "fully taken into account." Compare, e.g., United States v. Garcia-Hernandez, 237 F.3d 105, 109 (2d Cir. 2000) (determining that a prior offense is "fully taken into account" if and only if the guidelines provide for sentencing as if both the offense of conviction and the separate offense had been prosecuted in a single proceeding), with United States v. Fuentes, 107 F.3d 1515, 1524 (11th Cir. 1997) (finding that a prior offense has been "fully taken into account" when the prior offense is part of the same course of conduct, common scheme, or plan).

Second, this amendment addresses how this guideline applies in cases in which an instant offense is committed while the defendant is on federal or state probation, parole, or supervised release, and has had such probation, parole, or supervised release revoked. Under this amendment, the sentence for the instant offense may be imposed concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment; however, the Commission recommends a consecutive sentence in this situation. This amendment also resolves a circuit conflict concerning whether the imposition of such sentence is required to be consecutive. The amendment follows holdings of the Second, Third, and Tenth Circuits stating that imposition of sentence for the instant offense is not required to be consecutive to the sentence imposed upon revocation of probation, parole, or supervised release. See United States v. Maria, 186 F.3d 65, 70-73 (2d Cir. 1999); United States v. Swan, 275 F.3d 272, 279-83 (3d Cir. 2002); United States v. Tisdale, 248 F.3d 964, 977-79 (10th Cir. 2001).

Third, this amendment provides a new downward departure provision in §5K2.23 (Discharged Terms of Imprisonment) regarding the effect of discharged terms of imprisonment. This provision replaces the departure provision previously set forth in Application Note 7 of §5G1.3. By placing the departure provision in Chapter Five, Part K, this amendment brings structural clarity to §5G1.3 because the guideline applies to undischarged, rather than discharged, terms of imprisonment. For ease of application, the new commentary in §5G1.3 provides a reference to §5K2.23.

Finally, this amendment addresses a circuit conflict regarding whether the sentencing court may grant "credit" or adjust the instant sentence for time served on a prior undischarged term covered under subsection (c). Compare Ruggiano v. Reish, 307 F.3d 121 (3d Cir. 2002) (federal sentencing court may grant such credit), with United States v. Fermin, 252 F.3d 102

(2d Cir. 2001) (court may not grant such credit). The amendment makes clear that the court may not adjust or give "credit" for time served on an undischarged term of imprisonment covered under subsection (c). However, the amendment adds commentary to §5G1.3 to provide that courts may consider a downward departure in an extraordinary case, in order to achieve a reasonable punishment for the instant offense.

Effective Date: The effective date of this amendment is November 1, 2003.

661. Amendment: Section 1B1.1 is amended by inserting before subsection (a) the following new paragraph:

> "Except as specifically directed, the provisions of this manual are to be applied in the following order:".

The Commentary to §1B1.1 captioned "Application Notes" is amended by striking Note 4 as follows:

> "4. The offense level adjustments from more than one specific offense characteristic within an offense guideline are cumulative (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. E.g., in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.
>
> Absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together).",

and inserting the following:

> "4. (A) Cumulative Application of Multiple Adjustments within One Guideline.—The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.
>
> (B) Cumulative Application of Multiple Adjustments from Multiple Guidelines.—Absent an instruction to the contrary, enhancements under Chapter Two, adjustments under Chapter Three, and determinations under Chapter Four are to be applied cumulatively. In some cases, such enhancements, adjustments, and determinations may be triggered by the same conduct. For example, shooting a

police officer during the commission of a robbery may warrant an injury enhancement under §2B3.1(b)(3) and an official victim adjustment under §3A1.2, even though the enhancement and the adjustment both are triggered by the shooting of the officer.".

The Commentary to §1B1.1 captioned "Application Notes" is amended by adding at the end the following:

"(7) Use of Abbreviated Guideline Titles.—Whenever a guideline makes reference to another guideline, a parenthetical restatement of that other guideline's heading accompanies the initial reference to that other guideline. This parenthetical is provided only for the convenience of the reader and is not intended to have substantive effect. In the case of lengthy guideline headings, such a parenthetical restatement of the guideline heading may be abbreviated for ease of reference. For example, references 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) may be abbreviated as follows: §2B1.1 (Theft, Property Destruction, and Fraud).".

The Commentary to §2A3.1 captioned "Application Notes" is amended in Note 1 in the paragraph beginning "'Prohibited sexual conduct'" by striking the following:

"'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.",

and inserting:

"'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.".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "19 U.S.C. § 2401f;" before "29 U.S.C.".

The Commentary to §2C1.3 captioned "Statutory Provisions" is amended by inserting "; 40 U.S.C. § 14309(a), (b)" after "1909".

Section §2D1.11(e)(1) is amended in the subdivision captioned "List I Chemicals" by striking the period after "Gamma-butyrolactone" and inserting a semi-colon; and by adding at the end the following:

"714 G or more of Red Phosphorus.".

Section §2D1.11(e)(2) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 214 G but less than 714 G of Red Phosphorus;".

Section §2D1.11(e)(3) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 71 G but less than 214 G of Red Phosphorus;".

Section §2D1.11(e)(4) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 50 G but less than 71 G of Red Phosphorus;".

Section §2D1.11(e)(5) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 29 G but less than 50 G of Red Phosphorus;".

Section §2D1.11(e)(6) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 7 G but less than 29 G of Red Phosphorus;".

Section §2D1.11(e)(7) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 6 G but less than 7 G of Red Phosphorus;".

Section §2D1.11(e)(8) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 4 G but less than 6 G of Red Phosphorus;".

Section §2D1.11(e)(9) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 3 G but less than 4 G of Red Phosphorus;".

Section §2D1.11(e)(10) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"Less than 3 G of Red Phosphorus;".

The Commentary to §2G2.1 captioned "Application Notes" is amended by striking Note 6 as follows:

"6. Upward Departure Provisions.—An upward departure may be warranted in either of the following circumstances:

(A) The defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years.

(B) The offense involved more than 10 victims.",

and inserting the following:

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

Section 2G2.2(b)(5) is amended by inserting ", receipt, or distribution" after "transmission".

The Commentary to §2H2.1 captioned "Statutory Provisions" is amended by inserting ", 1015(f)" after "597".

The Commentary to §2K2.5 captioned "Statutory Provisions" is amended by inserting "; 40 U.S.C. § 5104(e)(1)" after "930".

The Commentary to §2N2.1 captioned "Statutory Provisions" is amended by inserting ", 8313" after "7734".

The Commentary to §2R1.1 captioned "Statutory Provision" is amended by striking "Provision" and inserting "Provisions"; and by striking "§ 1" and inserting "§§ 1, 3(b)".

The Commentary to §4B1.5 captioned "Application Notes" is amended Note 4(A) by striking "(i) means" and inserting "means any of the following: (i)"; by striking "includes" each place it appears; by inserting "or" before "(iii)"; and by striking "; and (iv)" and inserting ". It".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 7 U.S.C. § 7734 the following new line:

"7 U.S.C. § 8313 2N2.1";

by inserting after the line referenced to 15 U.S.C. § 1 the following new line:

"15 U.S.C. § 3(b) 2R1.1";

in the line referenced to 18 U.S.C. § 1015 by inserting "(a)-(e)" after "1015";

by inserting after the line referenced to 18 U.S.C. § 1015(a)-(e), as amended by this amendment, the following new line:

"18 U.S.C. § 1015(f) 2H2.1";

by inserting after the line referenced to 19 U.S.C. § 2316 the following new line:

"19 U.S.C. § 2401f 2B1.1"; and

by inserting after the line referenced to 38 U.S.C. § 3502 the following new lines:

"40 U.S.C. § 5104(e)(1) 2K2.5
40 U.S.C. § 14309(a), (b) 2C1.3".

Reason for Amendment: This six-part amendment makes several technical and conforming changes to various guideline provisions.

First, this amendment makes changes to §1B1.1 (Application Instructions) to (1) provide an instruction making clear that the application instructions are to be applied in the order presented in the guideline; (2) provide an application note making clear that, absent an instruction to the contrary, Chapter Two enhancements, Chapter Three adjustments, and determinations under Chapter Four triggered by the same conduct are to be applied cumulatively; and (3) provide an application note concerning the use of abbreviated guideline titles to ease reference to guidelines that have exceptionally long titles.

Second, this amendment adds red phosphorus to the Chemical Quantity Table in §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) in response to a recent classification of red phosphorus as a List I chemical.

Third, this amendment conforms the departure provision in Application Note 6 of §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 Application Note 12 of §2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct).

Fourth, this amendment amends subsection (b)(5) of §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) to include receipt and distribution in the enhancement for use of a computer.

Fifth, this amendment restructures the definitions of "prohibited sexual conduct" in §§2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) and 4B1.5 (Repeat and Dangerous Sex Offender Against Minors) to eliminate possible ambiguity regarding the interaction of "means" and "includes".

Finally, this amendment responds to new legislation and makes other technical amendments as follows:

(1) Amends Appendix A (Statutory Index) and §2N2.1 (Violations of Statutes and Regulations Dealing with any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) in response to new offenses created by the Farm Security and Rural Investment Act of 2002 (the "Act"), Pub. L. 107–171. The first new offense provides a statutory maximum of one year of imprisonment for violating the Animal Health Protection Act (Subtitle E of the Act), or for counterfeiting or destroying certain documents specified in the Animal Health Protection Act. The second new offense provides a statutory maximum term of imprisonment of five years for importing, entering, exporting, or moving any animal or article for distribution or sale. The Act also provides a statutory maximum of ten years' imprisonment for a subsequent violation of either offense.

(2) Amends Appendix A 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 response to a new offense (19 U.S.C. § 2401f) created by the Trade Act of 2002, Pub. L. 107–210. The new offense provides a statutory maximum term of imprisonment of one year for knowingly making a false statement of material fact for the purpose of obtaining or increasing a payment of federal adjustment assistance to qualifying agricultural commodity producers.

(3) Amends Appendix A, §§2C1.3 (Conflict of Interest; Payment or Receipt of Unauthorized Compensation) and 2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone) in response to the codification of title 40, United States Code, by Pub. L. 107–217. Section 5104(e)(1) of title 40, United States Code, prohibits anyone (except as authorized by the Capitol Police Board) from carrying or having readily accessible a firearm, dangerous weapon, explosive, or incendiary device on the Capitol Grounds or in any of the Capitol Buildings. The statutory maximum term of imprisonment is five years. The amendment references 40 U.S.C. § 5104(e)(1) to §2K2.5. Section 14309(a) of title 40, United States Code, prohibits certain conflicts of interests of members of the Appalachian Regional Commission and provides a statutory maximum term of imprisonment of two years. Section 14309(b) prohibits certain additional sources of salary and provides a statutory maximum term of imprisonment of one year. The amendment references 40 U.S.C. § 14309(a) and (b) to §2C1.3.

(4) Amends Appendix A and §2H2.1 (Obstructing an Election or Registration) to provide a guideline reference for offenses under 18 U.S.C. § 1015(f). Prior to this amendment, 18 U.S.C. § 1015 was referenced to §§2B1.1, 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), 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). However, 18 U.S.C. § 1015(f) specifically relates to knowingly making false statements in order to register to vote, or to vote, in a Federal, State, or local election. Accordingly, the amendment references 18 U.S.C. § 1015(f) to §2H2.1 (Obstructing an Election or Registration).

(5) Amends Appendix A and §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) in response to a new offense (15 U.S.C. § 3) created by section 14102 (the Antitrust Technical Corrections Act of 2002) of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273. The new offense provides a statutory maximum term of imprisonment of three years, and a maximum fine of $10,000,000 for a corporation, or $350,000 for an

individual, for monopolizing, or attempting or conspiring to monopolize, any part of the trade or commerce in or between any states, or territories of the United States, or between any such states, or territories of the United States and any foreign nations.

Effective Date: The effective date of this amendment is November 1, 2003.

662. **Amendment:** Section 1B1.10(c) is amended by striking "and 606" and inserting "606, and 657".

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.

Effective Date: The effective date of this amendment is November 5, 2003.