



Amendments to the Sentencing Guidelines

May 18, 2006

This compilation contains unofficial text of amendments to the sentencing guidelines and is provided only for the convenience of the user. Official text of the amendments can be found on the Commission's website at www.ussc.gov and in the May 15, 2006, edition of the Federal Register (71 FR 28063).

TABLE OF CONTENTS

<u>AMENDMENT</u>	<u>PAGE NO.</u>
1. Reductions in Term of Imprisonment Based on Bureau of Prisons Motion	1
2. Application Issues	3
3. Miscellaneous Laws	7
4. Implementation of Intelligence Reform and Terrorism Prevention Act of 2004	16
5. Intellectual Property (FECA)	19
6. Anabolic Steroids	22
7. False Domain Names & CAN-SPAM	26
8. Obstruction of Justice (Terrorism)	28
9. Firearms	30
10. Immigration	37
11. §3C1.1 Circuit Conflicts	42
12. Crime Victims' Rights	45
13. Privilege Waiver	46

1. Reductions in Term of Imprisonment Based on Bureau of Prisons Motion

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).*

Amendment:

§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.

2. Application Issues

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 marijuana equivalency for that controlled substance.

Amendment:

§1B1.1 Application Instructions

* * *

Commentary

Application Notes:

* * *

~~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).~~

~~7.6.~~

* * *

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(d) Cross References

- (1) If a victim 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) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

* * *

(c) DRUG QUANTITY TABLE

Section 2D1.1(c) (Drug Quantity Table) 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.

Commentary

* * *

Application Notes:

* * *

10. *The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. ~~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.~~ 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 gram of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kilograms 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.

~~§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.~~

PART C - OBSTRUCTION AND RELATED ADJUSTMENTS

* * *

§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.

3. Miscellaneous Laws

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.

Amendment:

§2A1.1. First Degree Murder

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 1841(a)(2)(C), 2113(e), 2118(c)(2), 2332b(a)(1), 2340A; 21 U.S.C. § 848(e). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A1.2. Second Degree Murder

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 1841(a)(2)(C), 2332b(a)(1), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A1.3. Voluntary Manslaughter

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 1841(a)(2)(C), 2332b(a)(1). For additional statutory

provision(s), see Appendix A (Statutory Index).

* * *

§2A1.4. Involuntary Manslaughter

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 1841(a)(2)(C), 2332b(a)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A2.1. Assault with Intent to Commit Murder; Attempted Murder

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 113(a)(1), 351(c), 1113, 1116(a), 1751(c), 1841(a)(2)(C), 1993(a)(6). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A2.2. Aggravated Assault

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), 114, 115(a), (b)(1), 351(e), 1751(e), 1841(a)(2)(C), 1993(a)(6), 2332b(a)(1), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§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

* * *

(b) Specific Offense Characteristics

* * *

- (6) If the offense involved theft of, damage to, or destruction of, property from a national cemetery **or veterans' memorial**, increase by **2** levels.

* * *

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1037, 1341-1344, 1348, 1350, 1361, 1363, **1369**, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992, 1993(a)(1), (a)(4), 2113(b), 2312-2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"Trade secret" has the meaning given that term in 18 U.S.C. § 1839(3).

"Veterans' memorial" means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).

* * *

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources

* * *

- (b) Specific Offense Characteristics

* * *

- (2) If the offense involved a cultural heritage resource from, or that, prior to the offense, was on, in, or in the custody of (A) the national park system; (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery **or veterans' memorial**; (F) a museum; or (G) the World Heritage List, increase by **2** levels.

* * *

Commentary

Statutory Provisions: 16 U.S.C. §§ 470ee, 668(a), 707(b); 18 U.S.C. §§ 541-546, 641, 661-662, 666, 668, 1152-1153, 1163, 1168, 1170, 1361, **1369**, 2232, 2314-2315.

Application Notes:

* * *

3. Enhancement in Subsection (b)(2).—For purposes of subsection (b)(2):

* * *

(B) "National cemetery" ~~has the meaning given that term~~ and "veterans' memorial" have the meaning given those terms in Application Note 1 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

* * *

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

* * *

Commentary

* * *

Application Notes:

* * *

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).~~

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.*

PART T - OFFENSES INVOLVING TAXATION

* * *

3. CUSTOMS TAXES

Introductory Commentary

*This Subpart deals with violations of 18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915 and 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b), and 3907, and is designed to address violations involving revenue collection or trade regulation. It is not intended to deal with the importation of contraband, **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, such as drugs, or other items such as obscene material, firearms or pelts of endangered species, the importation of which is prohibited or restricted for non-economic reasons. Other, more specific criminal statutes apply to most of these offenses. Importation of contraband or stolen goods not specifically covered by this Subpart would be a reason for referring to another, more specific guideline, if applicable, or for departing upward if there is not another more specific applicable guideline.***

§2T3.1. Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915; 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b), 3907. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

5. ALL OTHER FELONY OFFENSES AND CLASS A MISDEMEANORS

§2X5.1. Other Felony Offenses

If the offense is a felony ~~or Class A misdemeanor~~ for which no guideline expressly has been promulgated, apply the most analogous offense guideline. If there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) shall control, except that any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable.

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).

Commentary

Statutory Provision: 18 U.S.C. § 1841(a)(1).

Application Notes:

1. ***In General.***—Guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline include: §5B1.3 (Conditions of Probation); §5D1.1 (Imposition of a Term of Supervised Release); §5D1.2 (Term of Supervised Release); §5D1.3 (Conditions of Supervised Release); §5E1.1 (Restitution); §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); Chapter Five, Part F (Sentencing Options); §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment); Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Departures); Chapter Six, Part A (Sentencing Procedures); Chapter Six, Part B (Plea Agreements).

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)).

Background: Many offenses, especially assimilative crimes, are not listed in the Statutory Index or in any of the lists of Statutory Provisions that follow each offense guideline. Nonetheless, the specific guidelines that have been promulgated cover the type of criminal behavior that most such offenses proscribe. The court is required to determine if there is a sufficiently analogous offense guideline, and, if so, to apply the guideline that is most analogous. 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.” *In a case in which there is no sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553 control.*

* * *

§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

	* * *
7 U.S.C. § 2024(c) 7 U.S.C. § 2156	2B1.1 2X5.2
	* * *
18 U.S.C. § 1121 18 U.S.C. § 1129(a)	2A1.1, 2A1.2 2X5.2
	* * *
18 U.S.C. § 1365(e) 18 U.S.C. § 1365(f)	2N1.1 2X5.2
	* * *
18 U.S.C. § 1366 18 U.S.C. § 1369	2B1.1 2B1.1, 2B1.5
	* * *
18 U.S.C. § 1792 18 U.S.C. § 1801	2P1.3 2X5.2
	* * *
18 U.S.C. § 1832 18 U.S.C. § 1841(a)(1) 18 U.S.C. § 1841(a)(2)(C)	2B1.1 2X5.1 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2
	* * *

19 U.S.C. § 2401f
19 U.S.C. § 3907

2B1.1
2T3.1

* * *

42 U.S.C. § 9603(d)
42 U.S.C. § 14133

2Q1.2
2X5.2

* * *

4. Implementation of the Intelligence Reform and Terrorism Prevention Act of 2004

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.

Amendment:

CHAPTER TWO - OFFENSE CONDUCT
* * *
PART A - OFFENSES AGAINST THE PERSON
* * *

6. THREATENING OR HARASSING COMMUNICATIONS, HOAXES, STALKING, AND DOMESTIC VIOLENCE

§2A6.1. Threatening or Harassing Communications; Hoaxes

* * *

(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.**

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(c), 35(b), 871, 876, 877, 878(a), 879, 1038, 1993(a)(7), (8), 2332b(a)(2); 47 U.S.C. § 223(a)(1)(C)-(E); 49 U.S.C. § 46507. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r)-(w), (x)(1), 924(a), (b), (e)-(i), (k)-(o), 2332g; 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).

* * *

Section 2L1.1(b), as amended by Amendment 10 of this document, is further amended as follows:

§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien

* * *

(b) Specific Offense Characteristics

* * *

(9) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by 2 levels.

* * *

§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

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 175b, 175c 229, 831, 832, 842(p)(2) (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 1993(a)(2), (3), (b), 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 2332h; 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

APPENDIX A - STATUTORY INDEX

18 U.S.C. § 175b 2M6.1
18 U.S.C. § 175c 2M6.1

* * *

18 U.S.C. § 831 2M6.1
18 U.S.C. § 832 2M6.1

* * *

18 U.S.C. § 1037 2B1.1
18 U.S.C. § 1038 2A6.1

* * *

18 U.S.C. § 2332f 2K1.4, 2M6.1
18 U.S.C. § 2332g 2K2.1
18 U.S.C. § 2332h 2M6.1

5. Intellectual Property (FECA)

Reason for Amendment: This amendment re-promulgates as a permanent amendment the temporary,

emergency amendment to §2B5.3 (*Criminal Infringement of Copyright or Trademark*) 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.

Amendment:

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

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

* * *

(2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by **2** levels.

(~~2~~3) If the offense involved the manufacture, importation, or uploading of infringing items, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(~~3~~)(4) * * *

(~~4~~)(5) * * *

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"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 as 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 an openly shared file.

"Work being prepared for commercial distribution" has the meaning given that term in 17 U.S.C. § 506(a)(3).

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

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

* * *

(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.*

* * *

(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.

* * *

~~3. Uploading.—With respect to uploading, subsection (b)(2) applies only to uploading with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item. For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant's personal computer.~~

~~4.3. * * *~~

~~5.4. * * *~~

* * *

APPENDIX A - STATUTORY INDEX

18 U.S.C. § 2319A 2B5.3
18 U.S.C. § 2319B 2B5.3

6. Anabolic Steroids

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.

Amendment:

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

* * *

(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.

~~(6)~~(8) * * *

~~(7)~~(9) * * *

(c) DRUG QUANTITY TABLE

* * *

*Notes to Drug Quantity Table:

* * *

(F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances (~~except anabolic steroids~~), Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. 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".

~~(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).]~~

~~(H)~~(G) * * *

~~(I)~~(H) * * *

~~(J)~~(I) * * *

* * *

Commentary

* * *

Application Notes:

* * *

8. Interaction with §3B1.3.—A defendant who used special skills in the commission of the offense

may be subject to an ~~enhancement~~**adjustment** under §3B1.3 (*Abuse of Position of Trust or Use of Special Skill*). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. **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.**

* * *

19. **Hazardous or Toxic Substances.**—Subsection ~~(b)(6)(A)~~**(b)(8)(A)** applies if the conduct for which the defendant is accountable under §1B1.3 (*Relevant Conduct*) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection ~~(b)(6)(A)~~**(b)(8)(A)** may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted.

* * *

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

(A) **Factors to Consider.**—In determining, for purposes of subsection ~~(b)(6)(B)~~**(b)(8)(B)** or (C), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:

* * *

(B) **Definitions.**—For purposes of subsection ~~(b)(6)(C)~~**(b)(8)(C)**:

* * *

21. **Applicability of Subsection ~~(b)(7)~~(b)(9).**—The applicability of subsection ~~(b)(7)~~**(b)(9)** shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection ~~(b)(7)~~**(b)(9)** applies.

* * *

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.

Background:

* * *

Subsection ~~(b)(6)(A)~~(b)(8)(A) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsections ~~(b)(6)(B)~~(b)(8)(B) and (C) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.

* * *

7. False Domain Names & CAN-SPAM

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).

Amendment:

§2G2.5. Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email

* * *

Commentary

Statutory Provisions: *15 U.S.C. § 7704(d); 18 U.S.C. § 2257.*

* * *

Chapter Three, Part C, as amended by Amendment 2 of this document, is further amended as follows:

§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

* * *

15 U.S.C. § 6821 2B1.1
15 U.S.C. § 7704(d) 2G2.5

8. Obstruction of Justice (Terrorism)

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).

Amendment:

§2J1.2. Obstruction of Justice

- (a) Base Offense Level: **14**
- (b) Specific Offense Characteristics
 - (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.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1001 when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, 1503, 1505-1513, 1516, 1519. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"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).

"Records, documents, or tangible objects" includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.

"Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

2. Chapter Three Adjustments.—

(A) Nonapplicability of 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

18 U.S.C. § 1001 2B1.1, 2J1.2 when the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable

9. Firearms

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.

Amendment:

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

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

(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) ~~or 18 U.S.C. § 921(a)(30)~~; 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;

* * *

(3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is a capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a) ~~or 18 U.S.C. § 921(a)(30)~~; 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;

(4) **20**, if --

* * *

(B) the (i) offense involved a (I) semiautomatic firearm that is a capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a) ~~or 18 U.S.C. § 921(a)(30)~~; and the (ii) defendant (i) (I) was a prohibited person at the time the defendant committed the instant offense; or (ii) (II) is convicted under 18 U.S.C. § 922(d);

(5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) ~~or 18 U.S.C. § 921(a)(30)~~;

* * *

(b) Specific Offense Characteristics

* * *

(4) If any firearm (A) was stolen, increase by 2 levels; or (B) had an altered or obliterated serial number, increase by 2 4 levels.

* * *

(5) If the defendant engaged in the trafficking of firearms, increase by 4 levels.

~~(5)~~(6) * * *

~~(6)~~(7) * * *

Commentary

* * *

Application Notes:

* * *

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).~~

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.

* * *

~~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.~~

~~5.4. Application of Subsection (a)(7).—~~

* * *

~~6.5. Application of Subsection (b)(1).—~~

* * *

~~7.6. Application of Subsection (b)(2).—~~

* * *

~~8.7. Destructive Devices.—~~

* * *

9.8. 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 ~~adjustment~~**enhancement** in subsection (b)(4)(A) ~~unless the offense involved a firearm with an altered or obliterated serial number.~~ 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 ~~adjustment~~**enhancement** in subsection (b)(4)(B) ~~unless the offense involved a stolen firearm or stolen ammunition.~~ 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.

~~10.9.~~ Application of Subsection (b)(7).—Under subsection ~~(b)(6)~~(b)(7), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (e.g., if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).

~~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).~~

~~12.10.~~ Prior Felony Convictions.—

* * *

~~13.11.~~ Upward Departure Provisions.—

* * *

~~14.12.~~ Armed Career Criminal.—

* * *

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.

~~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.~~

§5K2.17. High-Capacity, Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)

If the defendant possessed a ~~high-capacity~~, 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 "~~high-capacity~~, 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.

* * *

10. Immigration

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.

Amendment:

§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien

(a) Base Offense Level:

- (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);
- ~~(1)~~(2) **23**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or
- ~~(2)~~(3) **12**, otherwise.

* * *

(b) Specific Offense Characteristics

* * *

- (4) **If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor’s parent or grandparent, increase by 2 levels.**

~~(4)~~(5) * * *

~~(5)~~(6) * * *

- ~~(6)~~(7) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

<u>Death or Degree of Injury</u>	<u>Increase in Level</u>
(1) (A) Bodily Injury	add 2 levels
(2) (B) Serious Bodily Injury	add 4 levels
(3) (C) Permanent or Life-Threatening Bodily Injury	add 6 levels
(4) (D) Death	add 8 10 levels.

- (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.

(c) Cross Reference

- (1) If ~~death resulted~~ any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the special maritime and territorial jurisdiction of the United States, apply the appropriate murder **homicide** guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1324(a), 1327. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

* * *

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

"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.

2. **Interaction with §3B1.1.**—For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others. **In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply.**
3. **Upward Departure Provisions.**—An upward departure may be warranted in any of the following cases:
- (A) ~~Where the~~ **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.~~
- (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).
4. (C) ~~If the~~ **The** offense involved substantially more than 100 aliens, an upward departure may

be warranted.

- 5.4. *Prior Convictions Under Subsection (b)(3).*—Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).
- 6.5. *Application of Subsection (b)(6).*—Reckless conduct to which the adjustment from subsection ~~(b)(5)~~(b)(6) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition). If subsection ~~(b)(5)~~(b)(6) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection ~~(b)(5)~~(b)(6) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection ~~(b)(4)~~(b)(5).
- 6. *Inapplicability of §3A1.3.*—If an enhancement under subsection (b)(8) applies, do not apply §3A1.3 (Restraint of Victim).

Background: This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986. In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 (Aggravating Role) typically will apply to the most culpable defendants:

§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**

* * *

(b) Specific Offense Characteristics

* * *

- (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.

* * *

§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**

* * *

(b) Specific Offense Characteristics

* * *

- (3) 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.

* * *

11. §3C1.1 Circuit Conflict

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."

Amendment:

§3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice ~~during the course of~~ **with respect to** the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by **2** levels.

Commentary

Application Notes:

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

2. ***Limitations on Applicability of Adjustment.***—

* * *

3. ***Covered Conduct Generally.***—

* * *

4. ***Examples of Covered Conduct.***—*The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:*

* * *

(b) *committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction;*

* * *

(j) *failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p);*

(k) *threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.*

* * *

5. ***Examples of Conduct Not Ordinarily Covered.***—

* * *

6. ***"Material" Evidence Defined.***—

* * *

7. *Inapplicability of Adjustment in Certain Circumstances.*—

* * *

8. *Grouping under §3D1.2(c).*—

* * *

9. *Accountability for §1B1.3(a)(1)(A) Conduct.*—

* * *

12. Crime Victims' Rights

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.*

Amendment:

CHAPTER SIX - SENTENCING PROCEDURES, ~~AND~~ PLEA AGREEMENTS, **AND CRIME VICTIMS' RIGHTS**

* * *

§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).

13. Privilege Waiver

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.*

Amendment:

§8C2.5. Culpability Score

* * *

Commentary

Application Notes:

* * *

12. *To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization’s efforts to cooperate fully, the organization may still be given credit for full cooperation. ~~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.~~*