

## 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, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; and November 1, 2006.

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

The format under which the amendments are presented in Appendix C, including this supplement, is designed to facilitate a comparison between previously existing and amended provisions, in the event it becomes necessary to reference the former guideline, policy statement, or commentary language.

### AMENDMENTS

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

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

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

2. If the defendant is convicted under 21 U.S.C. § 848(e), a sentence of death may be imposed under the specific provisions contained in that statute.

This guideline applies when a sentence of death is not imposed.",

and inserting the following:

- "1. Applicability of Guideline.—This guideline applies in cases of premeditated killing. This guideline also applies when death results from the commission of certain felonies. For example, this guideline may be applied as a result of a cross reference (e.g., a kidnapping in which death occurs), or in cases in which the offense level of a guideline is calculated using the underlying crime (e.g., murder in aid of racketeering).
2. Imposition of Life Sentence.—
  - (A) Offenses Involving Premeditated Killing.—In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. § 3553(e).
  - (B) Felony Murder.—If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. For example, a downward departure may be warranted if in robbing a bank, the defendant merely passed a note to the teller, as a result of which the teller had a heart attack and died. The extent of the departure should be based upon the defendant's state of mind (e.g., recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, departure below the minimum guideline sentence provided for second degree murder in §2A1.2 (Second Degree Murder) is not likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.
3. Applicability of Guideline When Death Sentence Not Imposed.—If the defendant is sentenced pursuant to 18 U.S.C. § 3591 et seq. or 21 U.S.C. § 848(e), a sentence of death may be imposed under the specific provisions contained in that statute. This guideline applies when a sentence of death is not imposed under those specific provisions."

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

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

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

and inserting the following:

"Application Note:

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

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

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

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

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

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

and inserting the following:

"(2) (Apply the greater):

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

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

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

"(b) Special Instruction

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

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

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

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

and inserting the following:

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

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

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

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

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

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

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

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

- "1. Definitions of 'serious bodily injury' and 'permanent or life-threatening bodily injury' are found in the Commentary to §1B1.1 (Application Instructions).
2. 'First degree murder,' as used in subsection (a)(1), means conduct that, if committed within the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. § 1111.
3. If the offense created a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted."

and inserting the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and inserting the following:

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

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

the following:

- "3. Application of Subsection (b)(2).—In a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).
4. Application of Official Victim Adjustment.—If subsection (b)(6) applies, §3A1.2 (Official Victim) also shall apply."

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

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

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

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

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

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

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

- "1. 'Minor assault' means a misdemeanor assault, or a felonious assault not covered by §2A2.2.
2. Definitions of 'firearm' and 'dangerous weapon' are found in the Commentary to §1B1.1 (Application Instructions).
3. 'Substantial bodily injury' means 'bodily injury which involves - (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.' 18 U.S.C. § 113(b)(1)."

and inserting the following:

- "1. Definitions.—For purposes of this guideline:  
  
     ‘Bodily injury’, ‘dangerous weapon’, and ‘firearm’ have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).  
  
     ‘Minor assault’ means a misdemeanor assault, or a felonious assault not covered by §2A2.2 (Aggravated Assault).  
  
     ‘Substantial bodily injury’ means ‘bodily injury which involves (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.’ See 18 U.S.C. § 113(b)(1).
2. Application of Subsection (b)(1).—Conduct that forms the basis for application of subsection (a)(1) also may form the basis for application of the enhancement in subsection (b)(1)(A) or (B)."

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

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

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

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

- "1. The base offense level reflects the fact that the victim was a governmental officer performing official duties. Therefore, do not apply §3A1.2 (Official Victim) unless subsection (c) requires the offense level to be determined under §2A2.2 (Aggravated Assault). Conversely, the base offense level does not reflect the possibility that the defendant may create a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement official (although an offense under 18 U.S.C. § 758 for fleeing or evading a law enforcement checkpoint at high speed will often, but not always, involve the creation of that risk). If the defendant creates that risk and no higher guideline adjustment is applicable for the conduct creating the risk, apply §3C1.2 (Reckless Endangerment During Flight).
2. Definitions of ‘firearm’ and ‘dangerous weapon’ are found in the Commentary to §1B1.1 (Application Instructions)."

and inserting the following:

- "1. Definitions.—For purposes of this guideline, ‘bodily injury’, ‘dangerous

weapon', and 'firearm' have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

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

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

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

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

Section 3A1.2 is amended by striking:

"§3A1.2.        Official Victim

- (a) If (1) the victim was (A) a government officer or employee; (B) a former government officer or employee; or (C) a member of the immediate family of a person described in subdivision (A) or (B); and (2) the offense of conviction was motivated by such status, increase by 3 levels.
- (b) If, in a manner creating a substantial risk of serious bodily injury, the defendant or a person for whose conduct the defendant is otherwise accountable—
  - (1) knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom; or
  - (2) knowing or having reasonable cause to believe that a person was a prison official, assaulted such official while the defendant (or a person for whose



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

increase by 3 levels."

and inserting:

"§3A1.2. Official Victim

(Apply the greatest):

- (a) If (1) the victim was (A) a government officer or employee; (B) a former government officer or employee; or (C) a member of the immediate family of a person described in subdivision (A) or (B); and (2) the offense of conviction was motivated by such status, increase by 3 levels.
- (b) If subsection (a)(1) and (2) apply, and the applicable Chapter Two guideline is from Chapter Two, Part A (Offenses Against the Person), increase by 6 levels.
- (c) If, in a manner creating a substantial risk of serious bodily injury, the defendant or a person for whose conduct the defendant is otherwise accountable—
  - (1) knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom; or
  - (2) knowing or having reasonable cause to believe that a person was a prison official, assaulted such official while the defendant (or a person for whose conduct the defendant is otherwise accountable) was in the custody or control of a prison or other correctional facility,

increase by 6 levels."

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

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

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

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

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

and inserting the following:

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

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

First, this amendment makes a number of changes to the homicide guidelines. The amendment revises the commentary in guideline §2A1.1 (First Degree Murder) and deletes outdated language. One effect of this revision is to clarify that a downward departure from a mandatory statutory sentence of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. § 3553(e).

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

an approximate 20-year sentence of imprisonment for second degree murder.

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

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

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

alternative base offense levels each were increased by one level, a specific offense characteristic was added to provide a two-level enhancement if the victim sustained bodily injury, and a cross-reference to §2A2.2 was added. Similarly, §2A2.4 (Obstructing or Impeding Officers) was amended by increasing the base offense level to level 10, and by adding a specific offense characteristic providing a two-level increase if the victim sustained bodily injury.

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

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

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

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

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

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

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

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

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

Section 2A3.1(d)(1) is amended by striking "a correctional facility and the victim was a

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

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

"1. For purposes of this guideline—

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

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

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

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

‘The means set forth in 18 U.S.C. § 2241(a) or (b)’ are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnaping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished.

2. Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.
3. If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).",

and inserting the following:

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

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

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

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

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

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

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

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

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

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

‘Victim’ includes an undercover law enforcement officer.

2. Application of Subsection (b)(1).—For purposes of subsection (b)(1), ‘conduct described in 18 U.S.C. § 2241(a) or (b)’ is engaging in, or causing another person to engage in, a sexual act with another person by: (A) using force against the victim; (B) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping;

(C) rendering the victim unconscious; or (D) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.

3. Application of Subsection (b)(3).—

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

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

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

"Application of Subsection (b)(6).—

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

and by striking the last paragraph as follows:

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

and inserting the following:

"(B) Use of a Computer or Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if a computer or an interactive computer service was used to (i) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (ii) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection

(b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site."

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

- "5. Application of Subsection (c)(1).—
- (A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.
- (B) Definition.—For purposes of subsection (c)(1), 'sexually explicit conduct' has the meaning given that term in 18 U.S.C. § 2256(2)."

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

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

- "(a) Base Offense Level:
- (1) 24, if the offense involved (A) a violation of chapter 117 of title 18, United States Code; and (B)(i) the commission of a sexual act; or (ii) sexual contact;
- (2) 21, if the offense (A) involved a violation of chapter 117 of title 18, United States Code; but (B) did not involve (i) the commission of a sexual act; or (ii) sexual contact; or
- (3) 18, otherwise."

and inserting the following:

- "(a) Base Offense Level: 18".

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

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

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



- (A) the offense involved the knowing misrepresentation of a participant's identity to (i) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (ii) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct; or
  - (B) a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct, increase by 2 levels.
- (3) If a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct, increase by 2 levels.
  - (4) If (A) subsection (a)(1) applies; and (B) none of subsections (b)(1) through (b)(3) applies, decrease by 6 levels."

and inserting the following:

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

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

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

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

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

and by striking the following :

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

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

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

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

"Custody, Care, or Supervisory Control Enhancement.—

(A) In General.—Subsection (b)(1)";

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

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

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

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

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

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

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

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

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

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

and inserting the following:

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

The misrepresentation to which the enhancement in subsection (b)(2)(B)(i) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.
  - (B) Undue Influence.—In determining whether subsection (b)(2)(B)(ii) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.

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

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

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

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

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

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

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

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

Definitions.—For purposes of this guideline:

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

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

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

- "2. The enhancement in subsection (b)(1) applies in cases involving the misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(1) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises

custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(1) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

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

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

and inserting the following:

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

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

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

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

- "(1) 16, if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b);
- (2) 12, if the offense was committed by the means set forth in 18 U.S.C. § 2242;
- (3) 10, otherwise."

and inserting the following:

- "(1) 20, if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b);
- (2) 16, if the offense involved conduct described in 18 U.S.C. § 2242; or
- (3) 12, otherwise."

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

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

- "(4) If the offense involved the knowing misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, increase by 2 levels.
- (5) If a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, increase by 2 levels.
- (6) If the offense involved a violation of chapter 117 of title 18, United States Code, increase by 3 levels."

and inserting the following:

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

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

"For purposes of this guideline—

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

and inserting the following:

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

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

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

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

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

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

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

and inserting the following:

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

3. Application of Subsection (a)(2).—For purposes of subsection (a)(2), ‘conduct described in 18 U.S.C. § 2242’ is: (A) engaging in, or causing

sexual contact with, or by another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or (B) engaging in, or causing sexual contact with, or by another person who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act."

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

"Application of Subsection (b)(3).—

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

and by adding at the end the following:

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

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

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

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

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

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

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

and inserting the following:



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

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

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

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

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

(a)        Base Offense Level:

- (1)        19, if the offense involved a minor; or
- (2)        14, otherwise.

(b)        Specific Offense Characteristics

- (1)        If the offense involved (A) a commercial sex act; and (B) the use of physical force, fraud, or coercion, increase by 4 levels.
- (2)        If the offense involved a victim who had (A) not attained the age of 12 years, increase by 4 levels; or (B) attained the age of 12 years but not attained the age of 16 years, increase by 2 levels.
- (3)        If subsection (b)(2) applies; and—
  - (A)        the defendant was a parent, relative, or legal guardian of the victim; or
  - (B)        the victim was otherwise in the custody, care, or supervisory control of the defendant,increase by 2 levels.
- (4)        If subsection (b)(3) does not apply; and—

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

increase by 2 levels.

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

(c) Cross References

- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a person less than 18 years of age to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).
- (2) If the offense involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the offense involved criminal sexual abuse of a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the 'consent' of the victim.
- (3) If the offense did not involve promoting a commercial sex act, and neither subsection (c)(1) nor (c)(2) is applicable, apply §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate.

## (d) Special Instruction

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

Commentary

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

Application Notes:

1. For purposes of this guideline—

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

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

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

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

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

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

2. Subsection (b)(1) provides an enhancement for physical force, fraud, or coercion, that occurs as part of a commercial sex act offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures). For purposes of subsection (b)(1)(B), ‘coercion’ includes any form of conduct that negates the voluntariness of the behavior of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of an adult victim, rather than a victim less than 18 years of age, this

characteristic generally will not apply if the drug or alcohol was voluntarily taken.

3. For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.
4. For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.
5. Subsection (b)(3) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.
6. If the enhancement in subsection (b)(3) applies, do not apply subsection (b)(4) or §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
7. The enhancement in subsection (b)(4)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act. Subsection (b)(4)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(4)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

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

In determining whether subsection (b)(4)(B) applies, the court should

closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.

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

8. Subsection (b)(5) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor. Subsection (b)(5)(A) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(5)(A) would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.
9. The cross reference in subsection (c)(1) is to be construed broadly to include all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a person less than 18 years of age to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), 'sexually explicit conduct' has the meaning given that term in 18 U.S.C. § 2256.
10. Subsection (c)(2) provides a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. § 2241 or § 2242. For example, the cross reference to §2A3.1 shall apply if the offense involved criminal sexual abuse; and (A) the victim had not attained the age of 12 years (see 18 U.S.C. § 2241(c)); (B) the victim had attained the age of 12 years but had not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnapping (see 18 U.S.C. § 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnapping (see 18 U.S.C. § 2242(1)).
11. The cross reference in subsection (c)(3) addresses the case in which the offense did not involve promoting a commercial sex act, neither subsection (c)(1) nor (c)(2) is applicable, and the offense involved prohibited sexual conduct other than the conduct covered by subsection (c)(1) or (c)(2). In such case, the guideline for the underlying prohibited sexual conduct is to be used; i.e., §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4

(Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact).

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

Background: This guideline covers offenses under chapter 117 of title 18, United States Code. Those offenses involve promoting prostitution or prohibited sexual conduct through a variety of means. Offenses that involve promoting prostitution under chapter 117 of such title are sentenced under this guideline, unless other prohibited sexual conduct occurs as part of the prostitution offense, in which case one of the cross references would apply. Offenses under chapter 117 of such title that do not involve promoting prostitution are to be sentenced under §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate, pursuant to the cross references provided in subsection (c).

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

and inserting the following:

- "§2G1.1. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor
- (a) Base Offense Level: 14
  - (b) Specific Offense Characteristic
    - (1) If the offense involved fraud or coercion, increase by 4 levels.
  - (c) Cross Reference
    - (1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18 U.S.C. § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).
  - (d) Special Instruction
    - (1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be

applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

2. Application of Subsection (b)(1).—Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures). For purposes of subsection (b)(1), ‘coercion’ includes any form of conduct that negates the voluntariness of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. This characteristic generally will not apply if the drug or alcohol was voluntarily taken.
3. Application of Chapter Three Adjustment.—For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.
4. Application of Subsection (c)(1).—

- (A) Conduct Described in 18 U.S.C. § 2241(a) or (b).—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person by: (i) using force against the victim; (ii) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the victim unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.
- (B) Conduct Described in 18 U.S.C. § 2242.—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2242 is: (i) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (ii) engaging in, or causing another person to engage in, a sexual act with a victim who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.
5. Special Instruction at Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.
6. Upward Departure Provision.—If the offense involved more than ten victims, an upward departure may be warranted.

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

This guideline also covers offenses under section 1591 of title 18, United States Code, that involve recruiting or transporting a person, other than a minor, in



interstate commerce knowing that force, fraud, or coercion will be used to cause the person to engage in a commercial sex act.

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

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

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

- (a) Base Offense Level: 24
- (b) Specific Offense Characteristics
  - (1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.
  - (2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by 2 levels.
  - (3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by 2 levels.
  - (4) If the offense involved (A) the commission of a sex act or sexual contact; or (B) a commercial sex act, increase by 2 levels.

- (5) If the offense involved a minor who had not attained the age of 12 years, increase by 8 levels.
- (c) Cross References
- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.
  - (2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.
  - (3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the ‘consent’ of the minor.
- (d) Special Instruction
- (1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a minor); 18

U.S.C. §§ 1591 (only if the offense involved a minor), 2421 (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2422(b), 2423, 2425.

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

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

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

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

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

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

2. Application of Subsection (b)(1).—

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

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement

under subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. Application of Subsection (b)(2).—

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

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

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

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

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

5. Application of Subsection (c).—

- (A) Application of Subsection (c)(1).—The cross reference in subsection (c)(1) is to be construed broadly and includes all

instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice, advertisement or other method, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), 'sexually explicit conduct' has the meaning given that term in 18 U.S.C. § 2256(2).

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

- (i) Conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person: (I) using force against the minor; (II) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (III) rendering the minor unconscious; or (IV) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.
- (ii) Conduct described in 18 U.S.C. § 2241(c) is: (I) interstate travel with intent to engage in a sexual act with a minor who has not attained the age of 12 years; (II) knowingly engaging in a sexual act with a minor who has not attained the age of 12 years; or (III) knowingly engaging in a sexual act under the circumstances described in 18 U.S.C. § 2241(a) and (b) with a minor who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging).
- (iii) Conduct described in 18 U.S.C. § 2242 is: (I) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the minor in fear (other than by threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (II) engaging in, or causing another person to engage in, a sexual act with a minor who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

6. Application of Subsection (d)(1).—For the purposes of Chapter Three, Part

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

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

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

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

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

- "(2) (Apply the greater) If the offense involved—
- (A) the commission of a sexual act or sexual contact, increase by 2 levels; or
- (B) (i) the commission of a sexual act; and (ii) conduct described in 18 U.S.C. § 2241(a) or (b), increase by 4 levels.
- (3) If the offense involved distribution, increase by 2 levels.
- (4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels."

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

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

- "(c) Cross Reference
- (1) If the victim was killed in circumstances that would constitute

murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above."

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

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

- "1. For purposes of this guideline, 'minor' means an individual who had not attained the age of 18 years.
2. For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate victim. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.
3. Subsection (b)(2) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the child and not simply to the legal status of the defendant-child relationship.
4. If the adjustment in subsection (b)(2) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
5. The enhancement in subsection (b)(3)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material. Subsection (b)(3)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(3)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing

sexually explicit material. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

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

and inserting the following:

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

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

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

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

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

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

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

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



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

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

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

3. Application of Subsection (b)(5).—

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

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

4. Application of Subsection (b)(6).—

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

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

- (B) Use of a Computer or an Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if the offense involved the use of a computer or an interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or otherwise to solicit participation by a minor in such conduct for such purpose. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.
5. Application of Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction."

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

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

- "§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic
- (a) Base Offense Level: 17
- (b) Specific Offense Characteristics
- (1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by 2 levels.
- (2) (Apply the Greatest) If the offense involved:
- (A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and

- Fraud) corresponding to the retail value of the material, but by not less than 5 levels.
- (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.
  - (C) Distribution to a minor, increase by 5 levels.
  - (D) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.
  - (E) Distribution other than distribution described in subdivisions (A) through (D), increase by 2 levels.
- (3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
  - (4) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.
  - (5) If a computer was used for the transmission, receipt, or distribution of the material or a notice or advertisement of the material, increase by 2 levels.
  - (6) If the offense involved—
    - (A) at least 10 images, but fewer than 150, increase by 2 levels;
    - (B) at least 150 images, but fewer than 300, increase by 3 levels;
    - (C) at least 300 images, but fewer than 600, increase by 4 levels; and
    - (D) 600 or more images, increase by 5 levels.
- (c) Cross Reference
- (1) If the offense involved causing, transporting,

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

#### Commentary

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

#### Application Notes:

1. For purposes of this guideline—

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

‘Distribution for pecuniary gain’ means distribution for profit.

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

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

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

‘Pattern of activity involving the sexual abuse or exploitation of a minor’ means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B)

involved the same or different victims; or (C) resulted in a conviction for such conduct.

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

Commit Criminal Sexual Abuse).

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

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

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

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

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

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

and inserting the following:

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

(a) Base Offense Level:

- (1) 18, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), or § 2252A(a)(5).
- (2) 22, otherwise.

- (b) Specific Offense Characteristics
- (1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels.
  - (2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels.
  - (3) (Apply the greatest) If the offense involved:
    - (A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.
    - (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.
    - (C) Distribution to a minor, increase by 5 levels.
    - (D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.
    - (E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.
    - (F) Distribution other than distribution described in subdivisions (A) through (E), increase by 2 levels.
  - (4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
  - (5) If the defendant engaged in a pattern of activity

- involving the sexual abuse or exploitation of a minor, increase by 5 levels.
- (6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, increase by 2 levels.
- (7) If the offense involved—
- (A) at least 10 images, but fewer than 150, increase by 2 levels;
- (B) at least 150 images, but fewer than 300, increase by 3 levels;
- (C) at least 300 images, but fewer than 600, increase by 4 levels; and
- (D) 600 or more images, increase by 5 levels.
- (c) Cross Reference
- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

#### Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A, 2260(b).

#### Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

solicitation of such material by a defendant.

‘Distribution for pecuniary gain’ means distribution for profit.

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

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

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

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

‘Pattern of activity involving the sexual abuse or exploitation of a minor’ means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

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

‘Sexual abuse or exploitation’ means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251, § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). ‘Sexual abuse or exploitation’ does not include possession, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

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



3. Application of Subsection (b)(5).—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).
4. Application of Subsection (b)(7).—
  - (A) Definition of ‘Images’.—‘Images’ means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8).
  - (B) Determining the Number of Images.—For purposes of determining the number of images under subsection (b)(7):
    - (i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.
    - (ii) Each video, video-clip, movie, or similar recording shall be considered to have 75 images. If the length of the recording is substantially more than 5 minutes, an upward departure may be warranted.
5. Application of Subsection (c)(1).—
  - (A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.
  - (B) Definition.—‘Sexually explicit conduct’ has the meaning given that term in 18 U.S.C. § 2256(2).
6. Upward Departure Provision.—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

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

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

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

- (a) Base Offense Level: 15
- (b) Specific Offense Characteristics
  - (1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by 2 levels.
  - (2) If the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor, increase by 2 levels.
  - (3) If the defendant's possession of the material resulted from the defendant's use of a computer, increase by 2 levels.
  - (4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
  - (5) If the offense involved—
    - (A) at least 10 images, but fewer than 150, increase by 2 levels;
    - (B) at least 150 images, but fewer than 300, increase by 3 levels;
    - (C) at least 300 images, but fewer than 600, increase by 4 levels; and
    - (D) 600 or more images, increase by 5 levels.
- (c) Cross References
  - (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of

Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).

- (2) If the offense involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, shipping, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic), apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic).

Commentary

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

Application Notes:

1. For purposes of this guideline—

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

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

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

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

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

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

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

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

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

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

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

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

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

- "1. For purposes of this guideline—

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

‘Distribution for pecuniary gain’ means distribution for profit.

‘Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain’ means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. ‘Thing of value’ means anything of valuable consideration.

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

‘Minor’ means an individual who had not attained the age of 16 years.

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

and inserting the following:

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

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

‘Distribution’ means any act, including possession with intent to distribute, production, advertisement, and transportation, related to the transfer of obscene matter. Accordingly, distribution includes posting material

involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

‘Distribution for pecuniary gain’ means distribution for profit.

‘Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain’ means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. ‘Thing of value’ means anything of valuable consideration.

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

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

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

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

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

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

2. Inapplicability of Subsection (b)(3).—If the defendant is convicted of 18 U.S.C. § 2252B, subsection (b)(3) shall not apply.
3. Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, receive, or distribute such materials."

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

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

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

and inserting the following:

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

- (A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.
- (B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items."

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

- "(a) Subject to subsection (b), if a term of supervised release is ordered, the length of the term shall be:
  - (1) at least three years but not more than five years for a defendant convicted of a Class A or B felony;
  - (2) at least two years but not more than three years for a defendant convicted of a Class C or D felony;
  - (3) one year for a defendant convicted of a Class E felony or a Class A misdemeanor.

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

- (b) Except as otherwise provided, the term of supervised release imposed shall not be less than any statutorily required term of supervised release.
- (c) (Policy Statement) If the instant offense of conviction is a sex offense, the statutory maximum term of supervised release is recommended."

and inserting following:

- "(a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:
  - (1) At least three years but not more than five years for a defendant convicted of a Class A or B felony.
  - (2) At least two years but not more than three years for a defendant convicted of a Class C or D felony.

- (3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor.
- (b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—
  - (1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or
  - (2) a sex offense.

(Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.
- (c) The term of supervised release imposed shall be not less than any statutorily required term of supervised release."

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

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

and inserting the following:

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

- (A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.
- (B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items."

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

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

- "6. 'Maximum term of imprisonment imposable upon revocation,' as used in subsection (g)(2), refers to the maximum term of imprisonment authorized

by statute for the violation of supervised release, not to the maximum of the guideline range."

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

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

"18 U.S.C. § 1466A                    2G2.2";

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

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

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

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

"18 U.S.C. § 2252B                    2G3.1";

by striking the following:

"18 U.S.C. § 2260                    2G2.1, 2G2.2",

and inserting the following:

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

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

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

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

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

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

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

First, the amendment consolidates §§2G2.2 (Trafficking in Material Involving the Sexual



Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic), and 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), into one guideline, §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct). Consolidation addresses concerns raised by judges, probation officers, prosecutors, and defense attorneys regarding difficulties in determining the appropriate guideline (§2G2.2 or §2G2.4) for cases involving convictions of 18 U.S.C. § 2252 or § 2252A. Furthermore, as a result of amendments directed by the PROTECT Act, these guidelines have a number of similar specific offense characteristics.

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

The amendment provides two alternative base offense levels depending upon the statute of conviction. The base offense level is set at level 18 for a defendant convicted of the possession of child pornography under 18 U.S.C. § 2252(a)(4), 18 U.S.C. § 2252A(a)(5), or 18 U.S.C. § 1466A(b), and at level 22 for a defendant convicted of any other offense referenced to this guideline, primarily trafficking and receipt of child pornography. The Commission determined that a base offense level of level 22 is appropriate for trafficking offenses because, when combined with several specific offense characteristics which are expected to apply in almost every case (e.g., use of a computer, material involving children under 12 years of age, number of images), the mandatory minimum of 60 months' imprisonment will be reached or exceeded in almost every case by the Chapter Two calculations. The Commission increased the base offense level for possession offenses from level 15 to level 18 because of the increase in the statutory maximum term of imprisonment from 5 to 10 years, and to maintain proportionality with receipt and trafficking offenses. The amendment also provides a two-level decrease at §2G2.2(b)(1) for a defendant whose base offense level is level 22, whose conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor, and whose conduct did not involve an intent to traffic in or distribute the material. Thus, individuals convicted of receipt of child pornography with no intent to traffic or distribute the material essentially will have an adjusted offense level of level 20, as opposed to an offense level of level 22, for receipt with intent to traffic, prior to application of any other specific offense characteristics. The Commission's review of these cases indicated the conduct involved in such "simple receipt" cases in most instances was indistinguishable from "simple possession" cases. The statutory penalties for "simple receipt" cases, however, are the same as the statutory penalties for trafficking cases. Reconciling these competing concerns, the Commission determined that a two-level reduction from the base offense level of level 22 is warranted, if the defendant establishes that there was no intent to distribute the material.

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

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

The PROTECT Act directly amended §§2G2.2 and 2G2.4 to create a specific offense characteristic related to the number of child pornography images. That specific offense characteristic provides a graduated enhancement of two to five levels, depending on the number of images. However, the congressional amendment did not provide a definition of "image," which raised questions regarding how to apply the specific offense characteristic. This amendment defines the term "image" and provides an instruction regarding how to apply the specific offense characteristic to videotapes. Application Note 4 states that an "image" means any visual depiction described in 18 U.S.C. § 2256(5) and (8) and instructs that each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered one image. Furthermore, the application note provides that each video, video-clip, movie, or similar recording shall be considered to have 75 images for purposes of the specific offense characteristic. Application Note 4 also provides two possible grounds for an upward departure (if the number of images substantially underrepresents the number of minors or if the length of the videotape or recording is substantially more than five minutes). Because the image specific offense characteristic created directly by Congress in the PROTECT Act essentially supercedes an earlier directive regarding a specific offense characteristic relating to the number of items (see Pub. L. 102-141 and Amendment 436), the Commission deleted the specific offense characteristic for possessing ten or more child pornographic items (formerly §2G2.4(b)(3)). This deletion avoids potential litigation regarding issues of "double counting" if both specific offense characteristics were retained in the guideline.

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

The amendment also makes clear that distribution includes advertising and posting material involving the sexual exploitation of a minor on a website for public viewing but does not

include soliciting such material. In response to a circuit conflict, the amendment adds an application note to make clear that the specific offense characteristic for material portraying sadistic or masochistic conduct applies regardless of whether the defendant specifically intended to possess, receive, or distribute such material. The circuit courts have disagreed regarding whether a defendant must have specifically intended to receive the sadistic or masochistic images. Some circuit courts have required that the defendant must have intended to receive these images. See United States v. Kimbrough, 69 F.3d 723 (5<sup>th</sup> Cir. 1995); United States v. Tucker, 136 F.3d 763 (11<sup>th</sup> Cir. 1998). The Seventh Circuit has held that this specific offense characteristic is applied based on a strict liability standard, and that no proof of intent is necessary. See United States v. Richardson, 238 F.3d 837 (7<sup>th</sup> Cir. 2001). The Commission followed the Seventh Circuit's holding that the enhancement applies regardless of whether the defendant specifically intended to possess, receive, or distribute such material.

Second, section 103 of the PROTECT Act increased the mandatory minimum term of imprisonment from 10 to 15 years for offenses related to the production of child pornography under 18 U.S.C. § 2251. In response, the amendment increases the base offense level at §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) from level 27 to level 32. A base offense level of level 32 is appropriate for production offenses because, combined with the application of several specific offense characteristics that are expected to apply in almost all production cases (e.g., age of the victim), this base offense level will ensure that the 15 year mandatory minimum (180 months) will be met in by the Chapter Two calculations almost every case.

The amendment adds three new specific offense characteristics that are associated with the production of child pornography. The amendment provides, at §2G2.1(b)(2), a two-level increase if the offense involved the commission of a sex act or sexual contact, or a four-level increase if the offense involved a sex act and conduct described in 18 U.S.C. § 2241(a) or (b) (i.e., the use of force was involved). The Commission concluded that this type of conduct is more serious than the production of a picture without a sex act or the use of force, and therefore, a two- or four-level increase is appropriate. The amendment also adds a two-level increase if the production offense also involved distribution. The Commission concluded that because traffickers sentenced at §2G2.2 receive an increase for distributing images of child pornography, an individual who produces and distributes the image(s) also should be punished for distributing the item. Lastly, the amendment adds a new, four-level increase if the offense involved material portraying sadistic or masochistic conduct. Similar to the distribution specific offense characteristic, the Commission concluded that, because §2G2.2 contains a four-level increase for possessing, receiving or trafficking these images, the producers of such images also should receive comparable additional punishment.

Third, this amendment creates a new guideline, §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), to specifically address offenses under chapter 117 of title 18, United States Code (Transportation for Illegal Sexual Activity and Related Crimes). Prior to the amendment, chapter 117 offenses, primarily 18 U.S.C. §§ 2422 (Coercion and Enticement) and 2423 (Transportation of Minors), were referenced

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

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

This new guideline has a base offense level of level 24 to account for the new mandatory minimum terms of imprisonment established by the PROTECT Act. The new guideline provides six specific offense characteristics to provide proportionate enhancements for aggravating conduct that may occur in connection with these cases. The guideline contains enhancements for commission of a sex act or commercial sex act, use of a computer, misrepresentations of identity, undue influence, custody issues, and involvement of a minor under the age of 12 years. The amendment also provides three cross references to account for certain more serious sexual abuse conduct, including a cross reference if the offense involved conduct described in 18 U.S.C. § 2241 or § 2242. Furthermore, the amendment makes conforming changes to §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct) as a result of the creation of the new travel guideline. Section 2G1.1 is expected to apply primarily to adult prostitution cases because of the creation of §2G1.3.

Fourth, section 521 of the PROTECT Act created a new offense at 18 U.S.C. § 2252B (Misleading Domain Names on the Internet). Section 2252B(a) prohibits the knowing use of a misleading domain name on the Internet with the intent to deceive a person into viewing material constituting obscenity. Offenses under this subsection are punishable by a maximum term of imprisonment of two years. Section 2252B(b) prohibits the knowing use of a misleading domain name with the intent to deceive a minor into viewing material that is harmful to minors, with a maximum term of imprisonment of four years. The amendment refers the new offense to §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor), modifies the title of the guideline to include "Misleading Domain Names", and provides a two-level enhancement at §2G3.1(b)(2), if "the

offense involved the use of a misleading domain name on the Internet with the intent to deceive a minor into viewing material on the Internet that is harmful to minors." In addition, the amendment also provides enhancements for the following conduct: (1) distribution to a minor that was intended to persuade, induce, entice, or coerce a minor to engage in any illegal activity; and (2) use of a computer or interactive computer service. Finally, the amendment adds §2G3.1 to the list of guidelines at subsection (d) of §3D1.2 (Groups of Closely Related Counts). Grouping multiple counts of these offenses pursuant to §3D1.2(d) is appropriate because typically these offenses, as well as other pornography distribution offenses, are ongoing or continuous in nature. The amendment makes other minor technical changes to the commentary to make this guideline consistent with other Chapter Two, Part G guidelines.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"18 U.S.C. § 1037      2B1.1".

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

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

Additionally, in response to the directive, a new specific offense characteristic in §2B1.1(b)(7) provides for a two-level increase if the defendant is convicted under 18 U.S.C. § 1037 and the offense involved obtaining electronic mail addressed through improper means. A corresponding application note provides a definition of "improper means." Finally, the Commission also responded to the directive concerning other offenses by making several modifications to other guidelines, as set forth in Amendment 2 of this

document. For example, an amendment to the obscenity guideline, §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor), added a two-level enhancement if the offense involved the use of a computer or interactive computer service.

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

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

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

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

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

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

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

- (a) Base Offense Level: 10
- (b) Specific Offense Characteristics
  - (1) If the offense involved more than one bribe or extortion, increase by 2 levels.
  - (2) (If more than one applies, use the greater):
    - (A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii)



exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

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

(c) Cross References

- (1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense if the resulting offense level is greater than that determined above.
- (2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense if the resulting offense level is greater than that determined above.
- (3) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(d) Special Instruction for Fines - Organizations

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

Commentary

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

Application Notes:

1. 'Official holding a high-level decision-making or sensitive position' includes, for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility.
2. 'Loss', for purposes of subsection (b)(2)(A), shall be determined in accordance with Application Note 3 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud). The value of 'the benefit received or to be received' means the net value of such benefit. Examples: (1) A government employee, in return for a \$500 bribe, reduces the price of a piece of surplus property offered for sale by the government from \$10,000 to \$2,000; the value of the benefit received is \$8,000. (2) A \$150,000 contract on which \$20,000 profit was made was awarded in return for a bribe; the value of the benefit received is \$20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the above examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.
3. Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) except where the offense level is determined under §2C1.1(c)(1), (2), or (3). In such cases, an adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.
4. In some cases the monetary value of the unlawful payment may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the adjustments in §2C1.1(b)(2), and §2C1.1(c)(1), (2), and (3). However, in cases in which the seriousness of the offense is still not adequately reflected, an upward departure is warranted. See Chapter Five, Part K (Departures).
5. Where the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. See Chapter Five, Part K (Departures).
6. Subsection (b)(1) provides an adjustment for offenses involving more than one incident of either bribery or extortion. Related payments that, in essence, constitute a single incident of bribery or extortion (e.g., a number of installment payments for a single action) are to be treated as a single bribe or extortion, even if charged in separate counts.
7. For the purposes of determining whether to apply the cross references in this section, the 'resulting offense level' means the greater final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter

Three, Parts A-D).

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

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

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

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

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

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

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

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

apply.

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

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

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

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

- (a)     Base Offense Level: 7
- (b)     Specific Offense Characteristics
  - (1)     If the offense involved more than one gratuity, increase by 2 levels.
  - (2)     (If more than one applies, use the greater):
    - (A)     If the value of the gratuity (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
    - (B)     If the gratuity was given, or to be given, to an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels.

## (c) Special Instruction for Fines - Organizations

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

Commentary

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

Application Notes:

1. 'Official holding a high-level decision-making or sensitive position' includes, for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility.
2. Do not apply the adjustment in §3B1.3 (Abuse of Position or Trust or Use of Special Skill).
3. In some cases, the public official is the instigator of the offense. In others, a private citizen who is attempting to ingratiate himself or his business with the public official may be the initiator. This factor may appropriately be considered in determining the placement of the sentence within the applicable guideline range.
4. Related payments that, in essence, constitute a single gratuity (e.g., separate payments for airfare and hotel for a single vacation trip) are to be treated as a single gratuity, even if charged in separate counts.

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

and inserting the following:

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

## (a) Base Offense Level:

- (1) 14, if the defendant was a public official; or
- (2) 12, otherwise.

- (b) Specific Offense Characteristics
- (1) If the offense involved more than one bribe or extortion, increase by 2 levels.
  - (2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
  - (3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.
  - (4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by 2 levels.
- (c) Cross References
- (1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense, if the resulting offense level is greater than that determined above.
  - (2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense, if the resulting offense level is greater than that determined above.
  - (3) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), if the resulting offense level is greater than that

determined above.

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

Commentary

Statutory Provisions: 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3; 18 U.S.C. §§ 201(b)(1), (2), 371 (if conspiracy to defraud by interference with governmental functions), 872, 1341 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1342 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1343 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1951. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

‘Public official’ shall be construed broadly and includes the following:

- (A) ‘Public official’ as defined in 18 U.S.C. § 201(a)(1).
- (B) A member of a state or local legislature. ‘State’ means a State of the United States, and any commonwealth, territory, or possession of the United States.
- (C) An officer or employee or person acting for or on behalf of a state or local government, or any department, agency, or branch of government thereof, in any official function, under or by authority of such department, agency, or branch of government, or a juror in a state or local trial.
- (D) Any person who has been selected to be a person described

in subdivisions (A), (B), or (C), either before or after such person has qualified.

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

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

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

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

4. Application of Subsection (b)(3).—

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

(B) Examples.—Examples of a public official in a high-level decision-



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

5. Application of Subsection (c).—For the purposes of determining whether to apply the cross references in this section, the ‘resulting offense level’ means the final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A-D). See §1B1.5(d); Application Note 2 of the Commentary to §1B1.5 (Interpretation of References to Other Offense Guidelines).
6. Inapplicability of §3B1.3.—Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
7. Upward Departure Provisions.—In some cases the monetary value of the unlawful payment may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the enhancements in §2C1.1(b)(2) and (c)(1), (2), and (3). However, in cases in which the seriousness of the offense is still not adequately reflected, an upward departure is warranted. See Chapter Five, Part K (Departures).

In a case in which the court finds that the defendant’s conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. See §5K2.7 (Disruption of Governmental Function).

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

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

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

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

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

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

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

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

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

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

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

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

- (a) Base Offense Level:

- (1) 11, if the defendant was a public official; or
  - (2) 9, otherwise.
- (b) Specific Offense Characteristics
- (1) If the offense involved more than one gratuity, increase by 2 levels.
  - (2) If the value of the gratuity exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
  - (3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the resulting offense level is less than level 15, increase to level 15.
  - (4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by 2 levels.
- (c) Special Instruction for Fines - Organizations
- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the value of the unlawful payment.

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

‘Public official’ shall be construed broadly and includes the following:

- (A) ‘Public official’ as defined in 18 U.S.C. § 201(a)(1).
  - (B) A member of a state or local legislature. ‘State’ means a State of the United States, and any commonwealth, territory, or possession of the United States.
  - (C) An officer or employee or person acting for or on behalf of a state or local government, or any department, agency, or branch of government thereof, in any official function, under or by authority of such department, agency, or branch of government, or a juror.
  - (D) Any person who has been selected to be a person described in subdivisions (A), (B), or (C), either before or after such person has qualified.
  - (E) An individual who, although not otherwise covered by subdivisions (A) through (D): (i) is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto authority to make governmental decisions (e.g., which may include a leader of a state or local political party who acts in the manner described in this subdivision).
2. Application of Subsection (b)(1).—Related payments that, in essence, constitute a single gratuity (e.g., separate payments for airfare and hotel for a single vacation trip) are to be treated as a single gratuity, even if charged in separate counts.
3. Application of Subsection (b)(3).—
- (A) Definition.—‘High-level decision-making or sensitive position’ means a position characterized by a direct authority to make decisions for, or on behalf of, a government department, agency, or other government entity, or by a substantial influence over the decision-making process.
  - (B) Examples.—Examples of a public official in a high-level decision-making position include a prosecuting attorney, a judge, an agency administrator, a law enforcement officer, and any other public official with a similar level of authority. Examples of a public official who holds a sensitive position include a juror, a law enforcement officer, an election official, and any other similarly situated individual.
4. Inapplicability of §3B1.3.—Do not apply the adjustment in §3B1.3 (Abuse

of Position or Trust or Use of Special Skill).

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

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

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

- (a) Base Offense Level: 7
- (b) Specific Offense Characteristic
  - (1) If the value of the gratuity (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

Commentary

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

Application Note:

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

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

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

- (a) Base Offense Level: 10
- (b) Specific Offense Characteristic
  - (1) (If more than one applies, use the greater):
    - (A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
    - (B) If the offense involved an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels.
- (c) Cross References
  - (1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense if the resulting offense level is greater than that determined above.
  - (2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense if the resulting offense level is greater than that determined above.
  - (3) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.
  - (4) If the offense is covered more specifically under §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), or §2C1.3 (Conflict of Interest), apply

the offense guideline that most specifically covers the offense.

Commentary

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

Application Notes:

1. This guideline applies only to offenses committed by public officials or others acting with them that involve (A) depriving others of the intangible right to honest services (such offenses may be prosecuted under 18 U.S.C. §§ 1341-1343), or (B) conspiracy to defraud the United States by interfering with governmental functions (such offenses may be prosecuted under 18 U.S.C. § 371). ‘Public official,’ as used in this guideline, includes officers and employees of federal, state, or local government.
2. ‘Official holding a high-level decision-making or sensitive position’ includes, for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility.
3. ‘Loss’, for purposes of subsection (b)(1)(A), shall be determined in accordance with Application Note 3 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).
4. Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) except where the offense level is determined under §2C1.7(c)(1), (2), or (3). In such cases, an adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.
5. Where the court finds that the defendant’s conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. See Chapter Five, Part K (Departures).
6. For the purposes of determining whether to apply the cross references in this section, the ‘resulting offense level’ means the greater final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A-D).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sections 2C1.1 and 2C1.2 each are amended to include alternative base offense levels, with



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

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

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

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

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

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

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

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

Section 2D1.1(c) is amended in subdivision (10) by striking "or Schedule III substances" in

the thirteenth entry; and by inserting after the thirteenth entry the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Less than 250 units of Schedule III substances;"

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

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

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

from which cocaine and ecgonine have been removed.",

and inserting the following:

- "5. Analogues and Controlled Substances Not Referenced in this Guideline.—Any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. For purposes of this guideline ‘analogue’ has the meaning given the term ‘controlled substance analogue’ in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether a greater quantity of the analogue is needed to produce a substantially similar effect on the central nervous system as the controlled substance for which it is an analogue.

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

- (A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.
- (B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.
- (C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline."

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

"Schedule I or II Depressants

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

and inserting the following new subdivisions:

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

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

Gamma-hydroxybutyric Acid

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

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

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

and inserting the following:

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

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

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

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

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

(B) Upward Departure Provision.—If the defendant committed a sexual

offense against more than one individual, an upward departure would be warranted."

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

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

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

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

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

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

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

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

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

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

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

"Red Phosphorus";

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

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

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

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

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

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

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

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

- "(3) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed any prohibited flask, equipment, chemical, product, or material through mass-marketing by means of an interactive computer service, increase by 2 levels.
- (4) If the offense involved stealing anhydrous ammonia or transporting stolen anhydrous ammonia, increase by 6 levels."

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

- "4. Application of Subsection (b)(3).—For purposes of subsection (b)(3), ‘mass-marketing by means of an interactive computer service’ means the solicitation, by means of an interactive computer service, of a large number

of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(3) would apply to a defendant who operated a web site to promote the sale of prohibited flasks but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. ‘Interactive computer service’, for purposes of subsection (b)(3) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).”.

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

"21 U.S.C. § 957            2D1.1".

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

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

Third, this amendment provides a special instruction in §2D1.1(e) that requires application of the vulnerable victim adjustment in §3A1.1(b)(1) (Hate Crime Motivation or Vulnerable Victim) if the defendant commits a sexual offense by distributing a controlled substance to another individual, with or without that individual’s knowledge. The amendment addresses

cases in which the cross reference in §2D1.1(d)(2) does not apply. The cross reference in §2D1.1(d)(2) is limited to cases involving a conviction under 21 U.S.C. § 841(b)(7), which prescribes a 20-year statutory maximum penalty for the distribution of a controlled substance to another individual, without that individual's knowledge, with the intent to commit a crime of violence (including rape). Because the statute requires that the distribution occur without knowledge, the cross reference does not apply to drug facilitated sexual assaults when the victim of the sexual assault knowingly ingests the controlled substance. This amendment reflects the Commission's view that a defendant who commits a drug-facilitated sexual assault should receive increased punishment whether or not the victim knowingly ingested the controlled substance distributed by the defendant.

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

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

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

Seventh, this amendment updates the statutory references in §2D1.11(b)(2) and accompanying commentary to conform to statutory redesignations of certain offenses, and also expands application of §2D1.11(b)(2) to include 21 U.S.C. § 960(d)(3) and (d)(4) among the statutes of conviction for which the three-level reduction at subsection (b)(2) is available. The reduction formerly applied in cases in which the defendant, convicted under



21 U.S.C. § 841(c)(2), (f)(1), or § 960(d)(2), as properly redesignated, did not have knowledge or actual belief that the listed chemical would be used to manufacture a controlled substance. Section 841(c)(2) of title 21, United States Code, requires a finding of either knowledge or a reasonable cause to believe that the listed chemical would be used to manufacture a controlled substance. Sections 960(d)(3) and (d)(4) of title 21, United States Code, similarly require a finding that a person who imports, exports, or serves as a broker for, a listed chemical knows or has a reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance. Given that the reduction applies in 21 U.S.C. § 841(c)(2) cases in which the defendant had a reasonable cause to believe, but not knowledge or actual belief, that the listed chemical would be used to manufacture a controlled substance, and the mens rea in 21 U.S.C. § 841(c)(2) is the same as in 21 U.S.C. § 960(d)(3) and (d)(4), the amendment adds 21 U.S.C. § 960(d)(3) and (d)(4) to §2D1.11(b)(2).

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

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

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

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

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

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

and inserting the following:

"(3) the offense level specified in the Drug Quantity Table set forth in

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

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

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

and inserting the following:

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

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

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

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

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

and inserting the following:

"(3) If the offense involved—

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

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

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

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

and inserting the following:

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

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

1. 'Firearm' includes (i) any weapon (including a starter gun) which will, or is designed to, or may readily be converted to, expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. See 18 U.S.C. § 921(a)(3).
2. 'Ammunition' includes ammunition or cartridge cases, primer, bullets, or propellant powder designed for use in any firearm. See 18 U.S.C. § 921(a)(17)(A).
3. A 'firearm described in 26 U.S.C. § 5845(a)' includes: (i) a shotgun having a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; a rifle having a barrel or barrels of less than 16 inches in length; or a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; and (v) certain unusual weapons defined in 26 U.S.C. § 5845(e) (that are not conventional, unaltered handguns, rifles, or shotguns). For a more detailed definition, refer to 26 U.S.C. § 5845.  
  
A 'firearm described in 18 U.S.C. § 921(a)(30)' (pertaining to semiautomatic assault weapons) does not include a weapon exempted under the provisions of 18 U.S.C. § 922(v)(3).
4. 'Destructive device' is a type of firearm listed in 26 U.S.C. § 5845(a), and includes any explosive, incendiary, or poison gas -- (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses; any type of weapon which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch

in diameter; or any combination of parts either designed or intended for use in converting any device into any destructive device listed above. For a more detailed definition, refer to 26 U.S.C. § 5845(f).",

and by redesignating Note 5 as Note 1.

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

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

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

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

and by adding at the end the following paragraph:

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

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

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

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

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

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

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

individuals".

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

"(d) Special Instruction

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

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

and inserting the following:

"(d) Special Instruction

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

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

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

- (B) Any of the following offenses:

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

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

(a)(6)), " before "2A6.1".

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

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

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

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

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

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

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

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

- (a) Base Offense Level: 10
- (b) Specific Offense Characteristic
  - (1) If the defendant used the body armor in connection with another felony offense, increase by 4 levels.

Commentary

Statutory Provision: 18 U.S.C. § 931.

Application Notes:

1. Application of Subsection (b)(1).—
  - (A) Meaning of ‘Defendant’.—Consistent with §1B1.3 (Relevant Conduct), the term ‘defendant’, for purposes of subsection (b)(1), limits the accountability of the defendant to the defendant’s own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.
  - (B) Meaning of ‘Felony Offense’.—For purposes of subsection (b)(1), ‘felony offense’ means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.
  - (C) Meaning of ‘Used’.—For purposes of subsection (b)(1), ‘used’ means the body armor was (i) actively employed in a manner to protect the person from gunfire; or (ii) used as a means of bartering. Subsection (b)(1) does not apply if the body armor was merely possessed. For example, subsection (b)(1) would not apply if the body armor was found in the trunk of a car but was not being actively used as protection.
2. Inapplicability of §3B1.5.—If subsection (b)(1) applies, do not apply the adjustment in §3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence).

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

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

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

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

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

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

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

The commentary also provides guidance for the scope of the terms "defendant" and "used" for purposes of §2K2.6(b)(1). Use of the term "defendant" limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused. The term "used" requires that the body armor be actively used in order to protect from gunfire or be used as a means



of bartering. Finally, the commentary provides that when subsection (b)(1) applies and the defendant also is convicted of the underlying offense (the offense with respect to which the body armor was used), the counts shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely Related Counts).

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

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

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

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

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

- "1. For purposes of this guideline—

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

and inserting the following:

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

by striking Note 2 as follows:

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

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

The Commentary to §2L2.2 captioned "Application Notes" is amended by adding at the end the following:

- "3. Application of Subsection (b)(3).—The term ‘used’ is to be construed broadly and includes the attempted renewal of previously-issued passports.
4. Multiple Counts.—For the purposes of Chapter Three, Part D (Multiple Counts), a count of conviction for unlawfully entering or remaining in the United States covered by §2L1.2 (Unlawfully Entering or Remaining in the United States) arising from the same course of conduct as the count of

conviction covered by this guideline shall be considered a closely related count to the count of conviction covered by this guideline, and therefore is to be grouped with the count of conviction covered by this guideline.

5. Upward Departure Provision.—If the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to engage in terrorist activity, an upward departure may be warranted. See Application Note 4 of the Commentary to §3A1.4 (Terrorism)."

**Reason for Amendment:** The purpose of this amendment is to provide increased punishment for defendants who fraudulently use or obtain United States passports. The amendment adds a new specific offense characteristic at subsection (b)(3) of §2L2.2 (Smuggling, Transporting, or Harboring an Unlawful Alien) that provides an increase of four levels if the defendant fraudulently obtained or used a United States passport. Application Note 3 clarifies that "use" is to be construed broadly and includes the attempted renewal of a previously issued United States passport. Application Note 5 invites an upward departure if the defendant fraudulently obtained or used a United States passport with the intent to engage in terrorist activity.

This amendment responds to comments received from the Departments of State and Justice to the effect that maintaining the integrity of United States passports is at the core of United States border and security efforts. Accordingly, this amendment ensures increased punishment for those defendants who threaten the security of the United States by their fraudulent abuse of United States passports.

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

- 672. Amendment:** Section 2Q1.2(b) is amended by adding at the end the following:

- "(7) If the defendant was convicted under 49 U.S.C. § 5124 or § 46312, increase by 2 levels."

The Commentary to §2Q1.2 captioned "Statutory Provisions" is amended by striking "; 49 U.S.C. § 60123(d)" and inserting "; 49 U.S.C. §§ 5124, 46312".

The Commentary to §2Q1.2 captioned "Application Notes" is amended by striking Note 9 as follows:

- "9. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).",

and inserting the following:

- "9. Other Upward Departure Provisions.—
  - (A) Civil Adjudications and Failure to Comply with Administrative Order.—In a case in which the defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure

may be warranted. See §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

- (B) Extreme Psychological Injury.—If the offense caused extreme psychological injury, an upward departure may be warranted. See §5K2.3 (Extreme Psychological Injury).
- (C) Terrorism.—If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure would be warranted. See Application Note 4 of the Commentary to §3A1.4 (Terrorism)."

**Reason for Amendment:** This amendment adds a two-level enhancement in §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) for offenders convicted under 49 U.S.C. § 5124 or § 46312. These offenses pose an inherent risk to large populations in a manner not typically associated with other pollution offenses sentenced under the same guideline.

In addition, this amendment adds an application note inviting an upward departure if the offense was calculated to influence or affect the conduct of the government by intimidation or coercion, or to retaliate against government conduct. The Commission added this departure provision to address concerns that terrorists may commit hazardous material transportation offenses because of their potential to cause a one-time, catastrophic event. The upward departure provision would apply in cases in which a defendant who has a terrorist motive is not also convicted of a "federal crime of terrorism" that would trigger application of §3A1.4 (Terrorism).

This amendment also adds an upward departure provision that could apply if the offense resulted in extreme psychological injury. This provision conforms to the upward departure provision found at §2Q1.4 (Tampering or Attempted Tampering with a Public Water System; Threatening to Tamper with a Public Water System).

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

- 673. Amendment:** Chapter Eight is amended by striking the "Introductory Commentary" as follows:

" Introductory Commentary

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for

their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

This chapter reflects the following general principles: First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused. Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets. Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the highest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed. Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.",

and inserting the following:

" Introductory Commentary

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

This chapter reflects the following general principles:

First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.

Second, if the organization operated primarily for a criminal purpose or

primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.

Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.

Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.

These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws."

Section 8A1.2(a) is amended by inserting ", Subpart 1" after "Part B".

Section 8A1.2(b)(2)(D) is amended by adding at the end the following:

"To determine whether the organization had an effective compliance and ethics program for purposes of §8C2.5(f), apply §8B2.1 (Effective Compliance and Ethics Program)."

The Commentary to §8A1.2 captioned "Application Notes" is amended in Note 3(c) in the second sentence by inserting "of the organization" after "high-level personnel".

The Commentary to §8A1.2 captioned "Application Notes" is amended by striking Note 3(k) as follows:

"(k) An 'effective program to prevent and detect violations of law' means a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. Due diligence requires at a minimum that the organization must have taken the following types of steps:

- (1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.
- (2) Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.
- (3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.
- (4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, *e.g.*, by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.
- (5) The organization must have taken reasonable steps to achieve compliance with its standards, *e.g.*, by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.
- (6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.
- (7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses -- including any necessary modifications to its program to prevent and detect violations of law.

The precise actions necessary for an effective program to prevent and detect violations of law will depend upon a number of factors. Among the relevant factors are:

- (i) Size of the organization -- The requisite degree of formality of a program to prevent and detect violations of law will vary with the size of the organization: the larger the organization, the more formal the program typically should be. A larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and other agents.

- (ii) Likelihood that certain offenses may occur because of the nature of its business-- If because of the nature of an organization's business there is a substantial risk that certain types of offenses may occur, management must have taken steps to prevent and detect those types of offenses. For example, if an organization handles toxic substances, it must have established standards and procedures designed to ensure that those substances are properly handled at all times. If an organization employs sales personnel who have flexibility in setting prices, it must have established standards and procedures designed to prevent and detect price-fixing. If an organization employs sales personnel who have flexibility to represent the material characteristics of a product, it must have established standards and procedures designed to prevent fraud.
- (iii) Prior history of the organization -- An organization's prior history may indicate types of offenses that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct. An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective program to prevent and detect violations of law."

Chapter Eight, Part B is amended by striking the heading as follows:

"PART B - REMEDYING HARM FROM CRIMINAL CONDUCT",

and inserting the following:

"PART B - REMEDYING HARM FROM CRIMINAL CONDUCT,  
AND EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

1. REMEDYING HARM FROM CRIMINAL CONDUCT";

and by adding at the end the following new subpart:

"2. EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

§8B2.1. Effective Compliance and Ethics Program

- (a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—
  - (1) exercise due diligence to prevent and detect criminal conduct; and

- (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

- (b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

- (1) The organization shall establish standards and procedures to prevent and detect criminal conduct.

- (2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

- (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

- (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and



direct access to the governing authority or an appropriate subgroup of the governing authority.

- (3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.
- (4)
  - (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.
  - (B) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.
- (5) The organization shall take reasonable steps—
  - (A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;
  - (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and
  - (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

- (6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.
  - (7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.
- (c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

'Compliance and ethics program' means a program designed to prevent and detect criminal conduct.

'Governing authority' means the (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.

'High-level personnel of the organization' and 'substantial authority personnel' have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations).

'Standards and procedures' means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct.

2. Factors to Consider in Meeting Requirements of this Guideline.—

(A) In General.—Each of the requirements set forth in this guideline shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors

that shall be considered include: (i) applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) similar misconduct.

- (B) Applicable Governmental Regulation and Industry Practice.—An organization’s failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program.
- (C) The Size of the Organization.—
- (i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization’s standards and procedures, depend on the size of the organization.
- (ii) Large Organizations.—A large organization generally shall devote more formal operations and greater resources in meeting the requirements of this guideline than shall a small organization. As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs.
- (iii) Small Organizations.—In meeting the requirements of this guideline, small organizations shall demonstrate the same degree of commitment to ethical conduct and compliance with the law as large organizations. However, a small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrated through more formally planned and implemented systems.

Examples of the informality and use of fewer resources with which a small organization may meet the requirements of this guideline include the following: (I) the governing authority’s discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organization’s compliance and ethics efforts; (II) training employees through informal staff meetings, and monitoring through regular ‘walk-arounds’ or continuous observation while managing the organization; (III) using available personnel, rather than employing separate staff, to carry out the compliance and ethics

program; and (IV) modeling its own compliance and ethics program on existing, well-regarded compliance and ethics programs and best practices of other similar organizations.

- (D) Recurrence of Similar Misconduct.—Recurrence of similar misconduct creates doubt regarding whether the organization took reasonable steps to meet the requirements of this guideline. For purposes of this subdivision, ‘similar misconduct’ has the meaning given that term in the Commentary to §8A1.2 (Application Instructions - Organizations).
3. Application of Subsection (b)(2).—High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program, shall perform their assigned duties consistent with the exercise of due diligence, and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

If the specific individual(s) assigned overall responsibility for the compliance and ethics program does not have day-to-day operational responsibility for the program, then the individual(s) with day-to-day operational responsibility for the program typically should, no less than annually, give the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance and ethics program.

4. Application of Subsection (b)(3).—
- (A) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.
- (B) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals so as to ensure that all individuals within the high-level personnel and substantial authority personnel of the organization will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law under subsection (a). With respect to the hiring or promotion of such individuals, an organization shall consider the relatedness of the individual’s illegal activities and other misconduct (i.e., other conduct inconsistent with an effective compliance and ethics program) to the specific responsibilities the individual is anticipated to be assigned and other factors such as: (i) the recency of the individual’s illegal activities and other misconduct; and (ii) whether the individual has engaged in other such illegal activities and other such misconduct.

5. Application of Subsection (b)(6).—Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.
6. Application of Subsection (c).—To meet the requirements of subsection (c), an organization shall:
  - (A) Assess periodically the risk that criminal conduct will occur, including assessing the following:
    - (i) The nature and seriousness of such criminal conduct.
    - (ii) The likelihood that certain criminal conduct may occur because of the nature of the organization’s business. If, because of the nature of an organization’s business, there is a substantial risk that certain types of criminal conduct may occur, the organization shall take reasonable steps to prevent and detect that type of criminal conduct. For example, an organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish standards and procedures designed to prevent and detect fraud.
    - (iii) The prior history of the organization. The prior history of an organization may indicate types of criminal conduct that it shall take actions to prevent and detect.
  - (B) Prioritize periodically, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b), in order to focus on preventing and detecting the criminal conduct identified under subdivision (A) of this note as most serious, and most likely, to occur.
  - (C) Modify, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b) to reduce the risk of criminal conduct identified under subdivision (A) of this note as most serious, and most likely, to occur.

**Background:** This section sets forth the requirements for an effective compliance and ethics program. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107–204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this chapter ‘are sufficient to deter and punish organizational criminal misconduct.’

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable. The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense."

The Commentary to §8C2.4 captioned "Application Notes" is amended in Note 2 by striking "(Larceny, Embezzlement, and Other Forms of Theft)" and inserting "(Theft, Property Destruction, and Fraud)".

Section 8C2.5 is amended by striking subsection (f) as follows:

"(f) Effective Program to Prevent and Detect Violations of Law

If the offense occurred despite an effective program to prevent and detect violations of law, subtract 3 points.

Provided, that this subsection does not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual responsible for the administration or enforcement of a program to prevent and detect violations of law participated in, condoned, or was willfully ignorant of the offense. Participation of an individual within substantial authority personnel in an offense results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law.

Provided, further, that this subsection does not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities."

and inserting the following:

"(f) Effective Compliance and Ethics Program

(1) If the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program, as provided in §8B2.1 (Effective Compliance and Ethics Program), subtract 3 points.

(2) Subsection (f)(1) shall not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.

(3) (A) Except as provided in subdivision (B), subsection (f)(1) shall not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees,

or an individual described in §8B2.1(b)(2)(B) or (C), participated in, condoned, or was willfully ignorant of the offense.

- (B) There is a rebuttable presumption, for purposes of subsection (f)(1), that the organization did not have an effective compliance and ethics program if an individual—
- (i) within high-level personnel of a small organization; or
  - (ii) within substantial authority personnel, but not within high-level personnel, of any organization,
- participated in, condoned, or was willfully ignorant of, the offense."

The Commentary to §8C2.5 captioned "Application Notes" is amended by striking Note 1 as follows:

- "1. 'Substantial authority personnel,' 'condoned,' 'willfully ignorant of the offense,' 'similar misconduct,' 'prior criminal adjudication,' and 'effective program to prevent and detect violations of law,' are defined in the Commentary to §8A1.2 (Application Instructions - Organizations).",

and inserting the following:

- "1. Definitions.—For purposes of this guideline, 'condoned', 'prior criminal adjudication', 'similar misconduct', 'substantial authority personnel', and 'willfully ignorant of the offense' have the meaning given those terms in Application Note 3 of the Commentary to §8A1.2 (Application Instructions - Organizations).

'Small Organization', for purposes of subsection (f)(3), means an organization that, at the time of the instant offense, had fewer than 200 employees."

The Commentary to §8C2.5 captioned "Application Notes" is amended in Note 3 in the last sentence by striking "entire organization" and inserting "organization in its entirety".

The Commentary to §8C2.5 captioned "Application Notes" is amended in Note 10 by striking "The second proviso in subsection (f)" and inserting "Subsection (f)(2)"; and by striking "this proviso" and inserting "subsection (f)(2)".

The Commentary to §8C2.5 captioned "Application Notes" is amended in Note 12 by adding at the end the following:

"Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and

thorough disclosure of all pertinent information known to the organization."

Section 8C2.8(a) is amended in subdivision (9) by striking "and"; in subdivision (10) by striking the period at the end of the subdivision and inserting "; and"; and by adding at the end the following:

- "(11) whether the organization failed to have, at the time of the instant offense, an effective compliance and ethics program within the meaning of §8B2.1 (Effective Compliance and Ethics Program)."

The Commentary to §8C2.8 captioned "Application Notes" is amended in Note 4 in the first sentence by inserting "within high-level personnel of" after "organization or".

Section 8C4.10 is amended by striking "(Effective Program to Prevent and Detect Violations of Law)" and inserting "(Effective Compliance and Ethics Program)"; and by adding at the end the following paragraph:

"Similarly, if, at the time of the instant offense, the organization was required by law to have an effective compliance and ethics program, but the organization did not have such a program, an upward departure may be warranted."

Chapter Eight, Part D, is amended in the "Introductory Commentary" by striking "8D1.5" and inserting "8D1.4, and §8F1.1,".

Section 8D1.1(a) is amended by striking subdivision (3) as follows:

- "(3) if, at the time of sentencing, an organization having 50 or more employees does not have an effective program to prevent and detect violations of law;"

and inserting the following:

- "(3) if, at the time of sentencing, (A) the organization (i) has 50 or more employees, or (ii) was otherwise required under law to have an effective compliance and ethics program; and (B) the organization does not have such a program;"

Section 8D1.4(b)(4) is amended by striking "(1)" and inserting "(A)"; by striking "(2)" and inserting "(B)"; and by striking "(3)" and inserting "(C)".

Section 8D1.4(c) is amended by striking subdivision (1) as follows:

- "(1) The organization shall develop and submit to the court a program to prevent and detect violations of law, including a schedule for implementation."

and inserting the following:

- "(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics



program.";

and in subdivisions (2), (3), and (4) by striking "to prevent and detect violations of law" each place it appears and inserting "referred to in subdivision (1)".

The Commentary to §8D1.4 captioned "Application Notes" is amended by striking "Notes" in the heading and inserting "Note"; and in Note 1 by striking "a program to prevent and detect violations of law" and inserting "a compliance and ethics program"; and by striking the last sentence of the first paragraph as follows:

"The court should approve any program that appears reasonably calculated to prevent and detect violations of law, provided it is consistent with any applicable statutory or regulatory requirement."

and inserting the following:

"The court should approve any program that appears reasonably calculated to prevent and detect criminal conduct, as long as it is consistent with §8B2.1 (Effective Compliance and Ethics Program), and any applicable statutory and regulatory requirements."

Chapter Eight, Part D is amended by striking §8D1.5 and its accompanying commentary as follows:

"§8D1.5. Violations of Conditions of Probation - Organizations (Policy Statement)

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.

Commentary

Application Note:

1. In the event of repeated, serious violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders."

Chapter Eight is amended by adding at the end the following Part:

**"PART F - VIOLATIONS OF PROBATION - ORGANIZATIONS**

§8F1.1. Violations of Conditions of Probation - Organizations (Policy Statement)

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the

organization.

Commentary

Application Notes:

1. Appointment of Master or Trustee.—In the event of repeated violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.
2. Conditions of Probation.—Mandatory and recommended conditions of probation are specified in §§8D1.3 (Conditions of Probation - Organizations) and 8D1.4 (Recommended Conditions of Probation - Organizations).".

**Reason for Amendment:** This amendment modifies existing provisions of Chapter Eight and provides a new guideline at §8B2.1 (Effective Compliance and Ethics Program). Most notably, §8B2.1 strengthens the existing criteria an organization must follow in order to establish and maintain an effective program to prevent and detect criminal conduct for purposes of mitigating its sentencing culpability for an offense. This amendment is the

culmination of a multi-year review of the organizational guidelines, implements several recommendations issued on October 7, 2003, by the Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Advisory Group), and responds to the Sarbanes-Oxley Act ("the Act"), Pub. L. 107–204, which in section 805 directed the Commission to review and amend the organizational guidelines and related policy statements to ensure that they are sufficient to deter and punish organizational misconduct.

Consistent with the Act's focus on deterring criminal misconduct, this amendment revises the introductory commentary to Chapter Eight to highlight the importance of structural safeguards designed to prevent and detect criminal conduct. First and foremost among these safeguards is a regime of internal crime prevention and self-policing ("an effective compliance and ethics program"). While Chapter Eight derives its authority and content from the federal criminal law, an effective compliance and ethics program not only will prevent and detect criminal conduct, but also should facilitate compliance with all applicable laws.

Under §8C2.5(g) (Culpability Score), an effective compliance and ethics program is one of the mitigating factors that can reduce an organization's fine punishment under Chapter Eight. The absence of an effective program may be a reason for the court to place an organization on probation, and the implementation of an effective program may be a condition of probation for organizations under §8D1.4(c) (Recommended Conditions of Probation-Organizations).

In order to emphasize the importance of compliance and ethics programs and to provide more prominent guidance on the requirements for an effective program, the amendment elevates the criteria for an effective compliance program previously set forth in the Commentary to §8A1.2 (Application Instructions - Organizations) into a separate guideline. Furthermore, the amendment elaborates upon these criteria, introducing additional rigor generally and imposing significantly greater responsibilities on the organization's governing

authority and executive leadership.

Section 8B2.1(a)(1) sets forth the existing requirement that an organization exercise due diligence to prevent and detect criminal conduct, but adds the requirement that an organization "otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." This addition is intended to reflect the emphasis on ethical conduct and values incorporated into recent legislative and regulatory reforms, such as those provided by the Act.

Section 8B2.1(b) provides that due diligence and the promotion of desired organizational culture are indicated by the fulfilment of seven minimum requirements, which are the hallmarks of an effective program that encourages compliance with the law and ethical conduct. While the framework of requirements is derived from the existing criteria for an effective compliance program at Application Note 3(k) to §8A1.2, significant additional guidance is provided.

First, §8B2.1(b)(1) provides that organizations must establish "standards and procedures to prevent and detect criminal conduct." Application Note 1 establishes that "standards and procedures" encompass "standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct."

Second, the new guideline replaces the requirement in Application Note 3(k)(2) to §8A1.2 that "specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance" with more specific and exacting requirements. Section 8B2.1(b)(2) defines the specific roles and reporting relationships of particular categories of personnel with respect to compliance and ethics program responsibilities. Specifically, the Commission has determined that the organization's governing authority must "be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program." Application Note 1 defines "governing authority" as the "(A) Board of Directors, or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization."

Section 8B2.1(b)(2) provides that it is the organizational leadership, defined in the guidelines as "high-level personnel," who must ensure that the organization's program is effective. The accompanying commentary at Application Note 1 retains existing definitions for the terms "high-level personnel" and "substantial authority personnel" of the organization. Section 8B2.1(b)(2)(B) provides that the organization must assign someone in high-level personnel "overall responsibility" for the program. This prescription makes explicit that, while another individual or individuals may be assigned operational responsibility for the program, someone within high-level personnel must be assigned the ultimate responsibility for the program's effectiveness.

Section 8B2.1(b)(2)(C) requires that certain individual(s) have day-to-day responsibility for the compliance and ethics program and adequate resources to carry out the associated tasks. Specifically, §8B2.1 requires that the individual assigned day-to-day operational responsibility for the program, whether it be a high-level person or an employee to whom this task is assigned, report to organizational leadership and the governing authority on the program. If authority is delegated, the governing authority must receive reports from such individuals at least annually, according to the commentary in Application Note 3. In order

to carry out such responsibility, the new guideline mandates that such individual or individuals, no matter the level, must "be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority."

Third, §8B2.1(b)(3) replaces the previous requirement that substantial authority personnel be screened for their "propensity to engage in violations of law" with the requirement that the organization "use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program." Application Note 4(A) makes explicit that this provision does not require any "conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices." Application Note 4(B) provides that the organization shall hire and promote individuals so as to ensure that all individuals within the organizational leadership will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages a commitment to compliance with ethics and the law. If an individual has engaged in illegal activities, the organization has an obligation to consider the relatedness of the individual's illegal activities and other misconduct to the specific responsibilities such individual is expected to be assigned. The recency of the individual's illegal activities and other misconduct also should be considered.

Fourth, §8B2.1(b)(4) makes compliance and ethics training a requirement, and specifically extends the training requirement to the upper levels of an organization, including the governing authority and high-level personnel, in addition to all of the organization's employees and agents, as appropriate. Furthermore, subsection (b)(4) establishes that this communication and training obligation is ongoing, requiring "periodic" updates.

Fifth, §8B2.1(b)(5) expands the existing requirement regarding reasonable steps to achieve compliance. Specifically, the amendment mandates that organizations use auditing and monitoring systems designed to detect criminal conduct. It also adds the specific requirement that the organization periodically evaluate the effectiveness of its compliance and ethics program. Significantly, the new guideline expands the focus of internal reporting from simply reporting "the criminal conduct . . . of others" to using internal systems to either "report or seek guidance regarding potential or actual criminal conduct." The addition of "seeking guidance" is consistent with the increased focus of this guideline on the prevention and deterrence of wrongdoing within organizations. This section also replaces the existing reference to "reporting systems without fear of retribution" with the more specific requirement that the organization must have "a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation."

The Commission is aware that both anonymous and confidential mechanisms have inherent value and limitations. For example, anonymous mechanisms may hinder an organization from engaging in an effective dialogue with the potential whistleblower to discover additional information that might lead to a more efficient detection of the wrongdoing. Confidential mechanisms may permit the dialogue and development of maximum information, but the ability of organizations to ensure total confidentiality may be limited by legal obligations relating to self-disclosure, law enforcement subpoenas, and civil

discovery requests. The Commission intends for an organization to have maximum flexibility in implementing a system that is best suited to its culture and conforms to applicable law. A responsible organization is expected, as appropriate, to communicate to its employees any applicable limitations of its internal reporting mechanisms.

Sixth, §8B2.1(b)(6) broadens the existing criterion that the compliance standards be enforced through disciplinary measures by adding that such standards also be encouraged through "appropriate incentives to perform in accordance with the compliance and ethics program." This addition articulates both a duty to promote proper conduct in whatever manner an organization deems appropriate, as well as a duty to sanction improper conduct.

Finally, §8B2.1(b)(7) retains the requirement that an organization take reasonable steps to respond to and prevent further similar criminal conduct. This dual duty underscores the organization's obligation to address both specific instances of misconduct and systemic shortcomings that compromise the deterrent effect of its compliance and ethics program.

In addition to the seven requirements for a compliance and ethics program, §8B2.1(c) expressly provides, as an essential component of the design, implementation, and modification of an effective program, that an organization must periodically assess the risk of the occurrence of criminal conduct. The new guideline includes at Application Note 6 various factors that should be addressed when assessing relevant risks. Specifically, organizations should evaluate the nature and seriousness of potential criminal conduct, the likelihood that certain criminal conduct may occur because of the nature of the organization's business, and the prior history of the organization. To be effective, this process must be ongoing. Organizations must periodically prioritize their compliance and ethics resources to target those potential criminal activities that pose the greatest threat in light of the risks identified.

The amendment also provides additional guidance with respect to the implementation of compliance and ethics programs by small organizations by including frequent references to small organizations throughout the commentary of §8B2.1 and providing illustrations (see e.g., Application Note 2(C)(ii)). It also encourages larger organizations to promote the adoption of compliance and ethics programs by smaller organizations, including those with which they conduct or seek to conduct business.

This amendment also changes the automatic preclusion for compliance program credit provided in §8C2.5(f) (Culpability Score) for "small organizations." A "small organization" is defined, for this subsection only, as an organization having fewer than 200 employees. This modification is intended to assist smaller organizations that previously may have been automatically precluded, because of their size, from arguing for a culpability score reduction based upon an effective compliance and ethics program that fulfills all of the guideline requirements. Rather than precluding absolutely these small organizations from obtaining the reduction if certain categories of high-level personnel are involved in the offense of conviction, §8C2.5(f)(3) establishes that an offense by an individual within high-level personnel of the organization results in a rebuttable presumption for a small organization that it did not have an effective program. The small organization, however, can rebut that presumption by demonstrating that it had an effective program, despite the involvement in the offense of a person high in the organization's structure.

This amendment also addresses concerns about the relationship between obtaining credit

under §8C2.5(g) and waiver of the attorney-client privilege and the work product protection doctrine. Pursuant to §8C2.5(g)(1) and (2), an organization's culpability score will be reduced if it "fully cooperated in the investigation" of its wrongdoing, among other factors. The Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines studied the relationship between waivers and §8C2.5(g) by obtaining testimony and conducting its own research, including a survey of United States Attorneys' Offices (all of which are described at Part V of the Advisory Group Report of October 7, 2003). The Commission addresses some of these concerns by providing at Application Note 12 that waiver of the attorney-client privilege and of work product protections "is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." The Commission expects that such waivers will be required on a limited basis. See "United States Attorneys' Bulletin", November 2003, Volume 51, Number 6, pp. 1, 8.

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

- 674. Amendment:** The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 5 by striking the fifth sentence as follows:

"When not adequately taken into account by the applicable offense guideline, creation of a risk may provide a ground for imposing a sentence above the applicable guideline range.",

and inserting the following:

"In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward departure may be warranted."

The Commentary to §1B1.4 captioned "Background" is amended in the fifth sentence by striking "sentencing above the guideline range" and inserting "an upward departure".

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 1 in the third sentence by striking "increase the defendant's sentence above the applicable guideline range by upward departure" and inserting "depart upward"; and in the last sentence by striking "below the applicable guideline range" and inserting "downward".

Section 2B1.1(b)(10), as redesignated by Amendment 665, is amended in subdivision (A) by striking "device-making equipment" and inserting "(i) device-making equipment, or (ii) authentication feature"; in subdivision (B) by inserting "(i)" before "unauthorized access"; and by inserting ", or (ii) authentication feature" after "counterfeit access device"; and in subdivision (C)(i) by striking the semi-colon and inserting a comma.

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 4 by striking subdivision (C)(ii), as redesignated by Amendment 665, as follows:

- "(ii) Special Rule.—A case described in subdivision (B)(i) of this note that involved a Postal Service (I) relay box; (II) collection box; (III) delivery vehicle; or (IV) satchel or cart, shall be considered to have involved at least

50 victims.",

and inserting the following:

- "(ii) Special Rule.—A case described in subdivision (C)(i) of this note that involved—
- (I) a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims.
  - (II) a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle."

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 7, as redesignated by Amendment 665, by striking "(b)(7)" each place it appears and inserting "(b)(8)"; and in Note 8, as redesignated by Amendment 665, by striking "(b)(8)" each place it appears and inserting "(b)(9)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 9, as redesignated by Amendment 665, by striking "(b)(9)" each place it appears and inserting "(b)(10)"; in subdivision (A) by inserting before the paragraph that begins "'Counterfeit access device'" the following paragraph:

"'Authentication feature' has the meaning given that term in 18 U.S.C. § 1028(d)(1).";

in the paragraph that begins "'Means of identification'" by striking "(d)(4)" and inserting "(d)(7)"; and in subdivision (B) by inserting "Authentication Features and" before "Identification Documents."; and by inserting "authentication features," after "involving".

The Commentary §2B1.1 captioned "Application Notes" is amended in Note 10, as redesignated by Amendment 665, by striking "(b)(10)" each place it appears and inserting "(b)(11)"; in Note 11, as redesignated by Amendment 665, by striking "(b)(12)" each place it appears and inserting "(b)(13)"; in Note 12, as redesignated by Amendment 665, by striking "(b)(12)" each place it appears and inserting "(b)(13)"; in Note 13, as redesignated by Amendment 665, by striking "(b)(13)" each place it appears and inserting "(b)(14)"; and by striking "(b)(12)(B)" each place it appears and inserting "(b)(13)(B)"; in Note 14, as redesignated by Amendment 665, by striking "(b)(14)" each place it appears and inserting "(b)(15)"; and in Note 19(B), as redesignated by Amendment 665, by striking "(b)(13)(iii)" and inserting "(b)(14)(iii)".

The Commentary to §2B1.1 captioned "Background" is amended in the ninth paragraph by striking "Subsection (b)(7)(D)" and inserting "Subsection (b)(8)(D)"; in the tenth paragraph by striking "Subsection (b)(8)" and inserting "Subsection (b)(9)"; in the eleventh paragraph by striking "Subsections (b)(9)(A) and (B)" and inserting "Subsections (b)(10)(A)(i) and

(B)(i)"; in the twelfth paragraph by striking "Subsection (b)(9)(C)" and inserting "Subsection (b)(10)(C)"; in the thirteenth paragraph by striking "Subsection (b)(11)(B)" and inserting "Subsection (b)(12)(B)"; in the fourteenth paragraph by striking "Subsection (b)(12)(A)" and inserting "Subsection (b)(13)(A)"; in the fifteenth paragraph by striking "Subsection (b)(12)(B)" and inserting "Subsection (b)(13)(B)"; in the sixteenth paragraph by striking "Subsection (b)(13) implements" and inserting "Subsection (b)(14) implements"; and by striking "subsection (b)(13)(B)" and inserting "subsection (b)(14)(B)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 7 by striking "sentence below the applicable guideline range" and inserting "downward departure".

The Commentary to §2R1.1 captioned "Application Notes" is amended in Note 7 by striking ", or even above,"; and by inserting ", or an upward departure," after "guideline range".

The Commentary to §2T1.8 captioned "Application Note" is amended in Note 1 by striking "a sentence above the guidelines" and inserting "an upward departure".

Chapter Two, Part T, Subpart 3, is amended in the "Introductory Commentary" by striking "imposing a sentence above that specified in the guideline in this Subpart" and inserting "departing upward".

Chapter Two, Part X is amended by adding at the end the following new Subpart:

"6. OFFENSES INVOLVING USE OF A MINOR IN A CRIME OF VIOLENCE

§2X6.1. Use of a Minor in a Crime of Violence

- (a) Base Offense Level: 4 plus the offense level from the guideline applicable to the underlying crime of violence.

Commentary

Statutory Provision: 18 U.S.C. § 25.

Application Notes:

1. Definition.—For purposes of this guideline, ‘underlying crime of violence’ means the crime of violence as to which the defendant is convicted of using a minor.
2. Inapplicability of §3B1.4.—Do not apply the adjustment under §3B1.4 (Using a Minor to Commit a Crime).
3. Multiple Counts.—
  - (A) In a case in which the defendant is convicted under both 18 U.S.C. § 25 and the underlying crime of violence, the counts shall be grouped pursuant to subsection (a) of §3D1.2 (Groups of Closely Related Counts).



- (B) Multiple counts involving the use of a minor in a crime of violence shall not be grouped under §3D1.2."

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 5(b) by striking "3(g)" and inserting "4(g)".

Section 3D1.2(d) is amended by striking the period after "2P1.3" and inserting a semi-colon; and by inserting after the line that begins "§§2P1.1," the following new line:

"§2X6.1."

The Commentary to §3D1.3 captioned "Application Notes" is amended in Note 4 by striking "a sentence above the guideline range" and inserting "an upward departure".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 in the first sentence of the paragraph that begins "'Crime of violence' does not include" by inserting ", unless the possession was of a firearm described in 26 U.S.C. § 5845(a)" before the period.

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 by inserting before the paragraph that begins "Unlawfully possessing a prohibited flask" the following paragraph:

"Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence'."

The Commentary to §4B1.4 captioned "Application Note" is amended by striking "Note" in the heading and inserting "Notes"; and by adding at the end the following:

- "2. Application of §4B1.4 in Cases Involving Convictions Under 18 U.S.C. § 844(h), § 924(c), or § 929(a).—If a sentence under this guideline is imposed in conjunction with a sentence for a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a), do not apply either subsection (b)(3)(A) or (c)(2). A sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a) accounts for the conduct covered by subsections (b)(3)(A) and (c)(2) because of the relatedness of the conduct covered by these subsections to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).

In a few cases, the rule provided in the preceding paragraph may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (i.e., the guideline range that would have resulted if subsections (b)(3)(A) and (c)(2) had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had

there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).".

Section 5C1.2(a) is amended by striking "verbatim".

The Commentary to §5G1.2 captioned "Application Notes" is amended in Note 3(B)(iii) in the first sentence by striking "2113(a) (20 year" and inserting "113(a)(3) (10 year"; in the second sentence by striking "400" and inserting "460", and by striking "360-life" and inserting "460-485 months"; and in the third sentence by striking "40" and inserting "100", and by striking "2113(a)" and inserting "113(a)(3)".

Section 5H1.1 is amended by striking "sentence should be outside the applicable guideline range" and inserting "departure is warranted"; by striking "impose a sentence below the applicable guideline range when" and inserting "depart downward in a case in which"; and by inserting "; Gambling Addiction" after "Abuse".

Section 5H1.2 is amended by striking "sentence should be outside the applicable guideline range" and inserting "departure is warranted".

Section 5H1.3 is amended by striking "sentence should be outside the applicable guideline range" and inserting "departure is warranted".

Section 5H1.5 is amended by striking "sentence should be outside the applicable guideline range" and inserting "departure is warranted".

Chapter Five, Part H is amended by striking §5H1.6 as follows:

"§5H1.6. Family Ties and Responsibilities (Policy Statement)

Family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

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

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

\*Note: Section 401(b)(4) of Public Law 108-21 (the "Protect Act") directly amended §5H1.6 to add the second paragraph, effective April 30, 2003. The Commission incorporated this direct amendment in the Supplement to the 2002 Guidelines Manual but inadvertently omitted the second paragraph in the Federal Register notice of amendments dated October 21, 2003. The policy statement should be read as containing the second paragraph, pursuant to the direct amendment made by Public Law 108-21.",

and inserting the following:

"§5H1.6.        Family Ties and Responsibilities (Policy Statement)

In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

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

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

The Commentary to §5H1.6 is amended by adding at the end the following:

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

Section 5H1.11 is amended by striking "sentence should be outside the applicable guideline range" and inserting "departure is warranted".

Section 5H1.12 is amended by striking "grounds for imposing a sentence outside the applicable guideline range" and inserting "in determining whether a departure is warranted".

Section 5K2.12 is amended by striking "decrease the sentence below the applicable guideline range" and inserting "depart downward".

Section 5K2.13 is amended by striking "sentence below the applicable guideline range" and inserting "downward departure".

Section 5K2.14 is amended by striking "increase the sentence above the guideline range" and inserting "depart upward".

Section 5K2.16 is amended by striking "departure below the applicable guideline range for that offense" and inserting "downward departure".

Section 5K2.21 is amended by striking "increase the sentence above the guideline range" and inserting "depart upward".

Section 5K2.22 is amended by striking "impose a sentence below the applicable guideline range" each place it appears and inserting "depart downward"; and by striking "for imposing a sentence below the guidelines" and inserting "to depart downward".

Section 5K2.23 is amended by striking "sentence below the applicable guideline range" and

inserting "downward departure".

Section 6A1.1 is amended by striking the following:

"A probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record. Rule 32(b)(1), Fed. R. Crim. P. The defendant may not waive preparation of the presentence report."

and inserting the following:

"(a) The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless—

- (1) 18 U.S.C. § 3593(c) or another statute requires otherwise; or
- (2) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

Rule 32(c)(1)(A), Fed. R. Crim. P.

(b) The defendant may not waive preparation of the presentence report."

The Commentary to §6A1.1 is amended by striking:

" A thorough presentence investigation is essential in determining the facts relevant to sentencing. In order to ensure that the sentencing judge will have information sufficient to determine the appropriate sentence, Congress deleted provisions of Rule 32(c), Fed. R. Crim. P., which previously permitted the defendant to waive the presentence report. Rule 32(b)(1) permits the judge to dispense with a presentence report, but only after explaining, on the record, why sufficient information is already available."

and inserting the following:

" A thorough presentence investigation ordinarily is essential in determining the facts relevant to sentencing. Rule 32(c)(1)(A) permits the judge to dispense with a presentence report in certain limited circumstances, as when a specific statute requires or when the court finds sufficient information in the record to enable it to exercise its statutory sentencing authority meaningfully and explains its finding on the record."

Chapter Six, Part A is amended by striking §6A1.2 and its accompanying commentary as follows:

"§6A1.2. Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

Courts should adopt procedures to provide for the timely disclosure of the presentence report; the narrowing and resolution, where feasible, of issues in dispute in advance of the sentencing hearing; and the identification for the court of issues remaining in dispute. Rule 32(b)(6), Fed. R. Crim. P.

Commentary

Application Note:

1. Under Rule 32, Fed. R. Crim. P., if the court intends to consider a sentence outside the applicable guideline range on a ground not identified as a ground for departure either in the presentence report or a pre-hearing submission, it shall provide reasonable notice that it is contemplating such ruling, specifically identifying the grounds for the departure. Burns v. United States, 501 U.S. 129, 135-39 (1991).

Background: In order to focus the issues prior to sentencing, the parties are required to respond in writing to the presentence report and to identify any issues in dispute. Rule 32(b)(6)(B), Fed. R. Crim. P.",

and inserting the following:

- "§6A1.2. Disclosure of Presentence Report; Issues in Dispute (Policy Statement)
- (a) The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. Rule 32(e)(2), Fed. R. Crim. P.
  - (b) Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. An objecting party must provide a copy of its objections to the opposing party and to the probation officer. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report accordingly. Rule 32(f), Fed. R. Crim. P.
  - (c) At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them. Rule 32(g), Fed. R. Crim. P.

Background: In order to focus the issues prior to sentencing, the parties are required to respond in writing to the presentence report and to identify any issues in dispute. See Rule 32(f), Fed. R. Crim. P."

Section 6A1.3(b) is amended by striking "Rule 32(c)(1)" and inserting "Rule 32(i)".

The Commentary to §6A1.3 is amended by striking the first paragraph as follows:

" In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation no longer exists under sentencing guidelines. The court's resolution of disputed sentencing factors usually has a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair.";

by striking "117 S. Ct. 633, 635" and inserting "519 U.S. 148, 154"; and by striking "117 S. Ct. at 637" and inserting "519 U.S. at 157".

Chapter Six, Part A is amended by adding at the end the following:

"§6A1.4. Notice of Possible Departure (Policy Statement)

Before the court may depart from the applicable sentencing guideline range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. Rule 32(h), Fed. R. Crim. P.

Commentary

Background: The Federal Rules of Criminal Procedure were amended, effective December 1, 2002, to incorporate into Rule 32(h) the holding in Burns v. United States, 501 U.S. 129, 138-39 (1991). This policy statement parallels Rule 32(h), Fed. R. Crim. P."

Chapter Six, Part B is amended by striking the Introductory Commentary as follows:

" Introductory Commentary

Policy statements governing the acceptance of plea agreements under Rule 11(e)(1), Fed. R. Crim. P., are intended to ensure that plea negotiation practices:

- (1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and
- (2) do not perpetuate unwarranted sentencing disparity.

These policy statements are a first step toward implementing 28 U.S.C. § 994(a)(2)(E). Congress indicated that it expects judges ‘to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines.’ S. Rep. 98-225, 98th Cong., 1st Sess. 63, 167 (1983). In pursuit of this goal, the Commission shall study plea agreement practice under the guidelines and ultimately develop standards for judges to use in determining whether to accept plea agreements. Because of the difficulty in anticipating problems in this area, and because the sentencing guidelines are themselves to some degree experimental, substantive restrictions on judicial discretion would be premature at this stage of the Commission’s work.

The present policy statements move in the desired direction in two ways. First, the policy statements make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge. This is a reaffirmation of pre-guidelines practice. Second, the policy statements ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record. Explanations will be carefully analyzed by the Commission and will pave the way for more detailed policy statements presenting substantive criteria to achieve consistency in this aspect of the sentencing process.”,

and inserting the following:

” Introductory Commentary

Policy statements governing the acceptance of plea agreements under Rule 11(c), Fed. R. Crim. P., are intended to ensure that plea negotiation practices: (1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and (2) do not perpetuate unwarranted sentencing disparity.

These policy statements make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge. The policy statements also ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record.”.

Section 6B1.1 is amended by striking subsections (a), (b), and (c) as follows:

- ”(a) If the parties have reached a plea agreement, the court shall, on the record, require disclosure of the agreement in open court or, on a showing of good cause, in camera. Rule 11(e)(2), Fed. R. Crim. P.
- (b) If the plea agreement includes a nonbinding recommendation pursuant to Rule 11(e)(1)(B), the court shall advise the defendant that the court is not bound by the sentencing recommendation, and that the defendant has no right to withdraw the defendant’s guilty plea if the court decides not to accept the sentencing recommendation set forth in the plea agreement.
- (c) The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court’s decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence

report, unless a report is not required under §6A1.1.",

and inserting the following:

- "(a) The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. Rule 11(c)(2), Fed. R. Crim. P.
- (b) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. Rule 11(c)(3)(B), Fed. R. Crim. P.
- (c) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. Rule 11(c)(3)(A), Fed. R. Crim. P."

The Commentary to §6B1.1 is amended in the first paragraph by striking "Rule 11(e)" and inserting "Rule 11(c)";

and by striking the second paragraph as follows:

" Section 6B1.1(c) deals with the timing of the court's decision whether to accept the plea agreement. Rule 11(e)(2) gives the court discretion to accept the plea agreement immediately or defer acceptance pending consideration of the presentence report. Prior to the guidelines, an immediate decision was permissible because, under Rule 32(c), Fed. R. Crim. P., the defendant could waive preparation of the presentence report. Section 6B1.1(c) reflects the changes in practice required by §6A1.1 (Presentence Report) and amended Rule 32(c)(1). Since a presentence report normally will be prepared, the court must defer acceptance of the plea agreement until the court has had an opportunity to consider the presentence report."

and inserting the following:

" Section 6B1.1(c) deals with the timing of the court's decision regarding whether to accept or reject the plea agreement. Rule 11(c)(3)(A) gives the court discretion to accept or reject the plea agreement immediately or defer a decision pending consideration of the presentence report. Given that a presentence report normally will be prepared, the Commission recommends that the court defer acceptance of the plea agreement until the court has reviewed the presentence report."

Section 6B1.3 is amended by striking:

"If a plea agreement pursuant to Rule 11(e)(1)(A) or Rule 11(e)(1)(C) is rejected, the court shall afford the defendant an opportunity to withdraw the defendant's guilty plea. Rule 11(e)(4), Fed. R. Crim. P."



and inserting the following:

"If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera)—

- (a) inform the parties that the court rejects the plea agreement;
- (b) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and
- (c) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

Rule 11(c)(5), Fed. R. Crim. P."

The Commentary to §6B1.3 is amended by striking "Rule 11(e)(4)" and inserting "Rule 11(c)(5)"; and by striking "that would require dismissal of charges or imposition of a specific sentence." and inserting a period.

Appendix A is amended by inserting after the line referenced to 18 U.S.C. § 4 the following new line:

"18 U.S.C. § 25            2X6.1".

**Reason for Amendment:** This nine-part amendment consists of four technical and conforming amendments and five amendments of a more substantive nature, some of which are in response to new legislation.

First, this amendment corrects a typographical error in Application Note 4 to §3C1.1 (Obstructing or Impeding the Administration of Justice) by changing a reference to Application Note 3(g) to 4(g).

Second, this amendment makes a number of conforming changes to various guideline provisions and commentary as a result of departure amendments previously made in furtherance of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21 (the "PROTECT Act").

Third, this amendment corrects an error in an example provided in Application Note 3(B)(iii) of §5G1.2 (Sentencing on Multiple Counts of Conviction).

Fourth, this amendment generally updates Chapter Six (Sentencing Procedures and Plea Agreements) in response to a number of amendments that were made to the Federal Rules of Criminal Procedure effective December 1, 2002. While some of these changes to the Rules were substantive, the bulk of the changes to Rules 11 and 32 of the Federal Rules of Criminal Procedure were organizational and stylistic. These guideline amendments conform to those changes made to the Federal Rules of Criminal Procedure with respect to such issues as deadlines for disputed issues and requirements for disclosure of presentence reports, as

well as procedures the court must follow in rejecting certain plea agreements. Certain outdated commentary also has been deleted.

Fifth, this amendment broadens the special multiple victim rule in Application Note 4(C)(ii) of §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), as redesignated by Amendment 3 of this document, for offenses involving stolen United States mail. The rule is expanded to include theft of mail from housing unit cluster boxes, whether owned by the United States Postal Service or otherwise. The amendment provides a presumption that a theft from such a cluster box involves the number of victims corresponding to the number of mailboxes contained in the cluster box. The same rationale for the original special rule applies to this expansion: (i) unique proof problems in that once entry is gained to such a cluster box and mail is removed, it is difficult to determine the number of persons from whom mail was stolen; (ii) the frequently significant, but difficult to quantify, non-monetary losses; and (iii) the importance of maintaining the integrity of the United States mail service. See USSG App. C (Vol. II) (Amendment 617). These reasons are equally valid whether the mail receptacle is owned by the United States Postal Service or is privately owned.

Sixth, this amendment modifies §2B1.1(b)(10), as redesignated by Amendment 3 of this document, which provides a two-level enhancement and a minimum offense level of 12, in response to the Secure Authentication Feature and Enhanced Identification Defense Act of 2003 (the "SAFE ID Act") (section 607 of the PROTECT Act, Pub. L. 108–21). That Act created a new offense at 18 U.S.C. § 1028(a)(8), prohibiting the trafficking of authentication features (e.g., a hologram or symbol used by a government agency to determine whether a document is counterfeit, altered, or otherwise falsified), and amended 18 U.S.C. § 1028 to prohibit the transfer or possession of authentication features. This amendment makes §2B1.1(b)(10) applicable to offenses involving authentication features.

Seventh, this amendment creates a new guideline at §2X6.1 (Use of a Minor to Commit a Crime of Violence). This new guideline is in response to a new offense provided at 18 U.S.C. § 25 (Use of Minors in Crimes of Violence), which was created by section 601 of the PROTECT Act. The new offense prohibits any person 18 years of age or older from intentionally using a minor to commit a crime of violence or to assist in avoiding detection or apprehension for such offense. For a first conviction, the penalty is twice the maximum term of imprisonment that would otherwise be authorized for the offense, and for each subsequent conviction, three times the maximum term of imprisonment that would otherwise be authorized for the offense.

While consideration was given to expanding the existing two-level adjustment at §3B1.4 (Using a Minor to Commit a Crime), the Commission determined it was more appropriate and consistent with guideline construction to create a new guideline for the new substantive offense created by Congress in the PROTECT Act. This new guideline at §2X6.1 directs the court to increase by 4 levels the offense level from the guideline applicable to the underlying crime of violence. Application notes are included to provide that the adjustment under §3B1.4 is inapplicable if §2X6.1 is used and to provide rules for the grouping of multiple counts.

Eighth, this amendment expands the definition of "crime of violence" in Application Note

1 to §4B1.2 (Definitions of Terms Used in Section 4B1.1) to include unlawful possession of any firearm described in 26 U.S.C. § 5845(a). The amendment also excepts possession of those firearms described in 26 U.S.C. § 5845(a) from the rule that excludes felon in possession offenses from the definition of "crime of violence." Congress has determined that those firearms described in 26 U.S.C. § 5845(a) are inherently dangerous and when possessed unlawfully, serve only violent purposes. In the National Firearms Act, Pub. L. 90-618, Congress required that these firearms be registered with the National Firearms Registration and Transfer Record. A number of courts have held that possession of certain of these firearms, such as a sawed-off shotgun, is a "crime of violence" due to the serious potential risk of physical injury to another person. The amendment's categorical rule incorporating 26 U.S.C. § 5845(a) firearms includes short-barreled rifles and shotguns, machine guns, silencers, and destructive devices. It will affect determinations both of career offender status under Chapter Four, Part B and also of appropriate base offense levels in §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).

Ninth, this amendment provides an application note in §4B1.4 (Armed Career Criminal) to address an apparent "double counting" issue that appears to be present when a defendant is convicted both of 18 U.S.C. § 922(g) (Felon in Possession) and also of an offense such as 18 U.S.C. § 924(c) (Use of a Firearm in Relation to Any Crime of Violence or Drug Trafficking Crime) or a similar offense carrying a mandatory minimum consecutive penalty, such as 18 U.S.C. § 844(h) relating to use of explosives, or 18 U.S.C. § 929(a) relating to use of restricted ammunition.

The basis for the mandatory minimum, consecutive penalties in these offenses is the same as the basis for the enhanced guideline offense level 34 at §4B1.4(b)(3)(A) and the enhanced Criminal History Category VI at §4B1.4(c)(2); i.e., the use or possession of the firearm in connection with a crime of violence or controlled substance offense. The Commission determined that the mandatory minimum, consecutive sentences in these statutes are sufficient to take into account the aggravated conduct referenced in §4B1.4.

An upward departure is provided for those cases that result in a total maximum penalty that is less than the maximum of the guideline range that would have resulted if the enhanced offense level under §4B1.4(b)(3)(A) and the criminal history enhancement under §4B1.4(c)(2) had been applied. However, the extent of the upward departure shall not exceed the maximum of the guideline range that would have resulted had there not been a conviction under 18 U.S.C. § 924(c), § 844(h), or § 929(a).

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

**675. Amendment:** Section 2B5.3(b) is amended by redesignating subsections (b)(2) through (b)(4) as subsections (b)(3) through (b)(5), respectively; and by inserting after subsection (b)(1) the following:

"(2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by 2 levels."

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 1 by striking the last paragraph as follows:

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

and inserting the following:

"'Uploading' means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the infringing item, including by storing the infringing item in an openly shared file. 'Uploading' does not include merely downloading or installing an infringing item on a hard drive on a defendant's personal computer unless the infringing item is placed in an openly shared file.

'Work being prepared for commercial distribution' has the meaning given that term in 17 U.S.C. § 506(a)(3)."

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 2 in subdivision (A) by inserting after subdivision (v) the following:

"(vi) The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case involving such an offense, the 'retail value of the infringed item' is the value of that item upon its initial commercial distribution.";

and by inserting after subdivision (D) the following:

"(E) Indeterminate Number of Infringing Items.—In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records.".

The Commentary to §2B5.3 captioned "Application Notes" is amended by striking Note 3 as follows:

"3. Uploading.—With respect to uploading, subsection (b)(2) applies only to uploading with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item. For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant's personal computer.";

and by redesignating Notes 4 and 5 as Notes 3 and 4, respectively.

Appendix A (Statutory Index) is amended by inserting after the line reference to "18 U.S.C. § 2319A" the following:

"18 U.S.C. § 2319B 2B5.3".

**Reason for Amendment:** This amendment implements the directive in section 105 of the

Family Entertainment and Copyright Act of 2005, Pub. L. 109–9. The directive, which requires the Commission to promulgate an amendment under emergency amendment authority by October 24, 2005, instructs the Commission to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes..."

"In carrying out [the directive], the Commission shall—

(1) take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements...are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes;

(2) determine whether to provide a sentencing enhancement for those convicted of the offenses [involving intellectual property rights], if the conduct involves the display, performance, publication, reproduction, or distribution of a copyrighted work before it has been authorized by the copyright owner, whether in the media format used by the infringing party or in any other media format;

(3) determine whether the scope of 'uploading' set forth in application note 3 of section 2B5.3 of the Federal sentencing guidelines is adequate to address the loss attributable to people who, without authorization, broadly distribute copyrighted works over the Internet; and

(4) determine whether the sentencing guideline and policy statements applicable to the offenses [involving intellectual property rights] adequately reflect any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed."

#### Pre-Release Works

The amendment provides a separate two-level enhancement if the offense involved a pre-release work. The enhancement and the corresponding definition use language directly from 17 U.S.C. § 506(a) (criminal infringement). The amendment adds language to Application Note 2 that explains that in cases involving pre-release works, the infringement amount should be determined by using the retail value of the infringed item, rather than any premium price attributed to the infringing item because of its pre-release status. The amendment addresses concerns that distribution of an item before it is legally available to the consumer is more serious conduct than distribution of other infringing items and involves a harm not addressed by the current guideline.

#### Uploading

The concern underlying the uploading directive pertains to offenses in which the copyrighted work is transferred through file sharing. The amendment builds on the current definition of "uploading" to include making an infringing item available on the Internet by storing an infringing item in an openly shared file. The amendment also clarifies that uploading does not include merely downloading or installing infringing items on a hard drive of the defendant's computer unless the infringing item is in an openly shared file. By clarifying the definition of uploading in this manner, Application Note 3, which is a restatement of the uploading definition, is no longer necessary and the amendment deletes the application note from the guideline.

#### Indeterminate Number

The amendment addresses the final directive by amending Application Note 2, which sets forth the rules for determining the infringement amount. The note provides that the court may make a reasonable estimate of the infringement amount using any relevant information including financial records in cases in which the court cannot determine the number of infringing items.

#### New Offense

Finally, the amendment provides a reference in Appendix A (Statutory Index) for the new offense at 18 U.S.C. § 2319B. This offense is to be referenced to §2B5.3.

**Effective Date: The effective date of this amendment is October 24, 2005.**

**676. Amendment:** Section 2J1.2(b) is amended by striking subdivision (1) as follows:

- "(1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by 8 levels.",

and inserting the following:

- "(1) (Apply the greater):
- (A) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by 8 levels.
- (B) If (i) defendant was convicted under 18 U.S.C. § 1001 or § 1505; and (ii) the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, increase by 12 levels."

The Commentary to §2J1.2 captioned "Statutory Provisions" is amended by striking "18 U.S.C. §§ 1503" and inserting the following:

"18 U.S.C. §§ 1001 when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, 1503".

The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 1 by inserting after "Definitions.—For purposes of this guideline:" the following:

"‘Domestic terrorism’ has the meaning given that term in 18 U.S.C. § 2331(5).

‘International terrorism’ has the meaning given that term in 18 U.S.C. § 2331(1)."

The Commentary to §2J1.2 captioned "Application Notes" is amended by striking Note 2 as follows:

- "2. Nonapplicability of Chapter Three, Part C.—For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the

defendant obstructed the investigation, prosecution, or sentencing of the obstruction of justice count.",

and inserting the following:

- "2. Chapter Three Adjustments.—
- (A) Inapplicability of Chapter Three, Part C.—For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation, prosecution, or sentencing of the obstruction of justice count.
- (B) Interaction with Terrorism Adjustment.—If §3A1.4 (Terrorism) applies, do not apply subsection (b)(1)(B)."

Appendix A (Statutory Index) is amended in the line referenced to "18 U.S.C. § 1001" by inserting ", 2J1.2 when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable" after 2B1.1".

**Reason for Amendment:** This amendment implements section 6703 of the Intelligence Reform and Terrorism Prevention Act of 2004 (the "Act"), Pub. L. 108–458. Section 6703(a) provides an enhanced penalty of not more than 8 years of imprisonment for offenses under sections 1001(a) and 1505 of title 18, United States Code, "if the offense involves international or domestic terrorism (as defined in section 2331)." Section 6703(b) requires the Sentencing Commission to amend the sentencing guidelines to provide for "an increased offense level for an offense under sections 1001(a) and 1505 of title 18, United States Code, if the offense involves international or domestic terrorism, as defined in section 2331 of such title." The Commission is directed under section 3 of the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–76, to promulgate this amendment as an emergency amendment.

First, the amendment references convictions under 18 U.S.C. § 1001 to §2J1.2 (Obstruction of Justice) "when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable." It also adds a new specific offense characteristic at §2J1.2(b)(1)(B) providing for a 12 level increase for a defendant convicted under 18 U.S.C. §§ 1001 and 1505 "when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable." This 12 level increase is applied in lieu of the current 8 level increase for injury or threats to persons or property. The increase of 12 levels is intended to provide parity with the treatment of federal crimes of terrorism within the limits of the 8 year statutory maximum penalty. It is also provided to ensure a 5 year sentence of imprisonment for offenses that involve international or domestic terrorism.

Second, the amendment adds to Application Note 1 definitions for "domestic terrorism" and "international terrorism," using the meanings given the terms at 18 U.S.C. § 2331(5) and (1), respectively.

Third, the amendment adds to Application Note 2 an instruction that if §3A1.4 (Terrorism) applies, do not apply §2J1.2(b)(1)(B).

**Effective Date:** The effective date of this amendment is October 24, 2005.

**677. Amendment:** Chapter Two, Part B, Subpart 1 is amended by adding at the end the following new guideline and accompanying commentary:

"§2B1.6. Aggravated Identity Theft

- (a) If the defendant was convicted of violating 18 U.S.C. § 1028A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

Commentary

Statutory Provision: 18 U.S.C. § 1028A. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Imposition of Sentence.—
  - (A) In General.—Section 1028A of title 18, United State Code, provides a mandatory term of imprisonment. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 1028A is the term required by that statute. Except as provided in subdivision (B), 18 U.S.C. § 1028A also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.
  - (B) Multiple Convictions Under Section 1028A.—Section 1028A(b)(4) of title 18, United State Code, provides that in the case of multiple convictions under 18 U.S.C. § 1028A, the terms of imprisonment imposed on such counts may, in the discretion of the court, run concurrently, in whole or in part, with each other. See the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance regarding imposition of sentence on multiple counts of 18 U.S.C. § 1028A.
2. Inapplicability of Chapter Two Enhancement.—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. A sentence under this guideline accounts for this factor for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). ‘Means of identification’ has the meaning given that term in 18 U.S.C. § 1028(d)(7).
3. Inapplicability of Chapters Three and Four.—Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from



application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2."

The Commentary to §3B1.3 captioned "Application Notes" is amended in Note 1 by inserting "Definition of 'Public or Private Trust'.—" before "'Public or private trust' refers to", and by striking the second paragraph as follows:

"Notwithstanding the preceding paragraph, because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail.";

by redesignating Notes 2 through 4 as Notes 3 through 5, respectively; and by inserting after Note 1 the following:

"2. Application of Adjustment in Certain Circumstances.—Notwithstanding Application Note 1, or any other provision of this guideline, an adjustment under this guideline shall apply to the following:

- (A) An employee of the United States Postal Service who engages in the theft or destruction of undelivered United States mail.
- (B) A defendant who exceeds or abuses the authority of his or her position in order to obtain unlawfully, or use without authority, any means of identification. 'Means of identification' has the meaning given that term in 18 U.S.C. § 1028(d)(7). The following are examples to which this subdivision would apply: (i) an employee of a state motor vehicle department who exceeds or abuses the authority of his or her position by knowingly issuing a driver's license based on false, incomplete, or misleading information; (ii) a hospital orderly who exceeds or abuses the authority of his or her position by obtaining or misusing patient identification information from a patient chart; and (iii) a volunteer at a charitable organization who exceeds or abuses the authority of his or her position by obtaining or misusing identification information from a donor's file."

Section 3D1.1 is amended by striking subsection (b) as follows:

- "(b) Exclude from the application of §§3D1.2-3D1.5 any count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of §5G1.2(a)."

and inserting the following:

- "(b) Exclude from the application of §§3D1.2-3D1.5 the following:

- (1) Any count for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of §5G1.2(a).
- (2) Any count of conviction under 18 U.S.C. § 1028A. See Application Note 2(B) of the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance on how sentences for multiple counts of conviction under 18 U.S.C. § 1028A should be imposed."

The Commentary to §5G1.2 captioned "Application Notes" is amended in Note 2 by inserting "(A) In General.—" before "Subsection (a) applies"; by inserting "and 18 U.S.C. § 1028A (requiring a mandatory term of imprisonment of either two or five years, based on the conduct involved, and also requiring, except in the circumstances described in subdivision (B), the sentence imposed to run consecutively to any other term of imprisonment)" after "imprisonment"; by striking the following:

"Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e).";

and by adding at the end the following:

- "(B) Multiple Convictions Under 18 U.S.C. § 1028A.—Section 1028A of title 18, United States Code, generally requires that the mandatory term of imprisonment for a violation of such section be imposed consecutively to any other term of imprisonment. However, 18 U.S.C. § 1028A(b)(4) permits the court, in its discretion, to impose the mandatory term of imprisonment on a defendant for a violation of such section ‘concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission. . .’.

In determining whether multiple counts of 18 U.S.C. § 1028A should run concurrently with, or consecutively to, each other, the court should consider the following non-exhaustive list of factors:

- (i) The nature and seriousness of the underlying offenses. For example, the court should consider the appropriateness of imposing consecutive, or partially consecutive, terms of imprisonment for multiple counts of 18 U.S.C. § 1028A in a case in which an underlying offense for one of the 18 U.S.C. § 1028A offenses is a crime of violence or an offense enumerated in 18 U.S.C. § 2332b(g)(5)(B).

- (ii) Whether the underlying offenses are groupable under §3D1.2 (Multiple Counts). Generally, multiple counts of 18 U.S.C. § 1028A should run concurrently with one another in cases in which the underlying offenses are groupable under §3D1.2.
  - (iii) Whether the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are better achieved by imposing a concurrent or a consecutive sentence for multiple counts of 18 U.S.C. § 1028A.
- (C) Imposition of Supervised Release.—In the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e)."

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1028 the following:

"18 U.S.C. § 1028A                      2B1.6".

**Reason for Amendment:** This amendment implements sections 2 and 5 of the Identity Theft Penalty Enhancement Act, Pub. L. 108–275, 118 Stat. 831 ("the Act"), which create two new criminal offenses at 18 U.S.C. § 1028A and direct the Sentencing Commission to expand the upward adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill). This amendment also provides guidance to the courts on imposing sentences for multiple violations of section 1028A.

The Act creates a new offense at 18 U.S.C. § 1028A(a)(1) that prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, specific enumerated felonies. These felonies consist of various types of fraud, including mail and wire fraud in connection with passports, visas and other immigration, nationality, and citizenship laws, programs under the Social Security Act, and the acquisition of firearms. A conviction under section 1028A(a)(1) carries a two-year mandatory term of imprisonment that must run consecutively to any other term of imprisonment, including the sentence for the underlying felony conviction. The Act also creates a new offense at 18 U.S.C. § 1028A(b)(1) that prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, specific felonies enumerated in 18 U.S.C. § 2332b(g)(5)(B) ("federal crimes of terrorism"). Section 1028A(b)(1) provides a five-year mandatory term of imprisonment that must run consecutively to any other term of imprisonment, including the sentence for the underlying felony conviction. As described below, section 1028A(b)(4) creates an exception to the requirement for consecutive terms of imprisonment in cases involving multiple violations of the statute sentenced at the same time.

First, in response to the creation of these new criminal offenses, the amendment creates a new guideline at §2B1.6 (Aggravated Identity Theft). This guideline is patterned after §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). Because the new offenses carry a fixed, mandatory consecutive term of imprisonment, the new guideline, as does §2K2.4, provides that the guideline sentence is the term of imprisonment required by statute. To avoid unwarranted double-counting, the amendment contains an application note that prohibits the application of any specific offense characteristic for the transfer, possession, or use of a means of identification when

determining the sentence for the underlying offense in cases in which a sentence under §2B1.6 is imposed in conjunction with a sentence for an underlying offense. Also, consistent with §2K2.4, the new guideline at §2B1.6 contains an application note that provides that adjustments under Chapters Three and Four are inapplicable to sentences under this guideline.

Second, in response to the directive in section 5 to amend §3B1.3 (Abuse of Position of Trust or Use of Special Skill) to include a "defendant [who] exceeds or abuses the authority of his or her position in order to obtain unlawfully or use without authority any means of identification," the Commission created Application Note 2 to §3B1.3 to include such defendants within the scope of the guideline. The application note contains several examples to illustrate the types of conduct intended to be within the scope of the new provision.

Third, the amendment adds a number of provisions at appropriate guidelines in order to provide guidance to courts in accordance with section 2 of the Act (18 U.S.C. § 1028A(b)(4)). That section states that "a term of imprisonment imposed on a person for violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission . . . ." The amendment states a general rule, at §5G1.2 (Sentencing on Multiple Counts of Conviction), Application Note 2(B), providing that the court has discretion to impose concurrent or consecutive, or partially concurrent and partially consecutive, terms of imprisonment for multiple violations of 18 U.S.C. § 1028A. A non-exhaustive list of factors for courts to consider in making this determination is provided, including the nature and seriousness of the underlying offenses and whether the offenses would be groupable under §3D1.2 (Group of Closely Related Counts).

Finally, the amendment modifies §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) to make clear that section 1028A offenses are excluded from the general grouping rules in §§3D1.2 - 3D1.5 and makes conforming additions and changes to the new guideline at §2B1.6 (Aggravated Identity Theft) in Application Note 1 and §3D1.1(b)(1) and (2).

**Effective Date: The effective date of this amendment is November 1, 2005.**

**678. Amendment:** Section 2R1.1(a) is amended by striking "10" and inserting "12".

Section 2R1.1(b) is amended by striking subdivision (2) as follows:

"(2) If the volume of commerce attributable to the defendant was more than \$400,000, adjust the offense level as follows:

<u>Volume of</u> <u>Commerce (Apply the Greatest)</u>	<u>Adjustment to</u> <u>Offense Level</u>
(A) More than \$400,000	add 1
(B) More than \$1,000,000	add 2
(C) More than \$2,500,000	add 3
(D) More than \$6,250,000	add 4

(E)	More than \$15,000,000	add 5
(F)	More than \$37,500,000	add 6
(G)	More than \$100,000,000	add 7.

For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.",

and inserting the following:

- "(2) If the volume of commerce attributable to the defendant was more than \$1,000,000, adjust the offense level as follows:

<u>Volume of</u> <u>Commerce (Apply the Greatest)</u>	<u>Adjustment to</u> <u>Offense Level</u>
(A) More than \$1,000,000	add 2
(B) More than \$10,000,000	add 4
(C) More than \$40,000,000	add 6
(D) More than \$100,000,000	add 8
(E) More than \$250,000,000	add 10
(F) More than \$500,000,000	add 12
(G) More than \$1,000,000,000	add 14
(H) More than \$1,500,000,000	add 16.

For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.".

The Commentary to §2R1.1 captioned "Application Notes" is amended by striking Note 1 as follows:

- "1. The provisions of §3B1.1 (Aggravating Role) and §3B1.2 (Mitigating Role) should be applied to an individual defendant as appropriate to reflect the individual's role in committing the offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, a 4-level increase is called for under §3B1.1. An individual defendant should be considered for a downward adjustment under §3B1.2 for a mitigating role in the offense only if he was responsible in some minor way for his firm's participation in the conspiracy.".

and inserting the following:

- "1. Application of Chapter Three (Adjustments).—Sections 3B1.1 (Aggravating Role), 3B1.2 (Mitigating Role), 3B1.3 (Abuse of Position of

Trust or Use of Special Skill), and 3C1.1 (Obstructing or Impeding the Administration of Justice) may be relevant in determining the seriousness of the defendant's offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, the 4-level increase at §3B1.1(a) should be applied to reflect the defendant's aggravated role in the offense. For purposes of applying §3B1.2, an individual defendant should be considered for a mitigating role adjustment only if he were responsible in some minor way for his firm's participation in the conspiracy."

The Commentary to §2R1.1 captioned "Application Notes" is amended in Note 2 by striking the first sentence as follows:

"In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, his role, and the degree to which he personally profited from the offense (including salary, bonuses, and career enhancement).",

and inserting the following:

"Considerations in Setting Fine for Individuals.—In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, the defendant's role, and the degree to which the defendant personally profited from the offense (including salary, bonuses, and career enhancement)."

The Commentary to §2R1.1 captioned "Background" is amended in the second paragraph by striking the following:

"The Commission believes that the most effective method to deter individuals from committing this crime is through imposing short prison sentences coupled with large fines. The controlling consideration underlying this guideline is general deterrence.";

in the third paragraph by striking "confinement of six months or longer" and inserting "some period of confinement"; and in the last paragraph by striking the last sentence as follows:

"The statutory maximum fine is \$350,000 for individuals and \$10,000,000 for organizations, but is increased when there are convictions on multiple counts."

**Reason for Amendment:** This amendment responds to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108–237 (the "Act"). The Act increased the statutory maximum term of imprisonment for antitrust offenses under 15 U.S.C. §§ 1 and 3(b) from three to ten years. The amendment responds to congressional concern about the seriousness of antitrust offenses and provides for antitrust penalties that are more proportionate to those for sophisticated frauds sentenced under §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The Commission has long recognized the similarity of antitrust offenses to sophisticated frauds.

The amendment increases the base offense level for antitrust offenses in §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors ) to level 12. The higher base offense level ensures that penalties for antitrust offenses will be coextensive with those for sophisticated frauds sentenced under §2B1.1 and recognizes congressional concern about the inherent seriousness of antitrust offenses. The penalties for sophisticated fraud have been increased incrementally due to a series of amendments to §2B1.1, while no commensurate increases for antitrust offenses had occurred. Raising the base offense level of §2R1.1 helps restore the historic proportionality in the treatment of antitrust offenses and sophisticated frauds.

The "volume of commerce" table at §2R1.1(b)(2) is amended to provide up to 16 additional offense levels for the defendant whose offense involves more than \$1,500,000,000, while the new table's first threshold is raised from \$400,000 to \$1,000,000. The new volume of commerce table: (1) recognizes the depreciation in the value of the dollar since the table was last revised in 1991; (2) responds to data indicating that the financial magnitude of antitrust offenses has increased significantly; and (3) provides greater deterrence of large scale price-fixing crimes.

Application Note 1 to §2R1.1 is amended to emphasize the potential relevance of such Chapter Three enhancements as §3B1.1 (Aggravating Role), §3B1.3 (Abuse of Position of Trust or Use of Special Skill), and §3C1.1 (Obstructing or Impeding the Administration of Justice) in determining the appropriate sentence for an antitrust offender. Application Note 2 also is amended to highlight the potential relevance of the defendant's role in the offense in determining the amount of fine to be imposed. Finally, the amendment strikes outdated background commentary.

**Effective Date:** The effective date of this amendment is November 1, 2005.

**679. Amendment:** Section 2A2.4 is amended by striking the Commentary captioned "Background" as follows:

"Background: Violations of 18 U.S.C. §§ 1501, 1502, and 3056(d) are misdemeanors; violation of 18 U.S.C. § 111 is a felony."

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 15 in the first sentence by inserting "involving fraudulent conduct that is" after "establishes an offense"; and in the second sentence by inserting "involves fraudulent conduct that" after "the offense".

Section 2B3.3(c)(1) is amended by inserting "; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions" after "Official Right".

Section 2C1.3(c)(1) is amended by inserting "; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions" after "Official Right".

Section 2C1.8(c)(1) is amended by inserting "; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions" after "Official Right".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 5 in the first paragraph by striking "whether a greater quantity of the analogue is needed to produce a substantially similar effect on the central nervous system as" and inserting "whether the same quantity of analogue produces a greater effect on the central nervous system than".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 19 by striking "(b)(5)(A)" each place it appears and inserting "(b)(6)(A)"; in Note 20 by striking "(b)(5)(B) or (C)" and inserting "(b)(6)(B) or (C)"; and by striking "(b)(5)(C)" and inserting "(b)(6)(C)"; and in Note 21 by striking "(b)(6)" each place it appears and inserting "(b)(7)".

The Commentary to §2D1.1 captioned "Background" is amended in the ninth paragraph by striking "(b)(5)(A)" and inserting "(b)(6)(A)"; and in the last paragraph by striking "(b)(5)(B) and (C)" and inserting "(b)(6)(B) and (C)".

Section 2D1.11(e) is amended in subdivision (1) by striking "2271 L or more of Gamma-butyrolactone;" and inserting "1135.5 L or more of Gamma-butyrolactone;";

in subdivision (2) by striking "At least 681.3 L but less than 2271 L of Gamma-butyrolactone;" and inserting "At least 340.7 L but less than 1135.5 L of Gamma-butyrolactone;";

in subdivision (3) by striking "At least 227.1 L but less than 681.3 L of Gamma-butyrolactone;" and inserting "At least 113.6 L but less than 340.7 L of Gamma-butyrolactone;";

in subdivision (4) by striking "At least 159 L but less than 227.1 L of Gamma-butyrolactone;" and inserting "At least 79.5 L but less than 113.6 L of Gamma-butyrolactone;";

in subdivision (5) by striking "At least 90.8 L but less than 159 L of Gamma-butyrolactone;" and inserting "At least 45.4 L but less than 79.5 L of Gamma-butyrolactone;";

in subdivision (6) by striking "At least 22.7 L but less than 90.8 L of Gamma-butyrolactone;" and inserting "At least 11.4 L but less than 45.4 L of Gamma-butyrolactone;";

in subdivision (7) by striking "At least 18.2 L but less than 22.7 L of Gamma-butyrolactone;" and inserting "At least 9.1 L but less than 11.4 L of Gamma-butyrolactone;";

in subdivision (8) by striking "At least 13.6 L but less than 18.2 L of Gamma-butyrolactone;" and inserting "At least 6.8 L but less than 9.1 L of Gamma-butyrolactone;";

in subdivision (9) by striking "At least 9.1 L but less than 13.6 L of Gamma-butyrolactone;" and inserting "At least 4.5 L but less than 6.8 L of Gamma-butyrolactone;"; and

in subdivision (10) by striking "Less than 9.1 L of Gamma-butyrolactone;" and inserting "Less than 4.5 L of Gamma-butyrolactone;".

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



Section 2M6.1 is amended by striking "(a)(4)\*" in subsection (b)(1)(A) and inserting "(a)(4)(A)"; and by striking "\*Note: The reference to '(a)(4)' should be to '(a)(4)(A)'".

Section 3D1.2(d) is amended by striking "2C1.7,".

The Commentary to §5D1.2 captioned "Application Notes" is amended in Note 2 by inserting "Limitation on" before "Applicability of Statutory".

Section 8C2.1(a) is amended by striking ", 2C1.7".

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

"18 U.S.C. § 924(i)	2K2.1
18 U.S.C. § 924(j)(1)	2A1.1, 2A1.2
18 U.S.C. § 924(j)(2)	2A1.3, 2A1.4
18 U.S.C. § 924(k)-(o)	2K2.1",

and inserting the following:

"18 U.S.C. § 924(i)(1)	2A1.1, 2A1.2
18 U.S.C. § 924(i)(2)	2A1.3, 2A1.4
18 U.S.C. § 924(j)-(n)	2K2.1".

**Reason for Amendment:** This ten-part amendment consists of technical and conforming amendments to various guidelines.

First, this amendment deletes unnecessary background commentary in §2A2.4 (Obstructing or Impeding Officers).

Second, this amendment makes minor clarifying amendments to Application Note 15 in the fraud guideline, §2B1.1, to make clear that, in order for the cross reference at §2B1.1(c)(3) to apply, the conduct set forth in the count of conviction must establish a fraud or false statement-type offense.

Third, this amendment makes technical amendments to several guidelines to conform to changes made in the public corruption guidelines in the 2004 amendment cycle (see Appendix C to the Guidelines Manual, Amendment 666). Specifically, the amendment corrects title references to §2C1.1 in §§2B3.3(c)(1), 2C1.3(c)(1), and 2C1.8(c)(1) and strikes references to §2C1.7 in §§3D1.2(d) and 8C2.1.

Fourth, this amendment clarifies Application Note 5 in the drug guideline, §2D1.1, regarding drug analogues. The current note suggests that drug analogues are less potent than the drug for which it is an analogue. However, by statute, analogues can only be the same or more potent.

Fifth, this amendment redesignates incorrect references in a number of Application Notes in the drug guideline, §2D1.1.

Sixth, this amendment conforms §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to changes made in the drug

guideline, §2D1.1, in the 2004 amendment cycle (see Appendix C to the Guidelines Manual, Amendment 667). Specifically, the amendment amends the Chemical Quantity Table in §2D1.11(e) so that the amount of gamma-butyrolactone (GBL), at any particular offense level, is the amount that provides a 100 percent yield of gamma-hydroxybutyric acid (GHB).

Seventh, this amendment updates the statutory provisions in §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to account for redesignations of 18 U.S.C. § 924 offenses.

Eighth, this amendment corrects a typographical error in §2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy).

Ninth, this amendment corrects the title to §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) in Application Note 2 of §5D1.2 (Term of Supervised Release.).

Tenth, this amendment corrects Appendix A (Statutory Index) to account for redesignations of 18 U.S.C. § 924 offenses.

**Effective Date: The effective date of this amendment is November 1, 2005.**

**680. Amendment:** The Commentary to §2J1.6 captioned "Application Notes" is amended in Note 3 in the second paragraph in the fourth sentence by striking "See §3D1.1(b)" and inserting "See §3D1.1(b)(1)".

The Commentary to §2K2.1 captioned "Statutory Provisions", as amended by Amendment 679, is amended by striking "(e)-(h), (j)-(n)" and inserting "(e)-(i), (k)-(o)".

The Commentary to §2P1.2 captioned "Application Notes" is amended in Note 2 in the first paragraph in the fourth sentence by striking "See §3D1.1(b)" and inserting "See §3D1.1(b)(1)".

The Commentary to §3D1.1 captioned "Application Notes" is amended in Note 1 in the first paragraph by striking "Subsection (b)" and inserting "Subsection (b)(1)"; in the fourth sentence by striking "subsection (b)" and inserting "subsection (b)(1)"; and in the second paragraph by striking "subsection (b)" and inserting "subsection (b)(1)".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 1 by striking "See §3D1.1(b)" and inserting "See §3D1.1(b)(1)".

The Commentary to §5G1.2 captioned "Application Notes", as amended by Amendment 677, is amended in Note 2 in subdivision (A) by striking "(A) specifies" and inserting "(i) specifies" and by striking "(B) requires" and inserting "(ii) requires"; and in subdivision (B)(ii) by striking "(Multiple Counts)" and inserting "(Groups of Closely Related Counts)".

Appendix A (Statutory Index), as amended by Amendment 679, is amended by striking the following:

"18 U.S.C. § 924(i)(1)	2A1.1, 2A1.2
18 U.S.C. § 924(i)(2)	2A1.3, 2A1.4
18 U.S.C. § 924(j)-(n)	2K2.1".

and inserting the following:

"18 U.S.C. § 924(i)	2K2.1
18 U.S.C. § 924(j)(1)	2A1.1, 2A1.2
18 U.S.C. § 924(j)(2)	2A1.3, 2A1.4
18 U.S.C. § 924(k)-(o)	2K2.1".

**Reason for Amendment:** This amendment makes various technical and conforming changes in order to more fully implement amendments submitted to Congress on April 29, 2005 (see Amendments 677 and 679).

**Effective Date:** The effective date of this amendment is November 1, 2005.

**681. Amendment:** Section 2D1.1 is amended by redesignating subsections (b)(6) and (b)(7) as subsections (b)(8) and (b)(9), respectively; and by inserting the following after subsection (b)(5):

- "(6) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.
- (7) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels."

Section 2D1.1(c) is amended in the "\*Notes to Drug Quantity Table" in subdivision (F) by striking "(except anabolic steroids)"; and by adding at the end the following:

"For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (e.g., patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of an anabolic steroid is one 'unit'."

Section 2D1.1(c) is amended in the "\*Notes to Drug Quantity Table" by striking subdivision (G) as follows:

- "(G) In the case of anabolic steroids, one 'unit' means a 10 cc vial of an injectable steroid or fifty tablets. All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g., one 50 cc vial is to be counted as five 10 cc vials).";

and by redesignating subdivisions (H) through (J) as subdivisions (G) through (I), respectively.

The Commentary to §2D1.1 captioned "Application Notes" is amended in the first paragraph of Note 8 by inserting "Interaction with §3B1.3.—" before "A defendant who"; by striking "enhancement" and inserting "adjustment"; and by adding at the end the following:

"Additionally, an enhancement under §3B1.3 ordinarily would apply in a case in which the defendant used his or her position as a coach to influence an athlete to use an anabolic steroid."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Notes 19 and 20 by striking "(b)(6)" each place it appears and inserting "(b)(8)"; and in Note 21 by striking "(b)(7)" each place it appears and inserting "(b)(9)".

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

- "24. Application of Subsection (b)(6).—For purposes of subsection (b)(6), ‘masking agent’ means a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual’s body.
25. Application of Subsection (b)(7).—For purposes of subsection (b)(7), ‘athlete’ means an individual who participates in an athletic activity conducted by (i) an intercollegiate athletic association or interscholastic athletic association; (ii) a professional athletic association; or (iii) an amateur athletic organization."

The Commentary to §2D1.1 captioned "Background" is amended in the ninth paragraph by striking "(b)(6)(A)" and inserting "(b)(8)(A)"; and in the last paragraph by striking "(b)(6)(B) and (C)" and inserting "(b)(8)(B) and (C)".

**Reason for Amendment:** This amendment implements the directive in the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–76, which required the Commission, under emergency amendment authority, to implement section 3 of the Anabolic Steroid Control Act of 2004, Pub. L. 108–358 (the "ASC Act"). The ASC Act directed the Commission to "review the Federal sentencing guidelines with respect to offenses involving anabolic steroids" and "consider amending the...guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use...."

The amendment implements the directives by increasing the penalties for offenses involving anabolic steroids. It does so by changing the manner in which anabolic steroids are treated under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The amendment eliminates the sentencing distinction between anabolic steroids and other Schedule III substances when the steroid is in a pill, capsule, tablet, or liquid form. For anabolic steroids in other forms (e.g., patch, topical cream, aerosol), the amendment instructs the court that it shall make a reasonable estimate of the quantity of anabolic steroid involved in the offense, and in making such estimate, the court shall consider that each 25 mg of anabolic steroid is one "unit".

In addition, the amendment addresses two harms often associated with anabolic steroid offenses by providing new enhancements in §2D1.1(b)(6) and (b)(7). Subsection (b)(6) provides a two-level enhancement if the offense involved the distribution of an anabolic

steroid and a masking agent. Subsection (b)(7) provides a two-level enhancement if the defendant distributed an anabolic steroid to an athlete. Both enhancements address congressional concern with distribution of anabolic steroids to athletes, particularly the impact that steroids distribution and steroids use has on the integrity of sport, either because of the unfair advantage gained by the use of steroids or because of the concealment of such use.

The amendment also amends Application Note 8 of §2D1.1 to provide that an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) ordinarily would apply in the case of a defendant who used his or her position as a coach to influence an athlete to use an anabolic steroid.

**Effective Date: The effective date of this amendment is March 27, 2006.**

**682. Amendment:** The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 2(A) by adding at the end the following:

"(vii) A case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the 'infringed item' is the identifiable, genuine good or service."

**Reason for Amendment:** This amendment implements the emergency directive in section 1(c) of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109–181. The directive, which requires the Commission to promulgate an amendment under emergency amendment authority by September 12, 2006, instructs the Commission to "review, and if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 2318 or 2320 of title 18, United States Code . . . ." The directive further provides that the Commission shall:

determine whether the definition of "infringement amount" set forth in application note 2 of section 2B5.3 of the Federal sentencing guidelines is adequate to address situations in which the defendant has been convicted of one of the offenses [under section 2318 or 2320 of title 18, United States Code,] and the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement, such as an anti-circumvention device, or the item in which the defendant trafficked was infringing and also was intended to facilitate infringement in another good or service, such as a counterfeit label, documentation, or packaging, taking into account cases such as U.S. v. Sung, 87 F.3d 194 (7<sup>th</sup> Cir. 1996).

The emergency amendment adds subdivision (vii) to Application Note 2(A) of §2B5.3 (Criminal Infringement of Copyright or Trademark) to provide that the infringement amount is based on the retail value of the infringed item in a case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which,

had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service.

**Effective Date:** The effective date of this amendment is September 12, 2006.

**683. Amendment:** Chapter One, Part B is amended by adding at the end the following:

"§1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement)

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

- (1) (A) extraordinary and compelling reasons warrant the reduction; or
- (B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;
- (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
- (3) the reduction is consistent with this policy statement.

Commentary

Application Notes:

1. Application of Subsection (1)(A).—
  - (A) Extraordinary and Compelling Reasons.—A determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of subdivision (1)(A).
  - (B) Rehabilitation of the Defendant.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of subdivision (1)(A).
2. Application of Subdivision (3).—Any reduction made pursuant to a motion

by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

Background: This policy statement is an initial step toward implementing 28 U.S.C. § 994(t). The Commission intends to develop further criteria to be applied and a list of specific examples of extraordinary and compelling reasons for sentence reduction pursuant to such statute."

**Reason for Amendment:** This amendment creates a new policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons) as a first step toward implementing the directive in 28 U.S.C. § 994(t) that the Commission "in promulgating general policy statements regarding the sentence modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." The policy statement restates the statutory bases for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A). In addition, the policy statement provides that in all cases there must be a determination made by the court that the defendant is not a danger to the safety of any other person or to the community. The amendment also provides background commentary that states the Commission's intent to develop criteria to be applied and a list of specific examples pursuant to 28 U.S.C. § 994(t).

**Effective Date:** The effective date of this amendment is November 1, 2006.

**684. Amendment:** The Commentary to §1B1.1 captioned "Application Notes" is amended by striking Note 6 as follows:

"6. In the case of a defendant subject to a sentence enhancement under 18 U.S.C. § 3147 (Penalty for an Offense Committed While on Release), see §2J1.7 (Commission of Offense While on Release).";

and by redesignating Note 7 as Note 6.

Section 2D1.1(c) is amended by striking "(or the equivalent amount of other Schedule I or II Opiates)" each place it appears; by striking "(or the equivalent amount of other Schedule I or II Stimulants)" each place it appears; and by striking "(or the equivalent amount of other Schedule I or II Hallucinogens)" each place it appears.

Section 2D1.1(d)(1) is amended by inserting "or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline" after "Murder)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the first paragraph by striking the third and fourth sentences as follows:

"The Drug Equivalency Tables set forth below provide conversion factors for other substances, which the Drug Quantity Table refers to as 'equivalents' of these drugs. For example, one gram of a substance containing oxymorphone, a Schedule I opiate, is to be treated as the equivalent of five kilograms of marijuana in applying the Drug Quantity Table.",

and inserting the following:

"In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:

- (A) Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana.
- (B) Find the equivalent quantity of marihuana in the Drug Quantity Table.
- (C) Use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.

(See also Application Note 5.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kg of marihuana. In a case involving 100 gm of oxymorphone, the equivalent quantity of marihuana would be 500 kg, which corresponds to a base offense level of 28 in the Drug Quantity Table."

Chapter Two, Part J is amended by striking §2J1.7 and its accompanying commentary as follows:

"§2J1.7. Commission of Offense While on Release

If an enhancement under 18 U.S.C. § 3147 applies, add 3 levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release.

Commentary

Statutory Provision: 18 U.S.C. § 3147.

Application Notes:

1. Because 18 U.S.C. § 3147 is an enhancement provision, rather than an offense, this section provides a specific offense characteristic to increase the offense level for the offense committed while on release.
2. Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence



attributable to the enhancement. The court will have to ensure that the ‘total punishment’ (i.e., the sentence for the offense committed while on release plus the sentence enhancement under 18 U.S.C. § 3147) is in accord with the guideline range for the offense committed while on release, as adjusted by the enhancement in this section. For example, if the applicable adjusted guideline range is 30-37 months and the court determines ‘total punishment’ of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.

Background: An enhancement under 18 U.S.C. § 3147 may be imposed only after sufficient notice to the defendant by the government or the court, and applies only in the case of a conviction for a federal offense that is committed while on release on another federal charge.

Legislative history indicates that the mandatory nature of the penalties required by 18 U.S.C. § 3147 was to be eliminated upon the implementation of the sentencing guidelines. ‘Section 213(h) [renumbered as §200(g) in the Crime Control Act of 1984] amends the new provision in title I of this Act relating to consecutive enhanced penalties for committing an offense on release (new 18 U.S.C. § 3147) by eliminating the mandatory nature of the penalties in favor of utilizing sentencing guidelines.’ (Senate Report 98-225 at 186). Not all of the phraseology relating to the requirement of a mandatory sentence, however, was actually deleted from the statute. Consequently, it appears that the court is required to impose a consecutive sentence of imprisonment under this provision, but there is no requirement as to any minimum term. This guideline is drafted to enable the court to determine and implement a combined ‘total punishment’ consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement. Guideline provisions that prohibit the grouping of counts of conviction requiring consecutive sentences (e.g., the introductory paragraph of §3D1.2; §5G1.2(a)) do not apply to this section because 18 U.S.C. § 3147 is an enhancement, not a count of conviction.”.

Chapter 3, Part C is amended in the heading by adding at the end "AND RELATED ADJUSTMENTS".

Chapter Three, Part C is amended by adding at the end the following:

"§3C1.3.            Commission of Offense While on Release

If a statutory sentencing enhancement under 18 U.S.C. § 3147 applies, increase the offense level by 3 levels.

Commentary

Application Note:

1. Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to

comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the 'total punishment' (i.e., the sentence for the offense committed while on release plus the statutory sentencing enhancement under 18 U.S.C. § 3147) is in accord with the guideline range for the offense committed while on release, as adjusted by the enhancement in this section. For example, if the applicable adjusted guideline range is 30-37 months and the court determines a 'total punishment' of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.

Background: An enhancement under 18 U.S.C. § 3147 applies, after appropriate sentencing notice, when a defendant is sentenced for an offense committed while released in connection with another federal offense.

This guideline enables the court to determine and implement a combined 'total punishment' consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement."

**Reason for Amendment:** This amendment addresses several problematic areas of guideline application. First, the amendment adds language to the cross reference at subsection (d) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to allow the application of §2A1.2 (Second Degree Murder) in cases in which the conduct involved is second degree murder, if the resulting offense level is greater than the offense level determined under §2D1.1.

Second, the amendment creates a new guideline at §3C1.3 (Commission of Offense While on Release), which provides a three-level adjustment in cases in which the statutory sentencing enhancement at 18 U.S.C. § 3147 (Penalty for an offense committed while on release) applies. The amendment also deletes §2J1.7 (Commission of Offense While on Release), the Chapter Two guideline to which the statutory enhancement at 18 U.S.C. § 3147 had been referenced prior to the amendment. Despite its reference in Appendix A (Statutory Index), 18 U.S.C. § 3147 is not an offense of conviction and thus does not require reference in Appendix A. Creating a Chapter Three adjustment for 18 U.S.C. § 3147 cases ensures the enhancement is not overlooked and is consistent with other adjustments in Chapter Three, all of which apply to a broad range of offenses.

Third, the amendment deletes from the Drug Quantity Table in §2D1.1(c) language that indicates the court should apply "the equivalent amount of other Schedule I or II Opiates" (in the line referenced to Heroin), "the equivalent amount of other Schedule I or II Stimulants" (in the line referenced to Cocaine), and "the equivalent amount of other Schedule I or II Hallucinogens" (in the line referenced to LSD). This language caused some guideline users to erroneously calculate the base offense level without converting the controlled substance to its marijuana equivalency, even though Application Note 10 of §2D1.1 sets forth the marijuana equivalencies for substances not specifically referenced in the Drug Quantity Table. For example, instead of converting 10 KG of morphine (an opiate) to 5000 KG of marijuana and determining the base offense level on that marijuana equivalency (resulting in a base offense level of 34), some guideline users determined the

base offense level on the 10 KG of morphine by using the equivalent amount of heroin (resulting in a base offense level of 36). This amendment deletes the problematic language and also clarifies in Application Note 10 that, for cases involving a substance not specifically referenced in the Drug Quantity Table, the court is to determine the base offense level using the marihuana equivalency for that controlled substance.

**Effective Date: The effective date of this amendment is November 1, 2006.**

**685. Amendment:** The Commentary to §2A1.1 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1111,".

The Commentary to §2A1.2 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1111,".

The Commentary to §2A1.3 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1112,".

The Commentary to §2A1.4 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1112,".

The Commentary to §2A2.1 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1751(c),".

The Commentary to §2A2.2 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1751(e),".

Section 2B1.1(b)(6) is amended by inserting "or veterans' memorial" after "national cemetery".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "1369," after "1363,".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "'Trade secret'" the following paragraph:

"'Veterans' memorial' means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).".

Section 2B1.5(b)(2)(E) is amended by inserting "or veterans' memorial" after "cemetery".

The Commentary to §2B1.5 captioned "Statutory Provisions" is amended by inserting "1369," after "1361,".

The Commentary to §2B1.5 captioned "Application Notes" is amended in Note 3 in subdivision (B) by striking "has the meaning given that term" and inserting "and 'veterans' memorial' have the meaning given those terms".

The Commentary to §2N2.1 captioned "Application Notes" is amended by striking Note 3 as follows:

- "3. If death or bodily injury, extreme psychological injury, property damage or monetary loss resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).",

and inserting the following:

- "3. Upward Departure Provisions.—The following are circumstances in which an upward departure may be warranted:
- (A) Death or bodily injury, extreme psychological injury, property damage, or monetary loss resulted. See Chapter Five, Part K (Departures).
- (B) The defendant was convicted under 7 U.S.C. § 7734."

Chapter Two, Part T, Subpart 3 is amended in the "Introductory Commentary" in the first sentence by inserting "and 3907," after "1708(b),"; in the second sentence by striking "It is not intended to deal with the importation of contraband," and inserting "It is intended to deal with some types of contraband, such as certain uncertified diamonds, but is not intended to deal with the importation of other types of contraband,"; in the last sentence by inserting "not specifically covered by this Subpart" after "stolen goods"; and by inserting "if there is not another more specific applicable guideline" after "upward".

The Commentary to §2T3.1 captioned "Statutory Provisions" is amended by inserting ", 3907" after "1708(b)".

Chapter Two, Part X, Subpart 5 is amended in the heading by inserting "FELONY" after "OTHER"; and by adding at the end "AND CLASS A MISDEMEANORS".

Section 2X5.1 is amended in the heading by inserting "Felony" after "Other".

Section 2X5.1 is amended by striking "or Class A misdemeanor"; by striking "(b)" after "18 U.S.C. § 3553"; and by adding at the end the following paragraph:

"If the defendant is convicted under 18 U.S.C. § 1841(a)(1), apply the guideline that covers the conduct the defendant is convicted of having engaged in, as that conduct is described in 18 U.S.C. § 1841(a)(1) and listed in 18 U.S.C. § 1841(b)."

The Commentary the §2X5.1 is amended by inserting before "Application Note:" the following:

"Statutory Provision: 18 U.S.C. § 1841(a)(1)."

The Commentary the §2X5.1 captioned "Application Note" is amended by striking "Note" and inserting "Notes"; in Note 1 by inserting "In General.—" before "Guidelines"; and by adding at the end the following:

- "2. Convictions under 18 U.S.C. § 1841(a)(1).—
- (A) In General.—If the defendant is convicted under 18 U.S.C. §

1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in, *i.e.*, the conduct of which the defendant is convicted that violates a specific provision listed in 18 U.S.C. § 1841(b) and that results in the death of, or bodily injury to, a child in utero at the time of the offense of conviction. For example, if the defendant committed aggravated sexual abuse against the unborn child's mother and it caused the death of the child in utero, the applicable Chapter Two guideline would be §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

- (B) Upward Departure Provision.—For offenses under 18 U.S.C. § 1841(a)(1), an upward departure may be warranted if the offense level under the applicable guideline does not adequately account for the death of, or serious bodily injury to, the child in utero.
3. Application of §2X5.2.—This guideline applies only to felony offenses not referenced in Appendix A (Statutory Index). For Class A misdemeanor offenses that have not been referenced in Appendix A, apply §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).".

The Commentary to §2X5.1 captioned "Background" is amended in the first paragraph by striking the following:

"Where there is no sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) control. That statute provides in relevant part as follows: 'In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in [18 U.S.C. § 3553] subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.'",

and inserting the following:

"In a case in which there is no sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553 control.".

Chapter Two, Part X, Subpart 5 is amended by adding at the end the following:

"§2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)

- (a) Base Offense Level: 6

Commentary

Statutory Provisions: 7 U.S.C. § 2156; 18 U.S.C. §§ 1365(f), 1801; 42 U.S.C.

§§ 1129(a), 14133.

Application Note:

1. In General.—This guideline applies to Class A misdemeanor offenses that are specifically referenced in Appendix A (Statutory Index) to this guideline. This guideline also applies to Class A misdemeanor offenses that have not been referenced in Appendix A. Do not apply this guideline to a Class A misdemeanor that has been specifically referenced in Appendix A to another Chapter Two guideline."

Appendix A (Statutory Index) is amended by inserting after the line referenced to 7 U.S.C. § 2024(c) the following:

"7 U.S.C. § 2156                      2X5.2";

by inserting after the line referenced to 18 U.S.C. § 1121 the following:

"18 U.S.C. § 1129(a)              2X5.2";

by inserting after the line referenced to 18 U.S.C. § 1365(e) the following:

"18 U.S.C. § 1365(f)              2X5.2";

by inserting after the line referenced to 18 U.S.C. § 1366 the following:

"18 U.S.C. § 1369                      2B1.1, 2B1.5";

by inserting after the line referenced to 18 U.S.C. § 1792 the following:

"18 U.S.C. § 1801                      2X5.2";

by inserting after the line referenced to 18 U.S.C. § 1832 the following:

"18 U.S.C. § 1841(a)(1)              2X5.1  
18 U.S.C. § 1841(a)(2)(C)              2A1.1, 2A1.2, 2A1.3,  
2A1.4, 2A2.1, 2A2.2";

by inserting after the line referenced to 19 U.S.C. § 2401f the following:

"19 U.S.C. § 3907                      2T3.1"; and

by inserting after the line referenced to 42 U.S.C. § 9603(d) the following:

"42 U.S.C. § 14133                      2X5.2".

**Reason for Amendment:** This five-part amendment makes several additions to various guideline provisions in response to recently-enacted legislation, and creates a new guideline at §2X5.2 to cover certain Class A misdemeanors.

First, this amendment responds to section 2 of the Veterans' Memorial Preservation and Recognition Act of 2003, Pub. L. 108–29. This Act created a new offense at 18 U.S.C. § 1369 that prohibits the destruction of veterans' memorials and imposes a ten-year statutory maximum term of imprisonment. This amendment refers this new offense to both §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources), and broadens the application of the two-level enhancement under both §§2B1.1(b)(6) and 2B1.5(b)(2) to include veterans' memorials. The two-level enhancement at §2B1.1(b)(6), combined with the cross reference at §2B1.1(c)(4), ensures that the penalty for the destruction of veterans' memorials will reflect the status of a veterans' memorial as a specially protected cultural heritage resource.

Second, this amendment addresses the Plant Protection Act of 2002, Pub. L. 107–171, which created a new offense under 7 U.S.C. § 7734 for knowingly importing or exporting plants, plant products, biological control organisms, and like products for distribution or sale. The statutory maximum term of imprisonment for the first offense is five years, and for subsequent offenses the statutory maximum term of imprisonment is ten years. This amendment modifies Application Note 3 of §2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) to provide that an upward departure may be warranted if a defendant is convicted under 7 U.S.C. § 7734.

Third, this amendment addresses the Clean Diamond Trade Act of 2003, Pub. L. 108–19, and accompanying Executive Order 13312, which prohibits (1) "the importation into, or exportation from, the United States . . . of any rough diamond, from whatever source, unless the rough diamond has been controlled through the [Kimberley Process Certification Scheme]; and (2) any transaction by a United States person anywhere, or any transaction that occurs in whole or in part within the United States, that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this section," and conspiracies to commit such acts. This amendment references the new offense at 19 U.S.C. § 3907 to §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) because the offense involves importing into the United States "conflict" diamonds (so-called because the profits from their sale are frequently used to fund rebel and military activities) without proper certification or payment of duty fees according to the Kimberley Process Certification Scheme, a process that legitimizes the quality and original source of the diamond. Because the essence of this new statutory offense is to avoid proper certification and evade duty fees, penalties for its violation are appropriately covered by §2T3.1. This amendment also adds language referencing "contraband diamonds" to the introductory commentary of Chapter Two, Part T, Subpart Three to indicate that uncertified diamonds are contraband covered by §2T3.1 even if other types of contraband are covered by other, more specific guidelines.

Fourth, this amendment implements the Unborn Victims of Violence Act of 2004, Pub. L. 108–212, which created a new offense at 18 U.S.C. § 1841 for causing death or serious bodily injury to a child in utero while engaging in conduct violative of any of over 60 offenses enumerated at 18 U.S.C. § 1841(b). Under 18 U.S.C. § 1841(a)(1) and (a)(2)(A), the statutory maximum term of imprisonment for the conduct that "caused the death of, or bodily injury to a child in utero shall be the penalty provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother." Otherwise, under 18 U.S.C. § 1841(a)(2)(C), if the person "engaging in the conduct . . . intentionally kills or attempts to kill the unborn child, that person shall be punished . . . under sections 1111,

1112, and 1113 for intentionally killing or attempting to kill a human being.” The amendment references 18 U.S.C. § 1841(a)(2)(C) to the guidelines designated in Appendix A for 18 U.S.C. §§ 1111, 1112, and 1113, which are §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), and 2A1.4 (Involuntary Manslaughter). This amendment also refers the provisions under 18 U.S.C. § 1841(a)(1) and (a)(2)(A) to 2X5.1 (Other Offenses) and adds a special instruction that the most analogous guideline for these offenses is the guideline that covers the underlying offenses.

Fifth, this amendment creates a new guideline at §2X5.2 (Class A Misdemeanors) that covers all Class A misdemeanors not otherwise referenced to a more specific Chapter Two guideline. The amendment assigns a base offense level of 6 for such offenses, consistent with the guidelines’ treatment of many Class A misdemeanor and regulatory offenses. The amendment also references several new Class A Misdemeanors to this guideline. With the promulgation of this new guideline, the Commission will reference new Class A Misdemeanor offenses either to this guideline or to another, more specific Chapter Two guideline, as appropriate.

**Effective Date: The effective date of this amendment is November 1, 2006.**

**686. Amendment:** Chapter Two, Part A, Subpart 6 is amended in the heading by inserting "HOAXES," after "COMMUNICATIONS,".

Section 2A6.1 is amended in the heading by adding at the end "; Hoaxes".

Section 2A6.1 is amended by adding at the end the following:

"(c) Cross Reference

- (1) If the offense involved any conduct evidencing an intent to carry out a threat to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), apply §2M6.1 (Weapons of Mass Destruction), if the resulting offense level is greater than that determined under this guideline."

The Commentary to §2A6.1 captioned "Statutory Provisions" is amended by inserting "1038," after "879,".

The Commentary to §2K2.1 captioned "Statutory Provisions" is amended by inserting ", 2332g" after "(k)-(o)".

Section 2L1.1(b), as amended by Amendment 692, is further amended by adding at the end the following:

"(9) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by 2 levels."

The Commentary to §2M6.1 captioned "Statutory Provisions" is amended by inserting "175c," after "175b,"; by inserting "832," after "831,"; and by inserting ", 2332h" before "; 42 U.S.C."

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 175b the following:



"18 U.S.C. § 175c                      2M6.1";

by inserting after the line referenced to 18 U.S.C. § 831 the following:

"18 U.S.C. § 832                      2M6.1";

by inserting after the line referenced to 18 U.S.C. § 1037 the following:

"18 U.S.C. § 1038                      2A6.1"; and

by inserting after the line referenced to 18 U.S.C. § 2332f the following:

"18 U.S.C. § 2332g                      2K2.1  
18 U.S.C. § 2332h                      2M6.1".

**Reason for Amendment:** This amendment implements various provisions of the Intelligence Reform and Terrorism Prevention Act of 2004 (the "Act"), Pub. L. 108–458. Section 5401 of the Act adds a new subsection (a)(4) to 8 U.S.C. § 1324 that increases the otherwise applicable penalties by up to ten years' imprisonment for bringing aliens into the United States if (A) the conduct is part of an ongoing commercial organization or enterprise; (B) aliens were transported in groups of 10 or more; and (C)(i) aliens were transported in a manner that endangered their lives; or (ii) the aliens presented a life-threatening health risk to people in the United States. Offenses under 18 U.S.C. § 1324 are referenced to §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). In response to the new offense, the amendment adds a two-level specific offense characteristic at §2L1.1(b)(7) applicable to offenses of conviction under 8 U.S.C. § 1324(a)(4), to account for the increased statutory maximum penalty for such offenses.

Section 6702 of the Act creates a new offense at 18 U.S.C. § 1038 (False Information and Hoaxes). The amendment references the new offense to §2A6.1 (Threatening or Harassing Communications) and adds a cross reference to §2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy) if the conduct supports a threat to use a weapon of mass destruction. The Commission referenced the new offense to these guidelines because the conduct criminalized by the new statute is analogous to conduct already covered by other statutes referenced to these two guidelines.

Section 6803 of the Act creates a new offense at 18 U.S.C. § 832 (Participation in Nuclear and Weapons of Mass Destruction Threats in the United States), relating to participation in nuclear, and weapons of mass destruction, threats to the United States. Section 6803 also adds this new offense to the list of predicate offenses at 18 U.S.C. § 2332b(g)(5)(B)(i) and amends sections 57(b) and 92 of the Atomic Energy Act of 1954 (42 U.S.C. § 2077(b)) to cover the participation of an individual in the development of special nuclear material. The amendment references 18 U.S.C. § 832 to §2M6.1 because this offense is similar to other offenses referenced to this guideline.

Section 6903 of the Act creates a new offense at 18 U.S.C. § 2332g (Missile Systems Designed to Destroy Aircraft) prohibiting the production or transfer of missile systems designed to destroy aircraft. The amendment references 18 U.S.C. § 2332g to §2K2.1

(Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) because the types of weapons described in the offense would be covered as destructive devices under 26 U.S.C. § 5845(a).

Section 6905 of the Act creates a new offense at 18 U.S.C. § 2332h (Radiological Dispersal Devices) prohibiting the production, transfer, receipt, possession, or threat to use, any radiological dispersal device. The amendment references 18 U.S.C. § 2332h to §2M6.1 because of the nature of the offense. Section 2M6.1 covers conduct dealing with the production of certain types of nuclear, biological, or chemical weapons or other weapons of mass destruction, including weapons of mass destruction that, as defined in 18 U.S.C. § 2332a, are designed to release radiation or radioactivity at levels dangerous to human life.

Section 6906 of the Act creates a new offense at 18 U.S.C. § 175c (Variola Virus) that prohibits the production, acquisition, transfer, or possession of, or the threat to use, the variola virus. The amendment references the new offense to §2M6.1 because the variola virus may be used as a biological agent or toxin and, therefore, it is appropriate to reference this new offense to this guideline.

**Effective Date:** The effective date of this amendment is November 1, 2006.

- 687. Amendment:** Section 2B5.3 and Appendix A (Statutory Index), effective October 24, 2005 (see USSC Guidelines Manual, Supplement to Appendix C, Amendment 675), are re-promulgated with the following changes:

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 1, in the paragraph that begins 'Uploading' by striking "item in an openly shared file" and inserting "item as an openly shared file"; and by striking "placed in".

**Reason for Amendment:** This amendment re-promulgates as a permanent amendment the temporary, emergency amendment to §2B5.3 (Criminal Infringement of Copyright or Trademark), and Appendix A (Statutory Index), which became effective on October 24, 2005. The amendment implements the directive in section 105 of the Family Entertainment and Copyright Act of 2005, Pub. L. 109–9, which instructs the Commission, under emergency authority, to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes..."

"In carrying out [the directive], the Commission shall—

(1) take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements...are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes;

(2) determine whether to provide a sentencing enhancement for those convicted of the offenses [involving intellectual property rights], if the conduct involves the display, performance, publication, reproduction, or distribution of a copyrighted work before it has been authorized by the copyright owner, whether in the media format used by the infringing party or in any other media format;

(3) determine whether the scope of 'uploading' set forth in application note 3 of section 2B5.3 of the Federal sentencing guidelines is adequate to address the loss attributable to people who, without

authorization, broadly distribute copyrighted works over the Internet; and  
(4) determine whether the sentencing guideline and policy statements applicable to the offenses [involving intellectual property rights] adequately reflect any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed."

#### Pre-Release Works

The amendment provides a separate two-level enhancement if the offense involved a pre-release work. The enhancement and the corresponding definition use language directly from 17 U.S.C. § 506(a) (criminal infringement). The amendment adds language to Application Note 2 that explains that in cases involving pre-release works, the infringement amount should be determined by using the retail value of the infringed item, rather than any premium price attributed to the infringing item because of its pre-release status. The amendment addresses concerns that distribution of an item before it is legally available to the consumer is more serious conduct than distribution of other infringing items and involves a harm not addressed by the current guideline.

#### Uploading

The concern underlying the uploading directive pertains to offenses in which the copyrighted work is transferred through file sharing. The amendment builds on the current definition of "uploading" to include making an infringing item available on the Internet by storing an infringing item as an openly shared file. The amendment also clarifies that uploading does not include merely downloading or installing infringing items on a hard drive of the defendant's computer unless the infringing item is in an openly shared file. By clarifying the definition of uploading in this manner, Application Note 3, which is a restatement of the uploading definition, is no longer necessary and the amendment deletes the application note from the guideline.

#### Indeterminate Number

The amendment addresses the final directive by amending Application Note 2, which sets forth the rules for determining the infringement amount. The note provides that the court may make a reasonable estimate of the infringement amount using any relevant information including financial records in cases in which the court cannot determine the number of infringing items.

#### New Offense

Finally, the amendment provides a reference in Appendix A (Statutory Index) for the new offense at 18 U.S.C. § 2319B. This offense is to be referenced to §2B5.3.

**Effective Date: The effective date of this amendment is November 1, 2006.**

- 688. Amendment:** Section 2D1.1, effective March 27, 2006 (USSC Guidelines Manual, Supplement to the 2005 Supplement to Appendix C, Amendment 681), is repromulgated without change.

**Reason for Amendment:** This amendment re-promulgates as a permanent amendment the temporary, emergency amendment that implemented the directive in the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–76. That Act requires the Commission, under emergency amendment authority, to implement section 3 of the Anabolic Steroid Control Act of 2004, Pub. L. 108–358 (the "ASC Act"), which directs the Commission to "review the Federal sentencing guidelines with respect to offenses involving anabolic steroids" and "consider amending the . . . guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use . . ." The emergency amendment became effective on March 27, 2006 (See Supplement to Appendix C, Amendment 681).

The amendment implements the directives by increasing the penalties for offenses involving anabolic steroids. It does so by changing the manner in which anabolic steroids are treated under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The amendment eliminates the sentencing distinction between anabolic steroids and other Schedule III substances when the steroid is in a pill, capsule, tablet, or liquid form. For anabolic steroids in other forms (e.g., patch, topical cream, aerosol), the amendment instructs the court that it shall make a reasonable estimate of the quantity of anabolic steroid involved in the offense, and in making such estimate, the court shall consider that each 25 mg of anabolic steroid is one "unit".

In addition, the amendment addresses two harms often associated with anabolic steroid offenses by providing new enhancements in §2D1.1(b)(6) and (b)(7). Subsection (b)(6) provides a two-level enhancement if the offense involved the distribution of an anabolic steroid and a masking agent. Subsection (b)(7) provides a two-level enhancement if the defendant distributed an anabolic steroid to an athlete. Both enhancements address congressional concern with distribution of anabolic steroids to athletes, particularly the impact that steroids distribution and steroids use has on the integrity of sport, either because of the unfair advantage gained by the use of steroids or because of the concealment of such use.

The amendment also amends Application Note 8 of §2D1.1 to provide that an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) ordinarily would apply in the case of a defendant who used his or her position as a coach to influence an athlete to use an anabolic steroid.

**Effective Date: The effective date of this amendment is November 1, 2006.**

- 689. Amendment:** Section 2G2.5 is amended in the heading by adding at the end "; Failure to Provide Required Marks in Commercial Electronic Email".

The Commentary to §2G2.5 captioned "Statutory Provision" is amended by striking "Provision:" and inserting "Provisions: 15 U.S.C. § 7704(d);".

Chapter Three, Part C, as amended by Amendment 684 of this document, is further amended by adding at the end the following:

§3C1.4. False Registration of Domain Name

If a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies, increase by 2 levels.

Commentary

Background: This adjustment implements the directive to the Commission in section 204(b) of Pub. L. 108–482."

Appendix A (Statutory Index) is amended by inserting after the line referenced to 15 U.S.C. § 6821 the following:

"15 U.S.C. § 7704(d)                      2G2.5".

**Reason for Amendment:** This amendment (A) implements the directive to the Commission in section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004, Pub. L. 109–9; and (B) addresses the new offense in section 5(d) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. 108–187 ("CAN-SPAM Act")(15 U.S.C. § 7704(d)).

Section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004 directed the Commission to ensure that the applicable guideline range for a defendant convicted of any felony offense carried out online that may be facilitated through the use of a domain name registered with materially false contact information is sufficiently stringent to deter commission of such acts. The amendment implements this directive by creating a new guideline, at §3C1.4 (False Registration of Domain Names), which provides a two-level adjustment for cases in which a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies. Section 3559(f)(1), created by section 204(a) of the Intellectual Property Protection and Courts Administration Act of 2004, doubles the statutory maximum term of imprisonment, or increases the maximum sentence by seven years, whichever is less, if a defendant who is convicted of a felony offense knowingly falsely registered a domain name and used that domain name in the course of the offense. Basing the adjustment in the new guideline on application of the statutory enhancement in 18 U.S.C. § 3559(f)(1) satisfies the directive in a straightforward and uncomplicated manner.

Section 5(d)(1) of the CAN-SPAM Act prohibits the transmission of commercial electronic messages that contain "sexually oriented material" unless such messages include certain marks, notices, and information. The amendment references the new offense, found at 15 U.S.C. § 7704(d), to §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials). Prior to this amendment, §2G2.5 applied to violations of 18 U.S.C. § 2257, which requires producers of sexually explicit materials to maintain detailed records regarding their production activities and to make such records available for inspection by the Attorney General in accordance with applicable regulations. Although offenses under 15 U.S.C. § 7704(d) do not involve the same recording and reporting functions, section 7704(d) offenses essentially are regulatory in nature and in this manner are similar to other offenses sentenced under §2G2.5. In addition to the statutory reference changes, the amendment also expands the heading of §2G2.5 specifically to cover offenses under 15 U.S.C. § 7704(d).

**Effective Date: The effective date of this amendment is November 1, 2006.**

- 690. Amendment:** Section 2J1.2 and Appendix A (Statutory Index), effective October 24, 2005 (see USSC Guidelines Manual, Supplement to Appendix C, Amendment 676), are repromulgated without change.

**Reason for Amendment:** This amendment repromulgates as a permanent amendment the temporary, emergency amendment to §2J1.2 and Appendix A (Statutory Index), which became effective on October 24, 2005 (see Supplement to Appendix C, Amendment 676). The amendment implements section 6703 of the Intelligence Reform and Terrorism Prevention Act of 2004 (the "Act"), Pub. L. 108–458, which provides an enhanced penalty of not more than 8 years of imprisonment for offenses under sections 1001(a) and 1505 of title 18, United States Code, "if the offense involves international or domestic terrorism (as defined in section 2331)." Section 6703(b) requires the Sentencing Commission to amend the sentencing guidelines to provide for "an increased offense level for an offense under sections 1001(a) and 1505 of title 18, United States Code, if the offense involves international or domestic terrorism, as defined in section 2331 of such title." Section 3 of the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–76, directed the Commission, under emergency authority, to promulgate an amendment implementing section 6703(b).

First, the amendment references convictions under 18 U.S.C. § 1001 to §2J1.2 (Obstruction of Justice) "when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable." It also adds a new specific offense characteristic at §2J1.2(b)(1)(B) providing for a 12 level increase for a defendant convicted under 18 U.S.C. §§ 1001 and 1505 "when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable." This 12 level increase is applied in lieu of the current 8 level increase for injury or threats to persons or property. The increase of 12 levels is intended to provide parity with the treatment of federal crimes of terrorism within the limits of the 8 year statutory maximum penalty. It is also provided to ensure a 5 year sentence of imprisonment for offenses that involve international or domestic terrorism.

Second, the amendment adds to Application Note 1 definitions for "domestic terrorism" and "international terrorism," using the meanings given the terms at 18 U.S.C. § 2331(5) and (1), respectively.

Third, the amendment adds to Application Note 2 an instruction that if §3A1.4 (Terrorism) applies, do not apply §2J1.2(b)(1)(B).

**Effective Date: The effective date of this amendment is November 1, 2006.**

- 691. Amendment:** Section 2K2.1(a) is amended by striking subdivision (1) as follows:

"(1) 26, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;"

and inserting the following:

"(1) 26, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in

26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;"

by striking subdivision (3) as follows:

"(3) 22, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;"

and inserting the following:

"(3) 22, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;"

by striking subdivision (4)(B) as follows:

"(B) the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); and the defendant (i) was a prohibited person at the time the defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. § 922(d);"

and inserting the following:

"(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; or (II) is convicted under 18 U.S.C. § 922(d);"

and in subdivision (5) by striking "or 18 U.S.C. § 921(a)(30)".

Section 2K2.1(b) is amended by striking subdivision (4) as follows:

"(4) If any firearm was stolen, or had an altered or obliterated serial number, increase by 2 levels."

and inserting the following:

"(4) If any firearm (A) was stolen, increase by 2 levels; or (B) had an altered or obliterated serial number, increase by 4 levels."

Section 2K2.1(b) is amended by redesignating subdivisions (5) and (6) as subdivisions (6) and (7), respectively; and by inserting after "except if subsection (b)(3)(A) applies." the following subdivision:

- "(5) If the defendant engaged in the trafficking of firearms, increase by 4 levels."

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

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

and inserting the following:

- "2. Semiautomatic Firearm Capable of Accepting a Large Capacity Magazine.—For purposes of subsections (a)(1), (a)(3), and (a)(4), a ‘semiautomatic firearm capable of accepting a large capacity magazine’ means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition."

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

- "4. ‘Felony offense,’ as used in subsection (b)(5), means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.";

by redesignating Notes 5 through 10 as Notes 4 through 9, respectively; by striking Note 11 as follows:

- "11. Under subsection (c)(1), the offense level for the underlying offense (which may be a federal, state, or local offense) is to be determined under §2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).";

by redesignating Notes 12 through 14 as Notes 10 through 12, respectively; and by striking Notes 15 and 16 as follows:

- "15. As used in subsections (b)(5) and (c)(1), ‘another felony offense’ and ‘another offense’ refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.



16. The enhancement under subsection (b)(4) for a stolen firearm or a firearm with an altered or obliterated serial number applies whether or not the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number."

The Commentary to §2K2.1 captioned "Application Notes" is amended by striking Note 8, as redesignated by this amendment, and inserting the following:

"8. Application of Subsection (b)(4).—

- (A) Interaction with Subsection (a)(7).—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, if the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).

- (B) Knowledge or Reason to Believe.—Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number."

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 4, as redesignated by this amendment, by inserting "Application of Subsection (a)(7).—" before "Subsection (a)(7)"; in Note 5, as redesignated by this amendment, by inserting "Application of Subsection (b)(1).—" before "For purposes of calculating"; in Note 6, as redesignated by this amendment, by inserting "Application of Subsection (b)(2).—" before "Under subsection (b)(2)"; in Note 7, as redesignated by this amendment, by inserting "Destructive Devices.—" before "A defendant"; in Note 9, as redesignated by this amendment, by inserting "Application of Subsection (b)(7).—" before "Under"; and by striking "(b)(6), if" and inserting "(b)(7), if"; in Note 10, as redesignated by this amendment, by inserting "Prior Felony Convictions.—" before "For purposes of"; in Note 11, as redesignated by this amendment, by inserting "Upward Departure Provisions.—" before "An upward departure"; in Note 12, as redesignated by this amendment, by inserting "Armed Career Criminal.—" before "A defendant who"; and by inserting at the end the following:

"13. Application of Subsection (b)(5).—

- (A) In General.—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—
- (i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and
  - (ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—
    - (I) whose possession or receipt of the firearm would be unlawful; or
    - (II) who intended to use or dispose of the firearm unlawfully.
- (B) Definitions.—For purposes of this subsection:
- ‘Individual whose possession or receipt of the firearm would be unlawful’ means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. ‘Crime of violence’ and ‘controlled substance offense’ have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). ‘Misdemeanor crime of domestic violence’ has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).
- The term ‘defendant’, consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant’s own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.
- (C) Upward Departure Provision.—If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.
- (D) Interaction with Other Subsections.—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6) also would apply.

14. In Connection With.—

- (A) In General.—Subsections (b)(6) and (c)(1) apply if the firearm or

ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.

(B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(1) and (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) Definitions.—

‘Another felony offense’, for purposes of subsection (b)(6), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

‘Another offense’, for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

(D) Upward Departure Provision.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted."

Chapter Five, Part K is amended by striking §5K2.17 as follows:

"§5K2.17. High-Capacity, Semiautomatic Firearms (Policy Statement)

If the defendant possessed a high-capacity, semiautomatic firearm in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A ‘high-capacity, semiautomatic firearm’ means a semiautomatic firearm that has a magazine capacity of more than ten cartridges. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case."

and inserting:

"§5K2.17. Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)

If the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A 'semiautomatic firearm capable of accepting a large capacity magazine' means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case."

**Reason for Amendment:** This four part amendment addresses various issues pertaining to the primary firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). First, the amendment modifies four base offense levels that provide enhanced penalties for offenses involving a firearm described in 18 U.S.C. § 921(a)(30), the semiautomatic assault weapon ban that expired on September 13, 2004. The Commission received information regarding inconsistent application as to whether the enhanced base offense levels apply to these types of firearms in light of the ban's expiration. The amendment deletes the reference to 18 U.S.C. § 921(a)(30) at §2K2.1(a)(1), (a)(3), and (a)(4) and replaces the reference with the term, "a semiautomatic firearm capable of accepting a large capacity magazine," which is defined in Application Note 2.

While the amendment deletes the reference to 18 U.S.C. § 921(a)(30) at §2K2.1(a)(5), it does not include the phrase "a semiautomatic firearm that is capable of accepting a large capacity magazine" in this subsection because a defendant sentenced under subsection (a)(5) does not have the same "prohibited person" status as a defendant sentenced under subsections (a)(1), (a)(3), or (a)(4).

The amendment also amends §5K2.17 (High-Capacity, Semiautomatic Firearms) in a manner consistent with §2K2.1, as amended, except that it excludes the language pertaining to .22 caliber rim fire ammunition in order to remain in conformity with a prior congressional directive. As amended, §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine) provides that an upward departure may be warranted if a defendant possesses a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense.

Second, the amendment provides a 4-level enhancement at §2K2.1(b)(5) if the defendant engaged in the trafficking of firearms. The definition of trafficking encompasses transporting, transferring, or otherwise disposing of two or more firearms, or receipt of two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual. The definition also requires that the defendant know or have reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual whose possession or receipt would be unlawful or who intended to use or

dispose of the firearm unlawfully. With respect to an individual whose possession would be unlawful, the amendment includes individuals who previously have been convicted of a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence, or who at the time of the offense were under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Additionally, the definition provides that the enhancement applies regardless of whether anything of value was exchanged.

Third, the amendment modifies §2K2.1(b)(4) to increase penalties for offenses involving altered or obliterated serial numbers. Prior to this amendment, §2K2.1(b)(4) provided a 2-level enhancement if the offense involved either a stolen firearm or a firearm with an altered or obliterated serial number. The amendment provides a 4-level enhancement for offenses involving altered or obliterated serial numbers. This increase reflects both the difficulty in tracing firearms with altered or obliterated serial numbers, and the increased market for these types of weapons.

Fourth, the amendment addresses a circuit conflict pertaining to the application of current §2K2.1(b)(5) (re-designated by this amendment as §2K2.1(b)(6)) and (c)(1)), specifically with respect to the use of a firearm "in connection with" burglary and drug offenses. The amendment, adopting the language from Smith v. United States, 508 U.S. 223 (1993), provides at Application Note 14 that the provisions apply if the firearm facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. Furthermore, the amendment provides that in burglary offenses, these provisions apply to a defendant who takes a firearm during the course of the burglary, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary. In addition, the provisions apply in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug manufacturing materials, or drug paraphernalia. The Commission determined that application of these provisions is warranted in these cases because of the potential that the presence of the firearm has for facilitating another felony offense or another offense.

**Effective Date: The effective date of this amendment is November 1, 2006.**

**692. Amendment:** Section 2L1.1 is amended by redesignating subsections (a)(1) and (a)(2) as subsections (a)(2) and (a)(3), respectively; and by inserting after "Base Offense Level:" the following:

"(1) 25, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);".

Section 2L1.1 is amended by redesignating subsections (b)(4) through (b)(6) as subsections (b)(5) through (b)(7), respectively; and by inserting after subsection (b)(3) the following:

"(4) If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent, increase by 2 levels.".

Subsection (b)(7), as redesignated by this amendment, is amended by striking "8 levels" and inserting "10 levels"; and by redesignating subdivisions (1) through (4) as subdivisions (A) through (D), respectively.

Section 2L1.1(b) is amended by adding at the end the following:

- "(8) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (A) after the alien was smuggled into the United States; or (B) while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18."

Section 2L1.1(c) is amended by striking "If any person" through the end of "Subpart 1." and inserting the following:

- "(1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline."

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 1 by striking "For purposes of this guideline—" and inserting "Definitions.—For purposes of this guideline:"; and by adding at the end the following:

"'Minor' means an individual who had not attained the age of 16 years.

'Parent' means (A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father."

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 2 by inserting "Interaction with §3B1.1.—" before "For"; and by adding at the end the following:

"In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply."

The Commentary to §2L1.1 captioned "Application Notes" is amended by striking Notes 3 and 4 as follows:

- "3. Where the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior, an upward departure may be warranted.
4. If the offense involved substantially more than 100 aliens, an upward departure may be warranted."

and inserting the following:

- "3. Upward Departure Provisions.—An upward departure may be warranted in any of the following cases:
- (A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.

- (B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).
- (C) The offense involved substantially more than 100 aliens.";

by redesignating Notes 5 and 6 as Notes 4 and 5, respectively; in Note 4, as redesignated by this amendment, by inserting "Prior Convictions Under Subsection (b)(3).—" before "Prior felony"; and in Note 5, as redesignated by this amendment, by inserting "Application of Subsection (b)(6).—" before "Reckless"; by striking "(b)(5)" each place it appears and inserting "(b)(6)"; and by striking "(b)(4)" and inserting "(b)(5)".

The Commentary to §2L1.1 captioned "Application Notes" is amended by adding at the end the following:

- "6. Inapplicability of §3A1.3.—If an enhancement under subsection (b)(8) applies, do not apply §3A1.3 (Restraint of Victim).".

The Commentary to §2L1.1 captioned "Background" is amended by striking the last sentence as follows:

"In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 (Aggravating Role) typically will apply to the most culpable defendants.".

Section 2L2.1(b) is amended by adding at the end the following:

- "(5) If the defendant fraudulently obtained or used (A) a United States passport, increase by 4 levels; or (B) a foreign passport, increase by 2 levels.".

Section 2L2.2(b)(3) is amended by inserting "(A)" after "used" and by inserting "; or (B) a foreign passport, increase by 2 levels" after "4 levels".

**Reason for Amendment:** This two-part amendment addresses various issues pertaining to §§2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport).

The first part of this amendment modifies §2L1.1. First, this amendment addresses national security concerns pertaining to the smuggling of illegal aliens. Specifically, a new base offense level of 25 at §2L1.1(a)(1) provides increased punishment for defendants convicted of 8 U.S.C. § 1327 involving an alien who is inadmissible because of "security or related grounds," as defined in 8 U.S.C. 1182(a)(3). To further address concerns related to national security, an application note provides that an upward departure may be warranted if the defendant had specific knowledge that the alien the defendant smuggled, transported, or

harbored was inadmissible for reasons of security and related grounds, as set forth in 8 U.S.C. § 1182(a)(3). This upward departure note applies regardless of whether the defendant is convicted of 8 U.S.C. § 1327.

Second, the amendment provides a two-level enhancement for a case in which the defendant smuggled, transported, or harbored a minor unaccompanied by the minor's parent or grandparent. This enhancement addresses concerns regarding the increased risk involved when unaccompanied minors are smuggled into, or harbored or transported within, the United States. Application Note 1 defines "minor" as "an individual who had not attained the age of 16 years" and defines "parent" as "(A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father."

Third, the amendment makes two changes with respect to offenses involving death. First, the amendment increases the enhancement from 8 levels to 10 levels if any person died as a result of the offense. Additionally, the cross reference at §2L1.1(c)(1) is expanded to cover homicides other than murder. This amendment ensures that any offense involving the death of an alien will be sentenced under the guideline appropriate for the particular type of homicide involved if the resulting offense level is greater than the offense level determined under §2L1.1.

Fourth, the amendment adds a two-level enhancement and a minimum offense level of 18 in a case in which an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, after the alien was smuggled into the United States, or while the alien was transported or harbored in the United States. This conduct may not be covered by §3A1.3 (Restraint of Victim) because an illegal alien, as a participant in the offense, may not be considered a "victim" for purposes of that adjustment. Additionally, application of §3A1.3 requires "physical restraint," as that term is defined in §1B1.1, and the involuntary detainment involved in offenses sentenced under §2L1.1 may not involve physical restraint. Finally, the amendment provides an application note, as a corollary to Application Note 2 in §3A1.3, that instructs the court not to apply §3A1.3 if the involuntary detainment enhancement applies

The second part of the amendment modifies §§2L2.1 and 2L2.2. First, this part of the amendment adds a new specific offense characteristic at §2L2.1(b)(5)(A) that provides a four-level enhancement in a case in which the defendant fraudulently used or obtained a United States passport. The same specific offense characteristic was added to §2L2.2, effective November 1, 2004 (see USSC Guidelines Manual Supplement to Appendix C, Amendment 671). The addition of this specific offense characteristic to §2L2.1 promotes proportionality between the document fraud guidelines, §§2L2.1 and 2L2.2.

Second, the amendment provides, at §2L2.1(b)(5)(B) and §2L2.2(b)(3)(B), a two-level enhancement if the defendant fraudulently obtained or used a foreign passport. This modification addresses concern regarding the threat to the security of the United States in document fraud offenses involving foreign passports.

**Effective Date: The effective date of this amendment is November 1, 2006.**

- 693. Amendment:** Section 3C1.1 is amended by striking "during the course of" and inserting "with respect to".



The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 1 by inserting "In General.—" before "This adjustment"; by striking "during the course of" and inserting "with respect to"; and by inserting at the end the following:

"Obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction."

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 2 by inserting "Limitations on Applicability of Adjustment.—" before "This provision"; in Note 3 by inserting "Covered Conduct Generally.—" before "Obstructive"; in Note 5 by inserting "Examples of Conduct Ordinarily Not Covered.—" before "Some types"; in Note 6 by inserting "'Material' Evidence Defined.—" before "'Material' evidence"; in Note 7 by inserting "Inapplicability of Adjustment in Certain Circumstances.—" before "If the defendant"; in Note 8 by inserting "Grouping Under §3D1.2(c).—" before "If the defendant"; and in Note 9 by inserting "Accountability for §1B1.3(a)(1)(A) Conduct.—" before "Under this section".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4 by inserting "Examples of Covered Conduct.—" before "The following"; in subdivision (b) by inserting ", including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction" after "suborn perjury"; by striking the period at the end of subdivision (j) and inserting a semi-colon; and by adding at the end the following subdivision:

"(k) threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction."

**Reason for Amendment:** This amendment addresses a circuit conflict regarding the issue of whether pre-investigative conduct can form the basis of an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice). The First, Second, Seventh, Tenth, and District of Columbia Circuits have held that pre-investigation conduct can be used to support an obstruction adjustment under §3C1.1. Compare United States v. McGovern, 329 F.3d 247, 252 (1st Cir. 2003)(holding that the submission of false run sheets to Medicare and Medicaid representatives qualified for the enhancement even though "the fact that there was no pending federal criminal investigation at the time of the obstruction did not disqualify a defendant from an enhancement when there was a 'close connection between the obstructive conduct and the offense of conviction.'"(quoting United States v. Emery, 991 F.2d 907, 911(1st Cir. 1992))); United States v. Fiore, 381 F.3d 89, 94 (2nd Cir. 2004)(defendant's perjury in an SEC civil investigation into defendant's securities fraud constituted obstruction of justice of the criminal investigation of the same "precise conduct" for which defendant was criminally convicted, even though the perjury occurred before the criminal investigation commenced); United States v. Snyder, 189 F.3d 640, 649 (7th Cir. 1999)(holding the adjustment appropriate in case in which defendant made pre-investigation threat to victim and did not withdraw his threat after the investigation began, thus obstructing justice during the course of the investigation); United States v. Mills, 194 F.3d 1108, 1115 (10th Cir. 1999)(holding that destruction of tape that occurred before an investigation began warranted application of the enhancement because the defendant knew an investigation would be conducted and understood the importance of the tape to that investigation); and United States

v. Barry, 938 F.2d 1327, 1333-34 (D.C. Cir. 1991)("Given the commentary and the case law interpreting §3C1.1, we conclude that the enhancement applies if the defendant attempted to obstruct justice in respect to the investigation or prosecution of the offense of conviction, even if the obstruction occurred before the police or prosecutors began investigating or prosecuting the specific offense of conviction."), with United States v. Baggett, 342 F.3d 536, 542 (6th Cir. 2003)(holding that the obstruction of justice enhancement could not be justified on the basis of the threats that the defendant made to the victim prior to the investigation, prosecution, or sentencing of the offense); United States v. Stolba, 357 F.3d 850, 852-53 (8th Cir. 2004)(holding that an obstruction adjustment is not available when destruction of documents occurred before an official investigation had commenced); United States v. DeGeorge, 380 F.3d 1203,1222 (9th Cir. 2004)(perjury during a civil trial as part of a scheme to defraud was not an obstruction of justice of a criminal investigation of the fraudulent scheme because the criminal investigation had not yet begun at the time the defendant perjured himself); see also United States v. Clayton, 172 F.3d 347, 355 (5th Cir. 1999)(holding that defendant's threats to witnesses warrant the enhancement under §3C1.1, but stating in dicta that the guideline "specifically limits applicable conduct to that which occurs during an investigation. . .").

The amendment, which adopts the majority view, permits application of the guideline to obstructive conduct that occurs prior to the start of the investigation of the instant offense of conviction by allowing the court to consider such conduct if it was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction. The amendment also adds, as examples of covered conduct in Application Note 4, (A) perjury that occurs during the course of a civil proceeding if such perjury pertains to the conduct that forms the basis of the offense of conviction; and (B) conduct involving threats to the victim of the offense if those threats were intended to prevent the victim from reporting the conduct constituting the offense of conviction. Finally, the amendment changes language in §3C1.1(A) from "during the course of" to "with respect to."

**Effective Date:** The effective date of this amendment is November 1, 2006.

**694. Amendment:** Chapter Six is amended in the heading by striking "AND" and inserting a comma; and by adding at the end ", AND CRIME VICTIMS' RIGHTS".

Chapter Six, Part A is amended by adding at the end the following:

"§6A1.5. Crime Victims' Rights (Policy Statement)

In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of Federal law pertaining to the treatment of crime victims.

#### Commentary

##### Application Note:

1. Definition.—For purposes of this policy statement, 'crime victim' has the

meaning given that term in 18 U.S.C. § 3771(e).".

**Reason for Amendment:** This amendment creates a new policy statement at §6A1.5 (Crime Victims' Rights) in response to the Justice for All Act of 2004, Pub. L. 108-405, which sets forth at 18 U.S.C. § 3771 various rights for crime victims during the criminal justice process, including at subsection (a)(4) the right to be "reasonably heard at any public proceeding . . . involving release, plea, sentencing, or any parole proceeding." The amendment also changes the title of Chapter Six to reflect the addition of the policy statement.

**Effective Date:** The effective date of this amendment is November 1, 2006.

- 695. Amendment:** The Commentary to §8C2.5 captioned "Application Notes" is amended in Note 12 by striking the last sentence as follows:

"Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

**Reason for Amendment:** This amendment deletes the last sentence of Application Note 12 to §8C2.5 (Culpability Score), which stated that "[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." The Commission added this sentence to address some concerns regarding the relationship between waivers and §8C2.5(g), and at the time stated that "[t]he Commission expects that such waivers will be required on a limited basis." See Supplement to Appendix C (Amendment 673, effective November 1, 2004). Subsequently, the Commission received public comment and heard testimony at public hearings on November 15, 2005, and March 15, 2006, that the sentence at issue could be misinterpreted to encourage waivers.

- 696. Amendment:** The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 7(C) by striking "§2J1.7" and inserting "§3C1.3".

The Commentary to §2K2.1 captioned "Application Notes", as amended by Amendment 691, is further amended in Note 3 by inserting "Definition of 'Prohibited Person'." before "For purposes"; and in Note 11, as redesignated by Amendment 691, by striking "Note 8" and inserting "Note 7".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4 by striking "(b)(5)" each place it appears and inserting "(b)(6)".

**Reason for Amendment:** This amendment makes various technical and conforming amendments in order to execute properly amendments submitted to the Congress on May 1, 2006, and that will become effective on November 1, 2006. Specifically, the amendment conforms guideline references in the commentary of §§2B1.1 (Theft, Property Destruction, and Fraud), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), and 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to redesignated guideline provisions and adds a

heading to Application Note 3 in §2K2.1.

**Effective Date: The effective date of this amendment is November 1, 2006.**