

SUPPLEMENT TO APPENDIX C - AMENDMENTS TO THE GUIDELINES MANUAL

This supplement to 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; and November 1, 2001.

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.

For amendments to the guidelines, policy statements, and official commentary effective November 1, 1997, and earlier, see the main volume of Appendix C.

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."

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.".

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. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

(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. Shaddock, 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. Carozella, 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. Flenory*, 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 resenteded 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 proposal 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 redesignations 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) <u>List I Chemicals</u>	Level 30
17.8 KG or more of Benzaldehyde;	
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; At least 300 G but less than 1 KG of Pseudoephedrine.	Level 34
(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 Pseudoephedrine.	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) <u>List I Chemicals</u> 890 G or more of Benzaldehyde; 20 KG or more of Benzyl Cyanide;	Level 30

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.

(2) List I Chemicals Level 28

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;
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 pseudoephedrine are the primary precursors used to make methamphetamine in the United States. Phenylpropanolamine 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):

	<u>Offense Statutory Maximum</u>	<u>Offense Level</u>
(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:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(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:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(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:

<u>"Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
(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:

	<u>"Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
(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 impossible.

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-Methylenedioxyamphetamine (MDMA), 3,4-Methylenedioxyamphetamine (MDA), 3,4-Methylenedioxy-N-ethylamphetamine (MDEA), Paramethoxyamphetamine (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 marijuana 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 marijuana equivalency of 200 grams. This amendment sets the marijuana 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 marijuana 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 pseudoephedrine are the primary precursors used to make methamphetamine in the United States. Phenylpropanolamine 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 I 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".
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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 proposed 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:

	<u>Value</u> (Apply the Greatest)	<u>Increase in Level</u>
(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 marijuana 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.