

REVISED PROPOSED AMENDMENT: CONSENT CALENDAR AMENDMENTS

Synopsis of Proposed Amendment: *This proposed amendment makes technical and conforming changes to various guideline provisions. The proposed amendment accomplishes the following:*

- (1) *Clarifies that language in §5D1.2(c) (recommending the maximum term of supervised release for sex offenders) is a policy statement.*
- (2) *Conforms the language in §2B4.1(b)(2) concerning offenses that "affect a financial institution" with subsection (b)(12) of §2B1.1 (Larceny, Embezzlement, and other forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit).*
- (3) *Inserts a missing "or" in §2Q1.6(a)(3).*
- (4) *(A) Updates statutory references in §§2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt and 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) and Appendix A (Statutory Index) to correspond to statutory redesignations made by the Hillary J. Farias and Samantha Reid Date Rape Prevention Act; and (B) corrects references to the new chemical quantity tables in §2D1.11.*
- (5) *Corrects a change to the commentary of §2N2.1(b)(1) that was inadvertently made as part of the conforming package of amendments in the Economic Crime Package.*
- (6) *Corrects a grammatical error in Note (D) of §2T1.1(c)(1) by replacing "subdivisions (A), (B), or (C)" with "subdivision (A), (B), or (C)".*
- (7) *Adds a mandatory condition to §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) that the defendant provide DNA if the defendant is required to do so by the DNA Analysis Backlog Elimination Act of 2000. Pursuant to section 3 of this Act, a defendant is required to provide a DNA sample if the defendant is convicted of certain offenses (e.g., murder, kidnapping).*
- (8) *Deletes from Application Note 5 of §5E1.2 (Fines for Individual Defendants) an incorrect statement concerning the Clean Air Act.*
- (9) *Inserts a missing "Background" title in §5F1.7 (Shock Incarceration).*

- (10) *Conforms §§5D1.3, 5F1.1, Part A of Chapter Seven, and §7B1.3 (Revocation of Supervised Release) to current statutory law and provides an explanatory note concerning the conditions of intermittent confinement and community confinement as conditions of supervised release.*
- (11) *Updates statutory references in §5F1.5 (Occupational Restrictions).*
- (12) *Refers 18 U.S.C. § 2245 (sexual abuse resulting in death) to §2A1.1 (First Degree Murder) in Appendix A (Statutory Index).*
- (13) *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.*
- (14) *Responds to new legislation as follows:*
- (A) *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, Dec. 28, 2000, 114 Stat. 305.*
- (B) *References in Appendix A two new offenses created by the American Homeownership and Economic Opportunity Act of 2000, Pub. L. 106–569, Dec. 27, 2000, 114 Stat. 2944. Section 5410(b) of title 42, which provides that knowing and willful violations of a state's installation program standards shall be punishable as a Class A misdemeanor, is referenced to §2N2.1. Section 14905 of title 42, which provides a criminal penalty of a \$250,000 fine and five years' imprisonment for equity skimming, is referenced to §2B1.1.*
- (C) *References 16 U.S.C. § 1437(c) to §2A2.4 (Obstructing or Impeding Officers). Section 1437, as amended by the National Marine Sanctuaries Act of 2000, Pub. L. 106–513, Nov. 13, 2000, 114 Stat. 2387, 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 title 16. The Act provides a statutory maximum of six months, or if the offense involved the use of a dangerous weapon or resulted in bodily injury, a statutory maximum of 10 years. Section 1437(c) seems sufficiently similar to other offenses referenced to §2A2.4 to warrant reference to this guideline.*

- (15) *Proposes 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 (Sex Trafficking of Children by Force, Fraud or Coercion). Section 1591 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 is not 18 years old and will be forced to engage in a commercial sex act.*

In response to the Act, the Commission, in March 2001, passed an amendment that (A) referenced 18 U.S.C. § 1591 to §§2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material); and (B) provided an encouraged upward departure in §2G1.1 to address cases in which (i) 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 (ii) the offense involved more than 10 victims. Staff had recommended additional changes to §2G1.1 at that time but because adequate public notice regarding those changes had not been provided, staff recommended that the changes be made during this amendment cycle.

This amendment proposes three substantive changes to §2G1.1. First, this amendment broadens the conduct covered by the guideline to all commercial sex acts. Currently, the conduct covered by the guideline is limited to prostitution. 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 section 1591 for offenses effected by "force, fraud, or coercion". Third, after reviewing again the statute and the encouraged upward departure note that the Commission passed in March, staff recommends deleting the portion of the note pertaining to the age of the victim because it encourages a departure for conduct arguably covered by the guideline in subsection (b)(2).

Proposed Amendment:

(1) Clarifies That §5D1.2(c) Is a Policy Statement

§5D1.2. Term of Supervised Release

* * *

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

* * *

(2) **Conforming Amendment to §2B4.1**

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

* * *

(b) **Specific Offense Characteristics**

* * *

~~(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.~~

(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.

* * *

Commentary

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Application Notes:

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~~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).~~

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.

* * *

(3) **Amendment to Insert Missing "Or" in §2Q1.6(a)(3)**

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

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

* * *

(3) If the offense involved reckless disregard to the risk that another person would be placed in danger of death or serious bodily injury under circumstances manifesting extreme indifference to such risk, the offense level from §2A2.2 (Aggravated Assault); **or**

* * *

(4) Updates Statutory References in §§2D1.9, 2D1.11, and 2D1.13, Corrects References to Quantity Table in §2D1.11

§2D1.9. **Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy**

(a) Base Offense Level: **23**

Commentary

Statutory Provision: 21 U.S.C. § 841(~~ed~~)(1).

* * *

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

(a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) ~~or (e) below.~~¹, as appropriate.

* * *

~~The reference to "subsection (d) below" should be a reference to "subsection (d) or (e) below, as appropriate."~~

* * *

* * *

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

Listed Chemicals and Quantity

Base Offense Level

* * *

***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.~~¹ **or (e) of this guideline, as appropriate.**

* * *

~~The reference to "subsection (d) of this guideline" should be a reference to "subsection (d) or (e) of this guideline, as appropriate".~~

* * *

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(~~dc~~)(1), (2), (~~gf~~)(1), 960(d)(1), (2).

* * *

§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

* * *

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(~~dc~~)(3), (~~gf~~)(1), 843(a)(4)(B), (a)(8).

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APPENDIX A - STATUTORY INDEX

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21 U.S.C. § 841(dc)(1),(2)	2D1.11
21 U.S.C. § 841(dc)(3)	2D1.13
21 U.S.C. § 841(ed)	2D1.9
21 U.S.C. § 841(gf)(1)	2D1.11, 2D1.13

(5) Conforms Reference to Consolidated Theft and Fraud Guideline

§2N2.1. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product

* * *

Commentary

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Application Notes:

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2. *The cross reference at subsection (b)(1) addresses cases in which the offense involved ~~theft, property destruction, or fraud~~. The cross reference at subsection (b)(2) addresses cases in which the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline (e.g., bribery).*

* * *

(6) **Corrects Grammatical Error in §2T1.1(c)(1)(D)**

§2T1.1. **Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents**

* * *

(c) Special Instructions

For the purposes of this guideline --

- (1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).

Notes:

* * *

(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.

* * *

(7) **Adds New Mandatory Condition of Probation and Supervised Release to §§5B1.3 and 5D1.3**

§5B1.3. **Conditions of Probation**

(a) Mandatory Conditions–

* * *

- (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;
- (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).

* * *

§5D1.3. Conditions of Supervised Release

(a) **Mandatory Conditions**–

* * *

- (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;
- (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).

* * *

(8) Deletes Incorrect Statement Regarding Fines and the Clean Air Act

§5E1.2. Fines for Individual Defendants

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Commentary

Application Notes:

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5. *Subsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases. These statutes include, among others: 21 U.S.C. §§ 841(b) and 960(b), which authorize fines up to \$8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S.C. § 848(a), which authorizes fines up to \$4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S.C. § 1956(a), which authorizes a fine equal to the greater of \$500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; 18 U.S.C. § 1957(b)(2), which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction; 33 U.S.C. § 1319(c), which authorizes a fine of up to \$50,000 per day for violations of the Water Pollution Control Act; 42 U.S.C. § 6928(d), which authorizes a fine of up to \$50,000 per day for violations of the Resource Conservation Act; and ~~42 U.S.C. § 7413(c), which authorizes a fine of up to \$25,000 per day for violations of the Clean Air Act.~~*

(9) Inserts Missing "Background" Title

§5F1.7. Shock Incarceration Program (Policy Statement)

The court, pursuant to 18 U.S.C. §§ 3582(a) and 3621(b)(4), may recommend that a defendant who meets the criteria set forth in 18 U.S.C. § 4046 participate in a shock incarceration program.

Commentary

Background:

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(10) Updates Chapters Five and Seven to Reflect Status of Current Law Regarding Intermittent Confinement and Community Confinement by Providing Explanatory Notes

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

* * *

(c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by --

* * *

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement* or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or

* * *

(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by --

* * *

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement* or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

* * *

Commentary

Application Notes:

* * *

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

* * *

- (C) *Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement* or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4-10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.*

* * *

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

* * *

- (B) *Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement* or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 8-14 months, a sentence of four months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.*

* * *

**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 re-designated 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 re-designated the remaining paragraphs of section 3563(b), it failed to make the corresponding re-designations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.

§5D1.3. Conditions of Supervised Release

* * *

(e) Additional Conditions (Policy Statement)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) Community Confinement*

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. See §5F1.1 (Community Confinement).

*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 re-designated 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 re-designated the remaining paragraphs of section 3563(b), it failed to make the corresponding re-designations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.

* * *

PART F - SENTENCING OPTIONS

§5F1.1. Community Confinement

Community confinement may be imposed as a condition of probation or supervised 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 re-designated 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 re-designated the remaining paragraphs of section 3563(b), it failed to make the corresponding re-designations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.

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CHAPTER SEVEN - VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

PART A - INTRODUCTION TO CHAPTER SEVEN

* * *

2. Background

* * *

(b) Supervised Release.

Supervised release, a new form of post-imprisonment supervision created by the Sentencing Reform Act, accompanied implementation of the guidelines. A term of supervised release may be imposed by the court as a part of the sentence of imprisonment at the time of initial sentencing. 18 U.S.C. § 3583(a). Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court. Accordingly,

supervised release is more analogous to the additional "special parole term" previously authorized for certain drug offenses.

With the exception of ~~intermittent confinement~~ **residency in, or participation in the program of, a community corrections facility***, which is available only for a sentence of probation, the conditions of supervised release authorized by statute are the same as those for a sentence of probation. When the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release, with or without extending the term or modifying the conditions, or revoke supervised release and impose a term of imprisonment. The periods of imprisonment authorized by statute for a violation of the conditions of supervised release generally are more limited, however, than those available for a violation of the conditions of probation. 18 U.S.C. § 3583(e)(3).

**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 re-designated 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 re-designated the remaining paragraphs of section 3563(b), it failed to make the corresponding re-designations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release. While imposition of intermittent confinement as a condition of supervised release does not violate the letter of the law as it is currently written, imposition of the condition arguably may not be consistent with its long-standing intent.

* * *

§7B1.3. Revocation of Probation or Supervised Release (Policy Statement)

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Commentary

Application Notes:

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5. *Intermittent confinement is authorized only as a condition of probation during the first year of the*

*term of probation. 18 U.S.C. § 3563(b)(11)(10).** ~~*Intermittent confinement is not authorized as a condition of supervised release. 18 U.S.C. § 3583(d).*~~

*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 re-designated 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 re-designated the remaining paragraphs of section 3563(b), it failed to make the corresponding re-designations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release. While imposition of intermittent confinement as a condition of supervised release does not violate the letter of the law as it is currently written, imposition of the condition arguably may not be consistent with its long-standing intent.

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(11) Updates Statutory References in §5F1.5

§5F1.5. Occupational Restrictions

* * *

Commentary

Background: The Comprehensive Crime Control Act authorizes the imposition of occupational restrictions as a condition of probation, 18 U.S.C. § 3563(b)(6)(b)(5), or supervised release, 18 U.S.C. § 3583(d). Pursuant to § 3563(b)(6)(b)(5), a court may require a defendant to:

[R]efrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances.

* * *

The appellate review provisions permit a defendant to challenge the imposition of a probation condition under 18 U.S.C. § 3563(b)(6)(b)(5) 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.” *See* 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).

(12) Refers 18 U.S.C. § 2245 to §2A1.1

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 2244	2A3.4
18 U.S.C. § 2245	2A1.1
18 U.S.C. § 2251(a),(b)	2G2.1

(13) Corrects Inadvertent Omission from Earlier Amendment

Amendment 568, effective November 1, 1997, is repromulgated with the following additional change:

§4B1.4. Armed Career Criminal

* * *

(b) The offense level for an armed career criminal is the greatest of:

* * *

(3) (A) **34**, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in ~~§4B1.2(1)~~ §4B1.2(a) and (b), respectively, or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or

(14) Responds to New Legislation

(A) Updates Statutory Reference for "Means of Identification"

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft

* * *

Commentary

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Application Instructions:

* * *

7. Application of subsection (b)(9).—

* * *

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

(B) Appendix A (Statutory Index) References for New Offenses

APPENDIX A - STATUTORY INDEX

16 U.S.C. § 1417(a)(5), (6), (b)(2)	2A2.4	
16 U.S.C. § 1437(c)	2A2.4	
		* * *
42 U.S.C. § 5157(a)	2B1.1	
42 U.S.C. § 5410(b)	2N2.1	
		* * *
42 U.S.C. § 9603(d)	2Q1.2	
42 U.S.C. § 14905	2B1.1	

(15) Changes to Human Trafficking Guideline

PART G - OFFENSES INVOLVING ~~PROSTITUTION~~ **A COMMERCIAL SEX ACT,
SEXUAL EXPLOITATION OF MINORS, AND OBSCENITY**

Promoting ~~Prostitution~~ **A Commercial Sex Act or Prohibited Sexual Conduct**

2G1.1. Promoting ~~Prostitution~~ **A Commercial Sex Act or Prohibited Sexual Conduct**

* * *

(b) Specific Offense Characteristics

- (1) If the offense involved (A) ~~prostitution~~ **a commercial sex act**; and (B) the use of physical force, **fraud**, 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.

* * *

- (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~~ **commercial sex act**; or
 - (B) a participant otherwise unduly influenced a minor to engage in ~~prostitution~~ **commercial sex act**,
 increase by **2** levels.

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

(c) Cross References

* * *

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

(d) Special Instruction

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

Commentary

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Application Notes:

- 1. For purposes of this guideline—

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

* * *

"Promoting ~~prostitution~~ a commercial sex act" means persuading, inducing, enticing, or coercing

a person to engage in ~~prostitution~~ **a commercial sex act**, or to travel to engage in, ~~prostitution~~ **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, ~~prostitution~~ **a commercial sex act** or prohibited sexual conduct, whether or not the person consented to the ~~prostitution~~ **commercial sex act** or prohibited sexual conduct. Accordingly, "victim" may include an undercover law enforcement officer.

2. Subsection (b)(1) provides an enhancement for physical force, **fraud**, or coercion; that occurs as part of a ~~prostitution~~ **commercial sex act** offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures). For purposes of subsection (b)(1)(B), "coercion" includes any form of conduct that negates the voluntariness of the behavior of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of an adult victim, rather than a victim less than 18 years of age, this characteristic generally will not apply if the drug or alcohol was voluntarily taken.
3. For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of ~~prostitution~~ **a commercial sex act** or prohibited sexual conduct in respect to another victim.
4. For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, ~~prostitution~~ **a commercial sex act** or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of ~~prostitution~~ **a commercial sex act** or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.

* * *

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~~ **a commercial sex act**. Subsection (b)(4)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(4)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

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

* * *

In 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~~ a commercial sex act. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

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

* * *

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

12. *Upward Departure Provisions.—An upward departure may be warranted in either of the following circumstances if the offense involved more than 10 victims.:*

~~(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.~~

* * *