



# **Proposed Amendments to the Sentencing Guidelines**

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**January 30, 2007**

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**2007 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY  
STATEMENTS, AND OFFICIAL COMMENTARY**

**1. Transportation**

**Synopsis of Proposed Amendment:** *This proposed amendment implements a number of provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177 (hereinafter "PATRIOT Act") and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109–59 (hereinafter "SAFETEA-LU"). The proposed amendments also provide a corresponding amendment to Appendix A (Statutory Index). Specifically:*

- (A) *Section 110 of the PATRIOT Act strikes 18 U.S.C. §§ 1992 and 1993 and creates a new section 1992 (Terrorist attacks and other violence against railroad carriers and against mass transportation systems on land, on water, or through the air). The legislation creates a statutory maximum term of imprisonment of 20 years and includes a penalty of imprisonment for any years or life or, if the offense resulted in the death of any person, the defendant may be sentenced to death. There are exceptions to the life and death sentences for cases of surveillance, conveying false information, or attempting, threatening, or conspiring to engage in any violation under this section. The statute also contains aggravated offenses. First, a sentence of life or death may be imposed when the offense involved railroad on-track equipment or a mass transportation vehicle carrying a passenger or employee, or carrying hazardous material, or both. Second, a life or death sentence may be given if the offense was committed with the intent to endanger the safety of any person, or with a reckless disregard for the safety of any person, when the railroad on-track equipment or mass transportation vehicle was carrying a defined hazardous material at the time of the offense.*

*The proposed amendment updates all references to 18 U.S.C. § 1992 and eliminates all references to 18 U.S.C. § 1993. The proposed amendment also adds 18 U.S.C. § 1992 to the referenced statutory provisions in §§2A1.1 (First Degree Murder), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), and 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or a Ferry). Additionally, the amendment adjusts the definition of "mass transportation" in §§2A1.4, 2A5.2, and 2K1.4 (Arson; Property Damage by Use of Explosives) to reflect the new defining section, 18 U.S.C. § 1992(d)(7). Also proposed is the addition of "Navigation" to the title and text of §2A5.2 to better reflect the full scope of the newly created 18 U.S.C. § 1992.*

- (B) *Section 302 of the PATRIOT Act increases the scope of 18 U.S.C. § 1036 (Entry by false pretenses to any real property, vessel, or aircraft of the United States or secure area of any airport) by adding to the areas protected from illegal entry under this title secure and restricted areas of a seaport. Section 302 also increases the statutory maximum penalty from five years to ten years.*

*The proposed amendment refers this offense to §2B2.3(b)(1) and adds seaports to the list of protected areas warranting a two-level enhancement. The amendment also adds a definition for "seaport", as one does not currently exist in the guidelines.*

- (C) *Section 303 of the PATRIOT Act adds a new offense at 18 U.S.C. § 2237 (Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information). This new statute makes it a crime to refuse to stop a vessel in violation of a federal law enforcement officer's order*

*or to provide materially false information to a federal law enforcement officer during a boarding of a vessel.*

*The proposed amendment references this new offense to §§2A2.4 (Obstructing or Impeding Officers) and 2B1.1 (Fraud, Theft, and Property Damage).*

- (D) *Section 306 of the PATRIOT Act provides new offenses in 18 U.S.C. §§ 2291 (Destruction of vessel or maritime facility) and 2292 (Imparting or conveying false information). Section 2291 of title 18, United States Code, covers the destruction of vessels and maritime facilities and creates a statutory maximum term of imprisonment of 20 years. If the conduct under this section involves a vessel carrying nuclear or radioactive waste, a statutory maximum life sentence applies, and if death results, a life or death sentence is possible. Section 2292 of title 18, United States Code, prohibits providing false information regarding an attempt or alleged attempt to commit a crime and provides a statutory maximum sentence of five years.*

*The proposed amendment references 18 U.S.C. § 2291 to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A1.4 (Involuntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), 2A6.1 (Threatening or Harrassing Communications; Hoaxes), 2B1.1 (Fraud, Theft, and Property Damage), 2K1.4 (Arson; Property Damage by Use of Explosives) and 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction). Section 2292 of title 18, United States Code, is referenced to §2A6.1.*

- (E) *Section 307(c) of the PATRIOT Act directs the Commission to review the guidelines to determine whether a sentencing enhancement is appropriate for any offense under sections 659 or 2311 of title 18, United States Code.*

*The proposed amendment provides two options to respond to this directive. Option 1 amends §2B1.1(b)(4) to provide an alternative enhancement if the defendant was convicted under 18 U.S.C. § 659. An issue for comment also requests input regarding whether any such enhancement should include convictions under 18 U.S.C. §§ 2312 and 2313. Option 2 responds to the directive by revising §2B1.1(b)(11). Currently this section provides a minimum offense level of 14 for offenses involving an organized scheme to steal vehicles or vehicle parts. The proposed amendment adds convictions under 18 U.S.C. § 659 to this section and also provides a two-level increase for all cases covered under the subsection.*

- (F) *Section 308 of the PATRIOT Act increases the statutory maximum penalties for 18 U.S.C. § 2199 (Stowaways on vessels or aircraft). Absent any aggravating factors, the statutory maximum for offenses is increased from one year to five years. Section 308 adds a statutory maximum of 20 years if a person acts with the intent to commit serious bodily injury and serious bodily injury occurs. For offenses involving the intent to kill and death occurs, section 308 also adds a penalty of imprisonment for any term of years, including life or death.*

*The proposed amendment references 18 U.S.C. § 2199 to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A1.4 (Involuntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), and 2A2.3 (Minor Assault).*

- (G) *Section 4210 of SAFETEA-LU creates a new offense at 49 U.S.C. § 14915 for failure to release*

*household goods with a statutory maximum of two years.*

*The proposed amendment references this section to §2B1.1 as it is the most analogous guideline.*

- (H) *Section 4102(b) of SAFETEA-LU creates a new criminal violation for violating a commercial motor vehicle's out-of-service order. The offense carries a statutory maximum of one year.*

*The proposed amendment references this section to §2X5.2 (Class A Misdemeanor (Not Covered by Another Specific Offense Guideline)).*

*The proposed amendment also includes five issues for comment pertaining to the following:*

- (1) *Section 7121 of SAFETEA-LU creates a new aggravated felony under 49 U.S.C. § 5124 that carries a statutory maximum of 10 years when conduct under the section results in the release of a hazardous material that causes bodily injury or death. Appendix A (Statutory Index) currently references 49 U.S.C. § 5124 to §2Q1.2 ( Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce). An issue for comment asks whether penalties under §2Q1.2 are adequate for the new offense.*
- (2) *The proposed amendment adds seaports to the two-level enhancement in §2B2.3(b)(1). Section 2B2.3(c) provides a cross reference if the offense was committed with the intent to commit another criminal offense. An issue for comment asks whether, as an alternative to the cross reference provision and as a possible means of simplifying this guideline, it should amend §2B2.3 (Trespass) to provide instead a general specific offense characteristic for any trespass offense that was committed with the intent to commit another offense.*
- (3) *Section 309 of the PATRIOT Act creates a new offense at 18 U.S.C. § 226 (Bribery affecting port security), making it a crime to knowingly, and with the intent to commit international or domestic terrorism, bribe a public official to affect port security. It is also a crime under this section to be the recipient of such a bribe in return for being influenced in the performance of public duties affecting port security with the knowledge that such influence will be used to commit or plan to commit an act of terrorism.*

*The proposed amendment references 18 U.S.C. § 226 to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Official; Conspiracy to Defraud by Interference with Governmental Functions). An issue for comment addresses this proposed reference to §2C1.1 as well as the operation of the cross reference in §2C1.1(c)(1) in cases involving an intent to commit an act of international or domestic terrorism.*
- (4) *Whether the Commission should use the term "mass transportation" or "public transportation" in the context of §2A5.2 and other guidelines.*
- (5) *The proposed amendment provides options for increasing penalties for offenses under 18 U.S.C. § 659. An issue for comment asks whether the Commission also should provide similar increases for offenses under 18 U.S.C. §§ 2312 (Transportation of stolen*

vehicles) and 2313 (Sale or receipt of stolen vehicles).

**Proposed Amendment:**

**§2A1.1. First Degree Murder**

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 1841(a)(2)(C), 1992(a)(7), 2113(e), 2118(c)(2), 2199, 2291, 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), 2199, 2291, 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), 2199, 2291, 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), 2199, 2291, 2332b(a)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. Definitions.—For purposes of this guideline:

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

"Means of transportation" includes a motor vehicle (including an automobile or a boat) and a mass transportation vehicle. "Mass transportation" has the meaning given that term in ~~18 U.S.C. § 1992(d)(7)~~ ~~18 U.S.C. § 1993(c)(5)~~.

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

\* \* \*

**§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), ~~1992(a)(7)~~ ~~1993(a)(6)~~, 2199, 2291. 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), ~~1992(a)(7)~~ ~~1993(a)(6)~~, 2199, 2291, 2332b(a)(1), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

**§2A2.3. Minor Assault**

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ 112, 115(a), 115(b)(1), 351(e), 1751(e), 2199, 2291. For additional

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

**§2A2.4. Obstructing or Impeding Officers**

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 1501, 1502, 2237(a)(1), (a)(2)(A), 3056(d). For additional statutory provision(s), see Appendix A (Statutory Index).

\* \* \*

**§2A5.2. Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle or Ferry**

- (a) Base Offense Level (Apply the greatest):
  - (1) **30**, if the offense involved intentionally endangering the safety of: (A) an airport or an aircraft; or (B) a mass transportation facility; **or** a mass transportation vehicle; ~~or a ferry~~;
  - (2) **18**, if the offense involved recklessly endangering the safety of: (A) an airport or an aircraft; or (B) a mass transportation facility; **or** a mass transportation vehicle; ~~or a ferry~~;
  - (3) if an assault occurred, the offense level from the most analogous assault guideline, §§2A2.1-2A2.4; or
  - (4) **9**.
- (b) Specific Offense Characteristic
  - (1) If (A) subsection (a)(1) or (a)(2) applies; and (B)(i) a firearm was discharged, increase by **5** levels; (ii) a dangerous weapon was otherwise used, increase by **4** levels; or (iii) a dangerous weapon was brandished or its use was threatened, increase by **3** levels. If the resulting offense level is less than level **24**, increase to level **24**.
- (c) Cross References
  - (1) If death resulted, apply the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.



- (2) If the offense involved possession of, or a threat to use (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

Commentary

*Statutory Provisions:* 18 U.S.C. § ~~1992(a)(1), (a)(4), (a)(5), (a)(6)~~ ~~1993(a)(4), (5), (6), (b)~~; 49 U.S.C. §§ 46308, 46503, 46504 (formerly 49 U.S.C. § 1472(c), (j)). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. Definitions.—For purposes of this guideline:

"Biological agent", "chemical weapon", "nuclear byproduct material", "nuclear material", "toxin", and "weapon of mass destruction" have the meaning given those terms in Application Note 1 of the Commentary to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction).

"Brandished", "dangerous weapon", "firearm", and "otherwise used" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"Mass transportation" has the meaning given that term in ~~18 U.S.C. § 1992(d)(7)~~ ~~18 U.S.C. § 1993(c)(5)~~.

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

\* \* \*

Commentary

*Statutory Provisions:* 18 U.S.C. §§ 32(c), 35(b), 871, 876, 877, 878(a), 879, 1038, ~~1992(a)(9), (a)(10)~~ ~~1993(a)(7), (8)~~, ~~2291(a)(8), 2291(e), 2292~~, 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).

\* \* \*

**§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**

- (a) Base Offense Level:

- (1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
- (2) **6**, otherwise.

(b) Specific Offense Characteristics

- (1) If the loss exceeded \$5,000, increase the offense level as follows:

<u>Loss</u> (Apply the Greatest)	<u>Increase in Level</u>
(A) \$5,000 or less	no increase
(B) More than \$5,000	add <b>2</b>
(C) More than \$10,000	add <b>4</b>
(D) More than \$30,000	add <b>6</b>
(E) More than \$70,000	add <b>8</b>
(F) More than \$120,000	add <b>10</b>
(G) More than \$200,000	add <b>12</b>
(H) More than \$400,000	add <b>14</b>
(I) More than \$1,000,000	add <b>16</b>
(J) More than \$2,500,000	add <b>18</b>
(K) More than \$7,000,000	add <b>20</b>
(L) More than \$20,000,000	add <b>22</b>
(M) More than \$50,000,000	add <b>24</b>
(N) More than \$100,000,000	add <b>26</b>
(O) More than \$200,000,000	add <b>28</b>
(P) More than \$400,000,000	add <b>30</b> .

- (2) (Apply the greatest) If the offense—
  - (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2** levels;
  - (B) involved 50 or more victims, increase by **4** levels; or
  - (C) involved 250 or more victims, increase by **6** levels.
- (3) If the offense involved a theft from the person of another, increase by **2** levels.

[Option 1 (Section 659 offenses)]

- (4) If the (A) offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property; or (B) defendant was convicted under 18 U.S.C. § 659, increase by **2** levels.]
- (5) If the offense involved misappropriation of a trade secret and the

defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **2** levels.

- (6) If the offense involved theft of, damage to, or destruction of, property from a national cemetery or veterans' memorial, increase by **2** levels.
- (7) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.
- (8) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.
- (9) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (10) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

**[Option 2 (Section 659 offenses):**

- (11) If the (A) offense involved an organized scheme to steal vehicles or vehicle parts; or (B) defendant was convicted under 18 U.S.C. § 659, [increase by **2** levels. If ~~and~~ the offense level is less than level **14**, increase to level **14**.]
- (12) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels.

If the resulting offense level is less than level **14**, increase to level **14**.

- (13) (Apply the greater) If—
- (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or
  - (B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by **4** levels.
  - (C) The cumulative adjustments from application of both subsections (b)(2) and (b)(12)(B) shall not exceed **8** levels, except as provided in subdivision (D).
  - (D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.
- (14) (A) (Apply the greatest) If the defendant was convicted of an offense under:
- (i) 18 U.S.C. § 1030, and the offense involved (I) a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security; or (II) an intent to obtain personal information, increase by **2** levels.
  - (ii) 18 U.S.C. § 1030(a)(5)(A)(I), increase by **4** levels.
  - (iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.
- (B) If subdivision (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.
- (15) If the offense involved—
- (A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser,

or a person associated with an investment adviser; or

- (B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator, increase by 4 levels.

(c) Cross References

- (1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.
- (2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.
- (3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.
- (4) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), if the resulting offense level is greater than that determined above.

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(a)(1), (a)(5), ~~1993(a)(1), (a)(4)~~, 2113(b), 2291, 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. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Cultural heritage resource" has the meaning given that term in Application Note 1 of the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources).

"Equity securities" has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(11)).

"Financial institution" includes any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," primarily include large pension funds that serve many persons (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

"Firearm" and "destructive device" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

"Foreign instrumentality" and "foreign agent" have the meaning given those terms in 18 U.S.C. § 1839(1) and (2), respectively.

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

"Publicly traded company" means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). "Issuer" has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).

"Theft from the person of another" means theft, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing and non-forcible purse-snatching, such as the theft of a purse from a shopping cart.

*"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).*

*"Victim" means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.*

2. Application of Subsection (a)(1).—

(A) "Referenced to this Guideline."—For purposes of subsection (a)(1), an offense is "referenced to this guideline" if (i) this guideline is the applicable Chapter Two guideline determined under the provisions of §1B1.2 (Applicable Guidelines) for the offense of conviction; or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which §2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.

(B) Definition of "Statutory Maximum Term of Imprisonment."—For purposes of this guideline, "statutory maximum term of imprisonment" means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.

(C) Base Offense Level Determination for Cases Involving Multiple Counts.—In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.

3. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) Pecuniary Harm.—"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

- (iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.
- (v) Rules of Construction in Certain Cases.—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:
- (I) Product Substitution Cases.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.
- (II) Procurement Fraud Cases.—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.
- (III) Offenses Under 18 U.S.C. § 1030.—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.
- (B) Gain.—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.
- (C) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

*The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:*

- (i) *The fair market value of the property unlawfully taken or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.*



- (ii) *The cost of repairs to damaged property.*
  - (iii) *The approximate number of victims multiplied by the average loss to each victim.*
  - (iv) *The reduction that resulted from the offense in the value of equity securities or other corporate assets.*
  - (v) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*
- (D) Exclusions from Loss.—*Loss shall not include the following:*
- (i) *Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.*
  - (ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.*
- (E) Credits Against Loss.—*Loss shall be reduced by the following:*
- (i) *The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.*
  - (ii) *In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.*
- (F) Special Rules.—*Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:*
- (i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—*In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 7(A).*

- (ii) Government Benefits.—In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, loss is \$50.
- (iii) Davis-Bacon Act Violations.—In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.
- (iv) Ponzi and Other Fraudulent Investment Schemes.—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).
- (v) Certain Other Unlawful Misrepresentation Schemes.—In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.
- (vi) Value of Controlled Substances.—In a case involving controlled substances, loss is the estimated street value of the controlled substances.
- (vii) Value of Cultural Heritage Resources.—In a case involving a cultural heritage resource, loss attributable to that cultural heritage resource shall be determined in accordance with the rules for determining the "value of the cultural heritage resource" set forth in Application Note 2 of the Commentary to §2B1.5.

4. Application of Subsection (b)(2).—

- (A) Definition.—For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.
- (B) Applicability to Transmission of Multiple Commercial Electronic Mail Messages.—For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a

two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.

(C) Undelivered United States Mail.—

(i) In General.—In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, "victim" means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.

(ii) Special Rule.—A case described in subdivision (C)(i) of this note that involved—

(I) a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims.

(II) a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.

(iii) Definition.—"Undelivered United States mail" means mail that has not actually been received by the addressee or his agent (e.g., mail taken from the addressee's mail box).

(D) Vulnerable Victims.—If subsection (b)(2)(B) or (C) applies, an enhancement under §3A1.1(b)(2) shall not apply.

*[Option 1 (Section 659 offenses)]*

5. Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4)(A).—For purposes of subsection (b)(4)(A), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:

(A) The regularity and sophistication of the defendant's activities.

(B) The value and size of the inventory of stolen property maintained by the defendant.

(C) The extent to which the defendant's activities encouraged or facilitated other crimes.

(D) The defendant's past activities involving stolen property.]

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

7. Application of Subsection (b)(8).—

- (A) In General.—The adjustments in subsection (b)(8) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.
- (B) Misrepresentations Regarding Charitable and Other Institutions.—Subsection (b)(8)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable, educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant's personal gain). Subsection (b)(8)(A) applies, for example, to the following:
- (i) A defendant who solicited contributions for a non-existent famine relief organization.
  - (ii) A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.
  - (iii) A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant's personal benefit.
- (C) Fraud in Contravention of Prior Judicial Order.—Subsection (b)(8)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §3C1.3 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).
- (D) College Scholarship Fraud.—For purposes of subsection (b)(8)(D):
- "Financial assistance" means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.
- "Institution of higher education" has the meaning given that term in section 101 of the

*Higher Education Act of 1954 (20 U.S.C. § 1001).*

(E) Non-Applicability of Enhancements.—

- (i) Subsection (b)(8)(A).—*If the conduct that forms the basis for an enhancement under subsection (b)(8)(A) is the only conduct that forms the basis for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under §3B1.3.*
- (ii) Subsection (b)(8)(B) and (C).—*If the conduct that forms the basis for an enhancement under subsection (b)(8)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under §3C1.1.*

8. Sophisticated Means Enhancement under Subsection (b)(9).—

- (A) Definition of United States.—*For purposes of subsection (b)(9)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.*
- (B) Sophisticated Means Enhancement.—*For purposes of subsection (b)(9)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.*
- (C) Non-Applicability of Enhancement.—*If the conduct that forms the basis for an enhancement under subsection (b)(9) is the only conduct that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.*

9. Application of Subsection (b)(10).—

- (A) Definitions.—*For purposes of subsection (b)(10):*

*"Authentication feature" has the meaning given that term in 18 U.S.C. § 1028(d)(1).*

*"Counterfeit access device" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service.*

*"Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).*

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

§ 1029(a)(8). "Scanning receiver" has the meaning given that term in 18 U.S.C. § 1029(e)(8).

"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (*i.e.*, not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).

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

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

(B) Authentication Features and Identification Documents.—Offenses involving authentication features, identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.

(C) Application of Subsection (b)(10)(C)(I).—

(i) In General.—Subsection (b)(10)(C)(I) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

(ii) Examples.—Examples of conduct to which subsection (b)(10)(C)(I) applies are as follows:

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

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

(iii) Nonapplicability of Subsection (b)(10)(C)(i).—Examples of conduct to which subsection (b)(10)(C)(i) does not apply are as follows:

- (I) *A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.*
- (II) *A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.*
- (D) *Application of Subsection (b)(10)(C)(ii).—Subsection (b)(10)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.*

*[Option 2 (Section 659 offenses):*

- 10. *~~Chop Shop Enhancement under~~ Application of Subsection (b)(11).—Subsection (b)(11) provides a minimum offense level in the case of an ongoing, sophisticated operation (such as an auto theft ring or "chop shop") to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts. *This subsection also applies if the defendant was convicted of cargo theft under 18 U.S.C. § 659. "Vehicles" refers to all forms of vehicles, including aircraft and watercraft. For purposes of this subsection, "vehicle" means motor vehicle, vessel, or aircraft.]**
- 11. *Gross Receipts Enhancement under Subsection (b)(13)(A).—*
  - (A) *In General.—For purposes of subsection (b)(13)(A), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.*
  - (B) *Definition.—"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).*
- 12. *Application of Subsection (b)(13)(B).—*
  - (A) *Application of Subsection (b)(13)(B)(i).—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:*
    - (i) *The financial institution became insolvent.*
    - (ii) *The financial institution substantially reduced benefits to pensioners or insureds.*
    - (iii) *The financial institution was unable on demand to refund fully any deposit, payment, or investment.*
    - (iv) *The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.*
  - (B) *Application of Subsection (b)(13)(B)(ii).—*

- (i) Definition.—For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).
- (ii) In General.—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:
  - (I) The organization became insolvent or suffered a substantial reduction in the value of its assets.
  - (II) The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).
  - (III) The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.
  - (IV) The organization substantially reduced its workforce.
  - (V) The organization substantially reduced its employee pension benefits.
  - (VI) The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.

13. Application of Subsection (b)(14).—

- (A) Definitions.—For purposes of subsection (b)(14):

"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).

"Personal information" means sensitive or private information (including such information in the possession of a third party), including (i) medical records; (ii) wills; (iii) diaries; (iv) private correspondence, including e-mail; (v) financial records; (vi) photographs of a sensitive or private nature; or (vii) similar information.

- (B) Subsection (b)(14)(iii).—If the same conduct that forms the basis for an enhancement under subsection (b)(14)(iii) is the only conduct that forms the basis for an enhancement



*under subsection (b)(13)(B), do not apply the enhancement under subsection (b)(13)(B).*

14. Application of Subsection (b)(15).—

(A) Definitions.—For purposes of this subsection:

*"Commodities law" means (i) the Commodities Exchange Act (7 U.S.C. § 1 et seq.); and (ii) includes the rules, regulations, and orders issued by the Commodities Futures Trading Commission.*

*"Commodity pool operator" has the meaning given that term in section 1a(4) of the Commodities Exchange Act (7 U.S.C. § 1a(4)).*

*"Commodity trading advisor" has the meaning given that term in section 1a(5) of the Commodities Exchange Act (7 U.S.C. § 1a(5)).*

*"Futures commission merchant" has the meaning given that term in section 1a(20) of the Commodities Exchange Act (7 U.S.C. § 1a(20)).*

*"Introducing broker" has the meaning given that term in section 1a(23) of the Commodities Exchange Act (7 U.S.C. § 1a(23)).*

*"Investment adviser" has the meaning given that term in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(11)).*

*"Person associated with a broker or dealer" has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(18)).*

*"Person associated with an investment adviser" has the meaning given that term in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(17)).*

*"Registered broker or dealer" has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(48)).*

*"Securities law" (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.*

(B) In General.—A conviction under a securities law or commodities law is not required in order for subsection (b)(15) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.

(C) Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If

*subsection (b)(15) applies, do not apply §3B1.3.*

15. Cross Reference in Subsection (c)(3).—Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense involves fraudulent conduct that is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).
16. Continuing Financial Crimes Enterprise.—If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise".
17. Partially Completed Offenses.—In the case of a partially completed offense (*e.g.*, an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. *See* Application Note 4 of the Commentary to §2X1.1.
18. Multiple-Count Indictments.—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. *See* Chapter Three, Part D (Multiple Counts).
19. Departure Considerations.—
  - (A) Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:
    - (i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.
    - (ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma,

*or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.*

- (iii) *The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).*
  - (iv) *The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).*
  - (v) *In a case involving stolen information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.*
  - (vi) *In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:*
    - (I) *The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.*
    - (II) *An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.*
    - (III) *The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.*
- (B) *Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)(14)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.*
- (C) *Downward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.*

*Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States).*

*Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.*

*The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.*

*Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under §2B3.1 (Robbery).*

***[Option 2 (Section 659 offenses):***

*A minimum offense level of level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. ~~Therefore, the~~ The specific offense characteristic of "organized scheme" is used in subsection (b)(11)(A) as an alternative to "loss" in setting a minimum offense level. The minimum offense level also applies to convictions under 18 U.S.C. § 659 for offenses involving cargo theft. Subsection (b)(11)(B) implements the directive in section 307 of Public Law 109–177.]*

*Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.*

*Offenses that involve the use of financial transactions or financial accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum offense level of level 12 is provided for these offenses.*

*Subsection (b)(6) implements the instruction to the Commission in section 2 of Public Law 105–101.*

*Subsection (b)(8)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106–420.*

*Subsection (b)(9) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.*

*Subsections (b)(10)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.*

*Subsection (b)(10)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding", in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification", the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (i.e., produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.*

*Subsection (b)(12)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.*

*Subsection (b)(13)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.*

*Subsection (b)(13)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.*

*Subsection (b)(14) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(14)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.*

\* \* \*

**§2B2.3. Trespass**

- (a) Base Offense Level: **4**
- (b) Specific Offense Characteristics
  - (1) If the trespass occurred (A) at a secured government facility; (B) at a nuclear energy facility; (C) on a vessel or aircraft of the United States; (D) in a secured area of an airport; (E) in a secure area within a seaport;

(EF) at a residence; or (FG) on a computer system used (i) to maintain or operate a critical infrastructure; or (ii) by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels.

- (2) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.
- (3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(c) Cross Reference

- (1) If the offense was committed with the intent to commit a felony offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above.

Commentary

*Statutory Provisions:* 18 U.S.C. §§ 1030(a)(3), 1036, 2199; 42 U.S.C. § 7270b. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Airport" has the meaning given that term in section 47102 of title 49, United States Code.*

*"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.*

*"Felony offense" means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought or a conviction was obtained.*

*"Firearm" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions).*

"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).

"Protected computer" means a computer described in 18 U.S.C. § 1030(e)(2)(A) or (B).

"Seaport" has the meaning given that term in 18 U.S.C. § 26.

2. Valuation of loss is discussed in the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

*Background:* Most trespasses punishable under federal law involve federal lands or property. The trespass section provides an enhancement for offenses involving trespass on secured government installations; (such as nuclear facilities) and other locations (such as airports and seaports) to protect a significant federal interest. Additionally, an enhancement is provided for trespass at a residence.

\* \* \*

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

\* \* \*

Commentary

*Statutory Provisions:* 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3; 18 U.S.C. §§ 201(b)(1), (2), 226, 371 (if conspiracy to defraud by interference with governmental functions), 872, 1341 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1342 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1343 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1951. For additional statutory provision(s), see Appendix A (Statutory Index).

\* \* \*

**§2K1.4      Arson; Property Damage by Use of Explosives**

\* \* \*

Commentary

*Statutory Provisions:* 18 U.S.C. §§ 32(a), (b), 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 1992(a)(1), (a)(2), (a)(4), ~~1993(a)(1), (a)(2), (a)(3), (b)~~, 2275, 2291, 2332a, 2332f; 49 U.S.C. § 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Explosives" includes any explosive, explosive material, or destructive device.

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

"Mass transportation" has the meaning given that term in ~~18 U.S.C. § 1992(d)(7)~~ ~~18 U.S.C. § 1993(c)(5)~~.

"State or government facility", "infrastructure facility", "place of public use", and "public transportation system" have the meaning given those terms in 18 U.S.C. § 2332f(e)(3), (5), (6), and (7), respectively.

2. Risk of Death or Serious Bodily Injury.— Creating a substantial risk of death or serious bodily injury includes creating that risk to fire fighters and other emergency and law enforcement personnel who respond to or investigate an offense.

3. Upward Departure Provision.—If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

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

\* \* \*

**§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)), ~~1992(a)(2), (a)(3), (a)(4), (b)(2)~~ ~~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)~~), ~~2291~~, 2332h; 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), see Appendix A (Statutory Index).

\* \* \*



**§2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants**

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. § 1992(b)(3); 33 U.S.C. § 1319(c)(3); 42 U.S.C. § 6928(e).

Application Note:

1. If death or serious bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Background: This section applies to offenses committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury.

\* \* \*

**§2X1.1. Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)**

- (a) Base Offense Level: The base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty.
- (b) Specific Offense Characteristics
  - (1) If an attempt, decrease by **3** levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.
  - (2) If a conspiracy, decrease by **3** levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.
  - (3) (A) If a solicitation, decrease by **3** levels unless the person solicited to commit or aid the substantive offense completed all the acts he believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar event beyond such person's control.  
(B) If the statute treats solicitation of the substantive offense

identically with the substantive offense, do not apply subdivision (A) above; i.e., the offense level for solicitation is the same as that for the substantive offense.

(c) Cross Reference

- (1) When an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section.

(d) Special Instruction

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

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

18 U.S.C. § 81;  
18 U.S.C. § 930(c);  
18 U.S.C. § 1362;  
18 U.S.C. § 1363;  
18 U.S.C. § 1992(a)(1)-(a)(7), (a)(9), (a)(10);  
18 U.S.C. § 2339A;  
18 U.S.C. § 2340A;  
49 U.S.C. § 46504;  
49 U.S.C. § 46505; and  
49 U.S.C. § 60123(b).

- (B) Any of the following offenses:

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

\* \* \*

**§2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)**

\* \* \*

Commentary

Statutory Provisions: 7 U.S.C. § 2156; 18 U.S.C. §§ 1365(f), 1801; 42 U.S.C. §§ 1129(a), 14133; **49 U.S.C. § 31310.**

\* \* \*

**APPENDIX A**

18 U.S.C. § 225  
18 U.S.C. § 226

2B1.1, 2B4.1  
2C1.1

18 U.S.C. § 1035  
18 U.S.C. § 1036  
18 U.S.C. § 1037

2B1.1  
2B2.3  
2B1.1

\* \* \*

18 U.S.C. § 1992(a)(1)  
18 U.S.C. § 1992(a)(2)  
18 U.S.C. § 1992(a)(3)  
18 U.S.C. § 1992(a)(4)  
18 U.S.C. § 1992(a)(5)  
18 U.S.C. § 1992(a)(6)  
18 U.S.C. § 1992(a)(7)  
18 U.S.C. § 1992(a)(8)  
18 U.S.C. § 1992(a)(9)  
18 U.S.C. § 1992(a)(10)  
~~18 U.S.C. § 1993(a)(1)~~  
~~18 U.S.C. § 1993(a)(2)~~  
~~18 U.S.C. § 1993(a)(3)~~  
~~18 U.S.C. § 1993(a)(4)~~  
~~18 U.S.C. § 1993(a)(5)~~  
~~18 U.S.C. § 1993(a)(6)~~  
~~18 U.S.C. § 1993(a)(7)~~  
~~18 U.S.C. § 1993(a)(8)~~  
  
~~18 U.S.C. § 1993(b)~~

2A5.2, 2B1.1, 2K1.4,  
2X1.1  
2K1.4, 2M6.1, 2X1.1  
2M6.1, 2X1.1  
2A5.2, 2K1.4, 2M6.1,  
2X1.1  
2A5.2, 2B1.1, 2X1.1  
2A5.2, 2X1.1  
2A1.1, 2A2.1, 2A2.2,  
2X1.1  
2X1.1  
2A6.1, 2X1.1  
2A6.1, 2X1.1  
2B1.1, 2K1.4  
2K1.4, 2M6.1  
2K1.4, 2M6.1  
2A5.2, 2B1.1  
2A5.2  
2A2.1, 2A2.2, 2A5.2  
2A6.1  
2A5.2 (if attempt or  
conspiracy to commit  
18 U.S.C. § 1993(a)(4),  
(a)(5), or (a)(6)), 2A6.1  
2A5.2, 2K1.4, 2M6.1

\* \* \*

18 U.S.C. § 2197  
18 U.S.C. § 2199

2B1.1  
2A1.1, 2A1.2, 2A1.3,  
2A1.4, 2A2.1, 2A2.2,  
2A2.3, 2B1.1, 2B2.3

18 U.S.C. § 2233  
18 U.S.C. § 2237(a)(1), (a)(2)(A)  
18 U.S.C. § 2237(a)(2)(B)

2B1.1, 2B3.1  
2A2.4  
2B1.1

	* * *
18 U.S.C. § 2281	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1
18 U.S.C. § 2291	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2K1.4, 2M6.1
18 U.S.C. § 2292	2A6.1

\* \* \*

49 U.S.C. § 14912	2B1.1
49 U.S.C. § 14915	2B1.1

\* \* \*

49 U.S.C. § 30170	2B1.1
49 U.S.C. § 31310	2X5.2

### Issues for Comment

1. *The SAFETEA-LU Act, Pub. L. 109–59, amended 49 U.S.C. § 5124 to provide a new aggravated felony, with a 10-year statutory maximum term of imprisonment, for cases involving a release of a hazardous material that results in death or bodily injury. Appendix A (Statutory Index) references 49 U.S.C. § 5124 to §2Q1.2 ( Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce). In 2004 the Commission amended §2Q1.2 to provide a two-level enhancement in §2Q1.2(b)(7) for defendants convicted of 49 U.S.C. §§ 5124 or 46312 because "[t]hese offenses pose an inherent risk to large populations in a manner not typically associated with other pollution offenses sentenced under the same guideline. See USSG App. C (Amendment 672)(effective Nov. 1, 2004). In addition to application of §2Q1.2(b)(7), a defendant convicted of 49 U.S.C. § 5124 likely would receive a four-level enhancement under §2Q1.2(b)(1)(B) for a release of a hazardous substance (because the offense of conviction necessarily involves such a release) and a nine-level enhancement for the substantial likelihood of death or serious bodily injury under §2Q1.2(b)(2). When added to the Base Offense Level of 8, the minimum offense level under §2Q1.2 would be level 23 (46-57 months at CHC I). Further, Application Note 6 states that an upward departure would be warranted in any case in which death or serious bodily injury results. The Commission requests comment regarding whether §2Q1.2 currently provides adequate penalties for a defendant convicted under 49 U.S.C. § 5124. If not, how should the Commission amend §2Q1.2 to address adequately these offenses? For example, should the Commission provide an enhancement greater than two levels for such offenses? Should the Commission provide a minimum offense level for 49 U.S.C. § 5124 offenses that actually result in death or serious bodily injury?*
2. *The USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177, amended 18 U.S.C. § 1036 to add seaports to the list of covered locations and to increase the statutory*

*maximum term of imprisonment from 5 years to 10 years. The proposed amendment adds seaports to the two-level enhancement in §2B2.3(b)(1). Section 2B2.3 (Trespass) also provides a cross reference in subsection (c) if the offense was committed with the intent to commit a felony offense. The Commission requests comment regarding whether, as an alternative to the cross reference provision, and as a possible means of simplifying this guideline, it should amend §2B2.3 to provide instead a general specific offense characteristic for any trespass offense that was committed with the intent to commit a felony. If so, how many levels would be appropriate? Should the Commission consider amending §2B2.3(b)(1) to provide an additional increase if the trespass on any of the enumerated locations was committed with the intent to commit a felony offense?*

3. *The USA PATRIOT Improvement and Reauthorization Act provided a new offense at 18 U.S.C. § 226 for bribery affecting port security. The provision criminalizes bribery with the intent to commit international terrorism or domestic terrorism and provides a statutory maximum term of imprisonment of 15 years. In general, the guidelines reference bribery offenses to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions), which provides alternative base offense levels of 14, if the defendant was public official, or 12, otherwise. Section 2C1.1(c)(1) provides a cross reference if the offense was committed for the purpose of facilitating the commission of another criminal offense (and the guideline applicable to a conspiracy to commit that other offense results in a greater offense level than §2C1.1). The Commission requests comment regarding whether it should reference 18 U.S.C. § 226 to §2C1.1 and, if so, whether the cross reference provision is a sufficient means of handling bribery cases involving an intent to commit an act of international or domestic terrorism. If the offense is referenced to §2C1.1, should the Commission, as an alternative to the cross reference provision and as a possible means of simplifying this guideline, provide a specific offense characteristic for convictions of 18 U.S.C. § 226 that results in an offense level proportionate to other terrorism-related offenses (*e.g.*, providing a minimum offense level of 26 would provide parity with offenses sentenced under §2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or for a Terrorist Purpose)). Alternatively, should the Commission reference 18 U.S.C. § 226 to §2M5.3?*
4. *In addition to consolidating 18 U.S.C. §§ 1992 and 1993, the USA PATRIOT Improvement and Reauthorization Act of 2005 replaced the term "public transportation" (added by the SAFETEA-LU Act) with "mass transportation" (the term used in 18 U.S.C. § 1992 prior to SAFETEA-LU). "Mass transportation" now is defined at 18 U.S.C. § 1992(d)(7) to have the same meaning as "public transportation" (defined at 49 U.S.C. § 5302(a)(7)) except that, for purposes of 18 U.S.C. § 1992, "mass transportation" includes school bus, charter, sightseeing transportation, and passenger vessel. School bus and charter are otherwise expressly excluded from the definition of "public transportation" as are intercity bus transportation and intercity passenger rail transportation. The Commission requests comment regarding the appropriate term to use in the context of §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or a Ferry). Specifically, should the Commission use "mass transportation" as that term is now defined by 18 U.S.C. § 1992(d)(7) (*i.e.*, including school bus, charter, sightseeing transportation and passenger vessel) or use the more limited term "public transportation" (*i.e.*, excluding school bus, charter, intercity bus transportation, and intercity passenger rail transportation)?*

5. *The proposed amendment provides two options for amending §2B1.1 to address 18 U.S.C. § 659 (Cargo theft). The Commission requests comment regarding whether, rather than an enhancement based on the statute of conviction, it ought to provide an enhancement based on real offense conduct such as if the offense involved cargo theft. The Commission also requests comment regarding whether it should provide an enhancement for conduct covered by convictions under 18 U.S.C. §§ 2312 (Transportation of stolen vehicles) and 2313 (Sale or receipt of stolen vehicles), either as part of the proposed enhancement for 18 U.S.C. § 659 offenses or as a separate enhancement.*

## 2. Sex Offenses

**Synopsis of Proposed Amendment:** *This multi-part proposed amendment implements the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109–248.*

*Part I of this proposed amendment implements the directive in section 141 of the Act pertaining to the new offense in 18 U.S.C. § 2250 for failure to register as a sex offender. The directive instructs the Commission, in promulgating guidelines for use by a sentencing court in determining the sentence to be imposed for [18 U.S.C. § 2250], to consider the following matters:*

- (1) Whether the person committed another sex offense in connection with, or during, the period for which the person failed to register.*
- (2) Whether the person committed an offense against a minor in connection with, or during, the period for which the person failed to register.*
- (3) Whether the person voluntarily attempted to correct the failure to register.*
- (4) The seriousness of the offense which gave rise to the requirement to register, including whether such offense is a tier I, tier II, or tier III offense, as those terms are defined in section 111 of the Act.*
- (5) Whether the person has been convicted or adjudicated delinquent for any offense other than the offense which gave rise to the requirement to register.*

*Section 2250 of title 18, United States Code, provides a statutory maximum term of imprisonment of ten years for the failure to register. There is an additional mandatory consecutive term of 5 years' imprisonment applicable if a person commits a crime of violence while in failure to register status (18 U.S.C. § 2250(c)). The requirements pertaining to who must register, where the registration must occur, and for how long are set forth in 42 U.S.C. § 16911.*

*The proposed amendment provides a new guideline in §2A3.5 (Failure to Register as a Sex Offender). The proposed amendment presents two options for addressing the fourth matter of the directive. Option One provides multiple base offense levels based on the category of offense that gave rise to the registration requirement: level 16 if the offense that gave rise to the requirement to register was a Tier III offense; level 14 if the offense that gave rise to the requirement to register was a Tier II offense; and level 12 if the offense that gave rise to the requirement to register was a Tier I offense. Option Two provides a base offense level of 12 and a specific offense characteristic in §2A3.5(b)(1) providing a two-level increase if the offense that gave rise to the requirement to register was a Tier II offense and a four-level increase if the offense that gave rise to the requirement to register was a Tier III offense. The resulting offense level under either option is the same for each tier of offense. The definitions for Tier I, II, and III offenses are the statutory definitions provided in 42 U.S.C. § 16911(2),(3), and (4), respectively.*

*The first and second matters are addressed in §2A3.5(b)(1) of Option One, and in §2A3.5(b)(2) of Option Two. Both options provide alternative increases based on the type of offense committed while in a failure to register status and on whether that offense was committed against a minor or an adult. The proposed amendment provides a 6-level increase if, while in a failure to register status, the defendant committed a sex offense against an adult, or kidnapped or falsely imprisoned a minor. If the defendant committed a sex offense against a minor, the proposed amendment provides an 8-level increase and a minimum*

offense level of [24]-[28].

The third matter is addressed in §2A3.5(b)(2) in Option One, and in §2A3.5(b)(3) in Option Two. Both options provide a [2][4]-level decrease if the defendant voluntarily attempted to correct the failure to register.

Issues for comment #2 and #3 in Part V of the proposed amendment request comment regarding the scope of these proposed enhancements. Issue for comment #3 also asks whether the Commission should include an instruction that the reduction does not apply if any of the proposed specific offense characteristics also apply.

The proposed amendment does not specifically address the fifth matter because application of Chapter Four will take into account whether the person has been convicted or adjudicated delinquent for any offense other than the offense which gave rise to the requirement to register.

The proposed amendment also provides another new guideline for certain aggravated offenses related to the requirement to register as a sex offender. As noted previously, 18 U.S.C. § 2250(c) provides a mandatory consecutive term of 5 years if a crime of violence was committed while the defendant was in a failure to register status. Section 2260A of title 18, United States Code, provides a mandatory consecutive term of 10 years' imprisonment if a person who is required to register commits an enumerated offense (including kidnapping, human trafficking, and various sex offenses). The new guideline, §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender), will apply to convictions under 18 U.S.C. §§ 2250(c) or 2260A, and instructs the court that the guideline sentence for any such conviction is the term of imprisonment required by statute. Neither Chapters Three nor Four will apply to any count of conviction covered by this guideline. This approach is the same approach the Commission has taken with other statutes that provide mandatory consecutive terms of imprisonment, namely 18 U.S.C. § 1028A (see §2B1.6 (Aggravated Identity Theft) and 18 U.S.C. § 924(c) (See §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes).)

Part II implements other new offenses and increased penalties as follows:

- (A) The Act provides a mandatory minimum term of imprisonment of 30 years for convictions under 18 U.S.C. § 2241(c) (Aggravated sexual abuse with children). This statute covers crossing state lines to engage in the sexual abuse of a child under the age of 12 years. It also covers engaging in a sexual act under the circumstances described in 18 U.S.C. § 2241(a) and (b) (force, threat, or other means) with a child who is between the ages of 12 years and 16 years and is at least four years younger than the person who is engaging in the sexual act. The proposed amendment provides a base offense level of 40 in §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the defendant was convicted under 18 U.S.C. § 2241(c). The specific offense characteristic for the age of the victim, subsection (b)(2), would not apply because the higher base offense level takes into account the age of the victim. There also is an application note that instructs the court not to apply the enhancement in §2A3.1(b)(1) (four-level enhancement if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b)) if the basis for the conviction under 18 U.S.C. § 2241(c) is that the defendant engaged in conduct described in 18 U.S.C. § 2241(a) or (b).
- (B) The Act increased the statutory maximum term of imprisonment for convictions under 18 U.S.C. § 2243(b) for sexual abuse of a ward from five years to 15 years. The proposed



*amendment proposes to increase the base offense level in §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts) to level [14][16][18][20].*

- (C) *The Act created a new offense in 18 U.S.C. § 2244(a)(5) for sexual contact offenses that would have violated 18 U.S.C. § 2241(c) had the sexual contact been a sexual act. (Section 2241(c) covers sexual acts with a child under 12 years old or sexual acts involving conduct described in 18 U.S.C. §2241(a) or (b) with a child between the ages of 12 and 16 and who is at least four years younger than the defendant.) The offense has a statutory maximum term of imprisonment of life.*

*The proposed amendment addresses this new offense by increasing the minimum offense level in the age enhancement in subsection §2A3.4(b)(1) from level 20 to level 22.*

*Issue for Comment #4 in Part V of the proposed amendment addresses whether §2A3.4 already adequately accounts for the new offense and therefore does not need to be amended.*

- (D) *The Act amended 18 U.S.C. § 1591 (sex trafficking of children or by force, fraud, or coercion) to provide a mandatory minimum term of imprisonment of 15 years if the sex trafficking offense involved a minor who had not attained the age of 14 years or involved force, fraud, or coercion (subsection 1591(b)(1)) and a mandatory minimum of 10 years if the offense involved a minor who had attained the age of 14 years but had not attained the age of 18 years (subsection 1591(b)(2)). The Act also increased the statutory maximum term of imprisonment from 40 years to life for 18 U.S.C. § 1591(b)(2) offenses. To address the increased statutory minimums, the proposed amendment modifies the base offense levels in §§2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct).*

*With respect to offenses involving force, fraud, or coercion, the proposed amendment would create a heightened base offense level of [34][36] in §2G1.1 if the offense of conviction is 18 U.S.C. § 1591 and the offense involved conduct described in subsection (b)(1) of that statute. An alternative base offense level of 14 would apply in all other cases. The proposed amendment also excludes application of the enhancement in §2G1.1(b)(1) to cases that are sentenced under §2G1.1(a)(1) because cases to which that base offense level apply necessarily involve fraud or coercion.*

*With respect to offenses involving minors, the proposed amendment would create alternative base offense levels in §2G1.3 based on the statute of conviction and the conduct described in that conviction. For convictions under 18 U.S.C. § 1591 in which the offense involved conduct described in subsection (b)(1) of that statute (i.e., offense was effected by force, fraud, or coercion, or involved a minor who had not attained the age of 14 years), the proposed base offense level is [34][36]. For convictions under 18 U.S.C. § 1591 in which the offense involved conduct described in subsection (b)(2) of that statute (i.e., offense involved a minor who had attained the age of 14 but had not attained the age of 18 years), the proposed base offense level is [30][32].*

*The Act also increased the penalties for 18 U.S.C. §§ 2422(b) (Coercion and enticement [of a minor to engage in criminal sexual activity]) and 2423(a) (Transportation [of a*

*minor] with intent to engage in criminal sexual activity). Both statutes now have a mandatory minimum term of 10 years (increased from 5 years) and a statutory maximum term of imprisonment of life (increased from 30 years). The proposed amendment would add §2G1.3(a)(3) with a base offense level of [28][30] if the defendant was convicted under 18 U.S.C. §§ 2422(b) or 2423(a). If the Commission decides that the base offense level should be the same for offenses under 18 U.S.C. §§ 1591(b)(2), 2422(b), and 2423(a), then the Team would modify the proposed amendment to consolidate these offenses into one base offense level.*

*The proposed amendment also provides a range of [4]-[8] at §2G1.3(b)(5). It also addresses the interaction of subsection (b)(5), which provides an 8-level increase if the offense involve a minor who had not attained the age of 12 years, and the proposed addition of alternative base offense levels. Now that age is a factor the court considers in determining the appropriate base offense level for convictions under 18 U.S.C. § 1591, the proposed amendment provides a new application note that instructs the court not to apply subsection (b)(5) if subsection (a)(1) applies. The proposed amendment also provides an option for modifying the enhancement.*

*Issue for comment #8 asks whether the Commission should consider providing an increase of four or six levels, instead of eight levels, at §2G1.3(b)(5) in any case in which the age of the minor victim is taken into account by base offense level.*

- (E) *The Act created a new offense in 18 U.S.C. § 2257A that imposes recordkeeping requirements on individuals who produce depictions of simulated sexually explicit conduct. Failure to comply with the recordkeeping requirements carries a statutory maximum term of imprisonment of 1 year. If the offense was intended to conceal a child pornography offense, the statute provides a statutory maximum term of imprisonment of 5 years for the first offense; for the second offense, the penalty is a 2-year mandatory minimum and a statutory maximum of 10 years.*

*The proposed amendment references this new offense to §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email).*

*Issue for Comment #5 in Part V of the proposed amendment requests comment regarding the refusal to allow inspection of records in violation of 18 U.S.C. §§ 2257(f)(5) or 2257A.*

- (F) *The Act created a new offense in 18 U.S.C. § 2252A(g) that prohibits engaging in child exploitation enterprises, defined in the statute as violating 18 U.S.C. §§ 1591, 1201 (if the victim is a minor), Chapter 109A (involving a minor), Chapter 110 (except for 18 U.S.C. §§ 2257 and 2257A), or Chapter 117 (involving a minor), as part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and committing those offenses in concert with three or more other people. The statute provides a mandatory minimum term of imprisonment of 20 years.*

*The proposed amendment creates a new guideline, §2G2.6 (Child Exploitation Enterprises), to cover this new offense. The guideline provides a base offense level of*

*[34][35][36][37] and three specific offense characteristics, based on the age of the victim (subsection (b)(1)), whether the defendant was the parent or had some other custodial care of the victim (subsection (b)(2)), and whether the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) (subsection (b)(3)).*

*Issue for Comment #6 requests comment regarding the base offense level, the scope of the proposed specific offense characteristics, and whether the Commission should consider other conduct for purposes of providing additional specific offense characteristics.*

- (G) *The Act created a new offense in 18 U.S.C. § 2252C that prohibits knowingly embedding words or images into the source code of a website with the intent to deceive a person into viewing obscenity, or to deceive a minor into viewing material harmful to minors. The statute carries a statutory maximum term of imprisonment of 20 years if the offense involved a minor, or a maximum of 10 years, otherwise. Application Note 2 proposes that the specific offense characteristic at §2G3.1(b)(3) not apply for offenses under 18 U.S.C. § 2252C.*

*The proposed amendment modifies subsection (b)(2) of §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), which currently provides a two-level enhancement if the offense involved misleading domain names. The proposed amendment adds to this enhancement embedding words or digital images on a website and also presents the option of providing a four-level increase for this enhancement.*

*Issue for Comment #7 requests comment regarding whether the Commission should provide an enhancement if the defendant intended to deceive someone other than a minor into viewing obscenity.*

*Part III addresses other criminal provisions contained in the Act as follows:*

- (A) *The Act created a new Class A misdemeanor in 42 U.S.C. § 16984 prohibiting the use of a child's fingerprints that were derived from a program funded by federal grants to support voluntary fingerprinting of children for any purpose other than providing the fingerprints to the child's parents or guardian. The proposed amendment references this*

*new offense to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Return Information) and provides a base offense level of 6 for the offense. The heading of the guideline also is amended to cover personal information of this sort.*

*The Act also created 42 U.S.C. § 16962 prohibiting the improper release of information obtained in fingerprint-based checks for the background check of foster or adoptive parents or of a person employed by, or considering employment with, a private or public educational agency. The statute provides a statutory maximum term of imprisonment of 10 years. The proposed amendment references this offense to §2H3.1 and such offenses will receive a base offense level of 9 under §2H3.1(a)(1).*

- (B) *The Act amended 18 U.S.C. § 1001 to provide an enhanced penalty of up to 8 years if the*

*matter relates to an offense under 18 U.S.C. § 1591 or Chapters 109A, 110, or 117 of title 18, United States Code. The proposed amendment adds a [2]-[12] level enhancement in subsection (b)(1)(C) of §2J1.2 (Obstruction of Justice) to cover such conduct.*

- (C) *The Act added 18 U.S.C. § 1591 to the list in 18 U.S.C. § 3559(e)(2) of repeated sex offenses committed against children that require a mandatory life imprisonment. The proposed amendment adds 18 U.S.C. § 1591 to the list of covered sex offenses in Application Note 2 of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).*

*Part IV addresses the probation and supervised release aspects of the Act. First, the proposed amendment updates subsection (a)(9) of §5B1.3 (Conditions of Probation) and subsection (a)(7) of §5D1.3 to include compliance with SORNA as one of the mandatory conditions. Second, it adds to the list of "special conditions" in §§5B1.3(d) and 5D1.3(d) a condition requiring a sex offender to submit to a search, as added to 18 U.S.C. §§ 3563(b) and 3583(d) by the Act. Third, the proposed amendment modifies §5D1.2 (Term of Supervised Release) to add Chapter 109B and 18 U.S.C. §§ 1201 and 1591 to the definition of sex offense in Application Note 1 of that guideline.*

*Part V sets forth all of the issues for comment. In addition to the specific issues noted in this synopsis, Issue for Comment #1 requests input regarding how the Commission should incorporate the mandatory minimum terms of imprisonment created or increased by the Adam Walsh Act and discusses four approaches for incorporating these penalties.*

## **Proposed Amendment**

### **Part I - Implementing Directive Regarding 18 U.S.C. § 2250 Offenses**

#### **3. CRIMINAL SEXUAL ABUSE AND OFFENSES RELATED TO REGISTRATION AS A SEX OFFENDER**

##### **§2A3.5. Failure to Register as a Sex Offender**

###### **Option 1:**

###### **[(a) Base Offense Level:**

- (1) 16, if the offense that gave rise to the requirement to register was a Tier III offense;**
- (2) 14, if the offense that gave rise to the requirement to register was a Tier II offense; or**
- (3) 12, if the offense that gave rise to the requirement to register was a Tier I offense.**

###### **(b) Specific Offense Characteristics**

- (1) If, while in a failure to register status, the defendant (A)(i)**

committed a sex offense against someone other than a minor; or (ii) kidnapped or falsely imprisoned a minor, increase by **6** levels; or (B) committed a sex offense against a minor, increase by **8** levels. If the offense level resulting from application of subdivision (B) is less than level ~~[24]~~-~~[28]~~, increase to level ~~[24]~~-~~[28]~~.

- (2) If the defendant voluntarily attempted to correct the failure to register, decrease by ~~[2]~~~~[4]~~ levels.]

Option 2:

(a) Base Offense Level: **12**

(b) Specific Offense Characteristics

- (1) If the offense that gave rise to the requirement to register was a (A) Tier II offense, increase by **2** levels; or (B) Tier III offense, increase by **4** levels.
- (2) If, while in a failure to register status, the defendant (A)(i) committed a sex offense against a person other than a minor; or (ii) kidnapped or falsely imprisoned a minor, increase by **6** levels; or (B) committed a sex offense against a minor, increase by **8** levels. If the offense level resulting from application of subdivision (B) is less than level ~~[24]~~-~~[28]~~, increase to level ~~[24]~~-~~[28]~~.
- (3) If the defendant voluntarily attempted to correct the failure to register, decrease by ~~[2]~~~~[4]~~ levels.]

Commentary

Statutory Provision: 18 U.S.C. § 2250(a).

Application Note:

1. Definitions.—For purposes of this guideline:

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

"Sex offense" has the meaning given that term in 42 U.S.C. § 16911(5), except that kidnapping and false imprisonment are not included.

*["Tier I offense"], "tier II offense", and "tier III offense" have the meaning given those terms in 42 U.S.C. § 16911[(2)], (3) and (4), respectively.*

**§2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender**

- (a) If the defendant was convicted under 18 U.S.C. § 2250(c) or § 2260A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2250(c), 2260A.

Application Notes:

1. *In General.—Sections 2250(c) and 2260A of title 18, United States Code, provide mandatory minimum terms of imprisonment that are required to be imposed consecutively to other offenses. Accordingly, the guideline sentence for a defendant convicted under either statute is the term required by the statute.*
2. *Inapplicability of Chapters Three and Four.—Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).*

**Part II - Implementing New Sex Offenses and Increased Penalties:**

**(A) New Mandatory Minimum for 18 U.S.C. § 2241(c)**

**§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse**

- (a) Base Offense Level: ~~30~~
- (1) **40**, if the defendant was convicted under 18 U.S.C. § 2241(c); or
  - (2) **30**, otherwise.
- (b) Specific Offense Characteristics
- (1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b),

increase by **4** levels.

- (2) **If subsection (a)(2) applies and** (A) ~~if~~ the victim had not attained the age of twelve years, increase by **4** levels; or (B) ~~if~~ the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.
- (3) If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by **2** levels.
- (4) (A) If the victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) if the victim sustained serious bodily injury, increase by **2** levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.
- (5) If the victim was abducted, increase by **4** levels.
- (6) If, to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or if, to facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, the offense involved (A) the knowing misrepresentation of a participant's identity; or (B) the use of a computer or an interactive computer service, increase by **2** levels.

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

(d) Special Instruction

- (1) If the offense occurred in the custody or control of a prison or other correctional facility and the victim was a prison official, the offense shall be deemed to have an official victim for purposes of subsection (c)(2) of §3A1.2 (Official Victim).

Commentary

Statutory Provisions: 18 U.S.C. §§ 2241, 2242. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

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

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

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

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

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

"Victim" includes an undercover law enforcement officer.

2. Application of Subsection (b)(1).—

(A) Definitions.—For purposes of subsection (b)(1), "conduct described in 18 U.S.C. §



2241(a) or (b)" is engaging in, or causing another person to engage in, a sexual act with another person by: (A) using force against the victim; (B) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (C) rendering the victim unconscious; or (D) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.

(B) Application in Cases Involving a Conviction under 18 U.S.C. § 2241(c).—If the conduct that forms the basis for a conviction under 18 U.S.C. § 2241(c) is that the defendant engaged in conduct described in 18 U.S.C. § 2241(a) or (b), do not apply subsection (b)(1).

3. Application of Subsection (b)(3).—

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

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

4. Application of Subsection (b)(6).—

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

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

(B) *Use of a Computer or Interactive Computer Service.*—Subsection (b)(6)(B) provides an enhancement if a computer or an interactive computer service was used to (i) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (ii) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.

5. Application of Subsection (c)(1).—

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

(B) *Definition.*—For purposes of subsection (c)(1), "sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).

6. Upward Departure Provision.—If a victim was sexually abused by more than one participant, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).

*Background:* Sexual offenses addressed in this section are crimes of violence. Because of their dangerousness, attempts are treated the same as completed acts of criminal sexual abuse. The maximum term of imprisonment authorized by statute is life imprisonment. The base offense level in subsection (a)(2) represents sexual abuse as set forth in 18 U.S.C. § 2242. An enhancement is provided for use of force; threat of death, serious bodily injury, or kidnapping; or certain other means as defined in 18 U.S.C. § 2241. This includes any use or threatened use of a dangerous weapon.

An enhancement is provided when the victim is less than sixteen years of age. An additional enhancement is provided where the victim is less than twelve years of age, *except when subsection (b)(2) applies*. Any criminal sexual abuse with a child less than twelve years of age, regardless of "consent," is governed by §2A3.1 (Criminal Sexual Abuse).

An enhancement for a custodial relationship between defendant and victim is also provided. Whether the custodial relationship is temporary or permanent, the defendant in such a case is a person the victim trusts or to whom the victim is entrusted. This represents the potential for greater and prolonged psychological damage. Also, an enhancement is provided where the victim was an inmate of, or a person employed in, a correctional facility. Finally, enhancements are provided for permanent, life-threatening, or serious bodily injury and abduction.

**(B) Increased Statutory Maximum in 18 U.S.C. § 2243(b)**

**§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts**

(a) Base Offense Level: [12][14][16][18][20]

(b) Specific Offense Characteristics

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

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

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

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

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

The misrepresentation to which the enhancement in subsection (b)(1) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the

*misrepresentation was made with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.*

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

~~*Background: The offense covered by this section is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.*~~

(C) **New Offense in 18 U.S.C. § 2244(a)(5)**

**§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact**

(a) Base Offense Level:

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

(b) Specific Offense Characteristics

- (1) If the victim had not attained the age of twelve years, increase by **4** levels; but if the resulting offense level is less than ~~20~~**22**, increase to level ~~20~~**22**.
- (2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.
- (3) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.
- (4) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.
- (5) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.

(c) Cross References

- (1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).
- (2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above.

Commentary

*Statutory Provisions:* 18 U.S.C. § 2244(a)(1), (2), (3). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

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

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

U.S.C. § 2242" is: (A) engaging in, or causing sexual contact with, or by another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or (B) engaging in, or causing sexual contact with, or by another person who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

4. Application of Subsection (b)(3).—

(A) Custody, Care, or Supervisory Control.—Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

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

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

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

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

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years.

(D) **Increased Penalties (statutory minimum and maximum) for 18 U.S.C. § 1591**

§2G1.1. **Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor**

- (a) Base Offense Level: ~~14~~
  - (1) ~~[34][36]~~, if the offense of conviction is 18 U.S.C. § 1591 and the offense involved conduct described in subsection (b)(1) of that statute; or
  - (2) **14**, otherwise.
- (b) Specific Offense Characteristic
  - (1) If **subsection (a)(2) applies and** the offense involved fraud or coercion, increase by **4** levels.
- (c) Cross Reference
  - (1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18 U.S.C. § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).
- (d) Special Instruction
  - (1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

2. *Application of Subsection (b)(1).*—Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. *See Chapter Five, Part K (Departures).* For purposes of subsection (b)(1), "coercion" includes any form of conduct that negates the voluntariness of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. This characteristic generally will not apply if the drug or alcohol was voluntarily taken. *Do not apply this enhancement if the base offense level is determined under subsection (a)(1) because subsection (a)(1) necessarily involves fraud or coercion.*
  
3. *Application of Chapter Three Adjustment.*—For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.
  
4. *Application of Subsection (c)(1).*—
  - (A) *Conduct Described in 18 U.S.C. § 2241(a) or (b).*—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person by: (i) using force against the victim; (ii) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the victim unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.
  
  - (B) *Conduct Described in 18 U.S.C. § 2242.*—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2242 is: (i) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (ii) engaging in, or causing another person to engage in, a sexual act with a victim who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.
  
5. *Special Instruction at Subsection (d)(1).*—For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel



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

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

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

This guideline also covers offenses under section 1591 of title 18, United States Code, that involve recruiting or transporting a person, other than a minor, in interstate commerce knowing that force, fraud, or coercion will be used to cause the person to engage in a commercial sex act.

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

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

- (a) Base Offense Level: **24**
- (1) **[34][36]**, if the defendant was convicted under 18 U.S.C. § 1591 and the offense involved conduct described in subsection (b)(1) of that statute;
  - (2) **[30][32]**, if the defendant was convicted under 18 U.S.C. § 1591 and the offense involved conduct described in subsection (b)(2) of that statute;
  - (3) **[28][30]**, if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or
  - (4) **24**, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.
- (2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by **2** levels.
- (3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by **2** levels.
- (4) If the offense involved (A) the commission of a sex act or sexual contact; or (B) a commercial sex act, increase by **2** levels.
- (5) If the offense involved a minor who had not attained the age of 12 years, increase by **[4][6][8]** levels.

(c) Cross References

- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.
- (2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.
- (3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to

engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the "consent" of the minor.

(d) Special Instruction

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

Commentary

*Statutory Provisions:* 8 U.S.C. § 1328 (only if the offense involved a minor); 18 U.S.C. §§ 1591 (only if the offense involved a minor), 2421 (only if the offense involved a minor), 2422 (only if the offense involved a minor), ~~2422(b)~~, 2423, 2425.

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

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

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

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

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

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

2. Application of Subsection (b)(1).—

- (A) Custody, Care, or Supervisory Control.—Subsection (b)(1) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.
- (B) Inapplicability of Chapter Three Adjustment.—If the enhancement under subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. Application of Subsection (b)(2).—

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

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

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

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

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

5. Interaction of Subsections (a)(1) and (b)(5).—If subsection (a)(1) applies, do not apply subsection (b)(5).
56. Application of Subsection (c).—
- (A) Application of Subsection (c)(1).—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice, advertisement or other method, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), "sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).
- (B) Application of Subsection (c)(3).—For purposes of subsection (c)(3), conduct described in 18 U.S.C. § 2241 means conduct described in 18 U.S.C. § 2241(a), (b), or (c). Accordingly, for purposes of subsection (c)(3):
- (i) Conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person: (I) using force against the minor; (II) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (III) rendering the minor unconscious; or (IV) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.
- (ii) Conduct described in 18 U.S.C. § 2241(c) is: (I) interstate travel with intent to engage in a sexual act with a minor who has not attained the age of 12 years; (II) knowingly engaging in a sexual act with a minor who has not attained the age of 12 years; or (III) knowingly engaging in a sexual act under the circumstances described in 18 U.S.C. § 2241(a) and (b) with a minor who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging).
- (iii) Conduct described in 18 U.S.C. § 2242 is: (I) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the minor in fear (other than by threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (II) engaging in, or causing another person to engage in, a sexual act with a minor who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.
67. Application of Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each minor transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate minor. Consequently, multiple counts involving more than one minor are not to be grouped

together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes travel or transportation to engage in a commercial sex act or prohibited sexual conduct in respect to more than one minor, whether specifically cited in the count of conviction, each such minor shall be treated as if contained in a separate count of conviction.

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

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

**(E) New Recordkeeping Offense in 18 U.S.C. § 2257A**

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

- (a) Base Offense Level: **6**
- (b) Cross References
  - (1) If the offense reflected an effort to conceal a substantive offense that involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).
  - (2) If the offense reflected an effort to conceal a substantive offense that involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic), apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic).

Commentary

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

(F) **New Offense in § 2252A(g) for Child Exploitation Enterprise**

**§2G2.6. Child Exploitation Enterprises**

- (a) Base Offense Level: ~~[34]~~~~[[35]~~~~[36]~~~~[37]~~
- (b) Specific Offense Characteristics
  - (1) If a victim (A) had not attained the age of 12 years, increase by **4** levels; or (B) had attained the age of 12 years but had not attained the age of 16 years, increase by **2** levels.
  - (2) If (A) the defendant was a parent, relative, or legal guardian of a minor victim; or (B) a minor victim was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.
  - (3) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by **2** levels.

Commentary

Statutory Provision: 18 U.S.C. § 2252A(g).

Application Notes:

1. Application of Subsection (b)(2).—

(A) Custody, Care, or Supervisory Control.—Subsection (b)(2) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

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

2. Application of Subsection (b)(3).—For purposes of subsection (b)(3), "conduct described in 18 U.S.C. § 2241(a) or (b)" is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to

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

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

**(G) New Offense in 18 U.S.C. § 2252C for Embedding Words or Images**

**§2G3.1. Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names**

- (a) Base Offense Level: **10**
- (b) Specific Offense Characteristics
- (1) (Apply the Greatest) If the offense involved:
- (A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.
- (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.
- (C) Distribution to a minor, increase by **5** levels.
- (D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.
- (E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.
- (F) Distribution other than distribution described in subdivisions (A) through (E), increase by **2** levels.
- ~~(2) If the offense involved the use of a misleading domain name on the Internet with the intent to deceive a minor into viewing material on the Internet that is harmful to minors, increase by **2** levels.~~



- (2) If, with the intent to deceive a minor into viewing material that is harmful to minors, the offense involved the use of (A) a misleading domain name on the Internet; or (B) embedded words or digital images in the sourcecode of a website, increase by [2][4] levels.
- (3) If the offense involved the use of a computer or an interactive computer service, increase by 2 levels.
- (4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

(c) Cross Reference

- (1) If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) or §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), as appropriate.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1460-1463, 1465, 1466, 1470, 2252B, 2252C. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

"Distribution for pecuniary gain" means distribution for profit.

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

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

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

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

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

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

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

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

*Background: Most federal prosecutions for offenses covered in this guideline are directed to offenses involving distribution for pecuniary gain. Consequently, the offense level under this section generally will be at least 15.*

## **Appendix A (Statutory Index)**

18 U.S.C. § 2245	2A1.1
18 U.S.C. § 2250(a)	2A3.5
18 U.S.C. § 2250(c)	2A3.6
* * *	
18 U.S.C. § 2252B	2G2.5
18 U.S.C. § 2252C	2G3.1
* * *	
18 U.S.C. § 2257	2G2.5
18 U.S.C. § 2257A	2G2.5
* * *	
18 U.S.C. § 2260(b)	2G2.2
18 U.S.C. § 2260A	2A3.6

## **Part III - Other Criminal Provisions**

### **(A) New Offenses in 42 U.S.C. §§ 16962 and 16984 Relating to Fingerprints**

#### **§2H3.1. Interception of Communications; Eavesdropping; Disclosure of Certain Personal**

## Information Tax Return Information

- (a) Base Offense Level (Apply the greater):
  - (1) **9**; or
  - (2) **6**, if the defendant was convicted of 26 U.S.C. §§ 7213A, ~~or 26 U.S.C. § 7216~~, or **42 U.S.C. § 16984**.
- (b) Specific Offense Characteristic
  - (1) If the purpose of the offense was to obtain direct or indirect commercial advantage or economic gain, increase by **3** levels.
- (c) Cross Reference
  - (1) If the purpose of the offense was to facilitate another offense, apply the guideline applicable to an attempt to commit that other offense, if the resulting offense level is greater than that determined above.

### Commentary

*Statutory Provisions:* 18 U.S.C. § 2511; 26 U.S.C. §§ 7213(a)(1)-(3), (a)(5), (d), 7213A, 7216; **42 U.S.C. §§ 16962, 16984**; 47 U.S.C. § 605. For additional statutory provision(s), see Appendix A (Statutory Index).

### Application Notes:

1. ~~Definitions.~~—For purposes of this guideline, "tax return" and "tax return information" have the meaning given the terms "return" and "return information" in 26 U.S.C. § 6103(b)(1) and (2), respectively.
12. *Satellite Cable Transmissions.*—If the offense involved interception of satellite cable transmissions for purposes of commercial advantage or private financial gain (including avoiding payment of fees), apply §2B5.3 (Criminal Infringement of Copyright) rather than this guideline.

*Background:* This section refers to conduct proscribed by 47 U.S.C. § 605 and the Electronic Communications Privacy Act of 1986, which amends 18 U.S.C. § 2511 and other sections of Title 18 dealing with unlawful interception and disclosure of communications. These statutes proscribe the interception and divulging of wire, oral, radio, and electronic communications. The Electronic Communications Privacy Act of 1986 provides for a maximum term of imprisonment of five years for violations involving most types of communication.

This section also refers to conduct relating to the disclosure and inspection of tax returns and tax return information, which is proscribed by 26 U.S.C. §§ 7213(a)(1)-(3), (5), (d), 7213A, and 7216. These statutes provide for a maximum term of imprisonment of five years for most types of disclosure of tax

return information, but provide a maximum term of imprisonment of one year for violations of 26 U.S.C. §§ 7213A and 7216.

**(B) Increased Penalty in 18 U.S.C. § 1001**

**§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 **the** (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.
    - (C) **If the (i) defendant was convicted under 18 U.S.C. § 1001; and (ii) statutory maximum term of imprisonment relating to sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code, is applicable, increase by [2]-[12] levels.**
  - (2) If the offense resulted in substantial interference with the administration of justice, increase by **3** levels.
  - (3) If the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation, increase by **2** levels.
- (c) Cross Reference
  - (1) If the offense involved obstructing the investigation or prosecution of a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

Commentary

*Statutory Provisions:* 18 U.S.C. §§ 1001 (when the statutory maximum term of imprisonment relating to international terrorism—~~or~~, domestic terrorism, or sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code, 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) 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).

3. Convictions for the Underlying Offense.—In the event that the defendant is convicted of an offense sentenced under this section as well as for the underlying offense (*i.e.*, the offense that is the object of the obstruction), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).

4. Upward Departure Considerations.—If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures). In a case involving an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness's face), an upward departure would be warranted.

5. Subsection (b)(1).—The inclusion of "property damage" under subsection (b)(1) is designed to address cases in which property damage is caused or threatened as a means of intimidation or retaliation (*e.g.*, to intimidate a witness from, or retaliate against a witness for, testifying). Subsection (b)(1) is not intended to apply, for example, where the offense consisted of destroying a ledger containing an incriminating entry.

*Background:* This section addresses offenses involving the obstruction of justice generally prosecuted under the above-referenced statutory provisions. Numerous offenses of varying seriousness may constitute obstruction of justice: using threats or force to intimidate or influence a juror or federal officer; obstructing a civil or administrative proceeding; stealing or altering court records; unlawfully intercepting grand jury deliberations; obstructing a criminal investigation; obstructing a state or local investigation of illegal gambling; using intimidation or force to influence testimony, alter evidence, evade legal process, or obstruct the communication of a judge or law enforcement officer; or causing a witness bodily injury or property damage in retaliation for providing testimony, information or evidence in a federal proceeding. The conduct that gives rise to the violation may, therefore, range from a mere threat to an act of extreme violence.

The specific offense characteristics reflect the more serious forms of obstruction. Because the conduct covered by this guideline is frequently part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense, a cross reference to §2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person.

**(C) 18 U.S.C. § 1591 Added to List of Covered Sex Offenses**

**§4B1.5. Repeat and Dangerous Sex Offender Against Minors**

(a) In any case in which the defendant’s instant offense of conviction is a covered sex crime, §4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction:

(1) The offense level shall be the greater of:

(A) the offense level determined under Chapters Two and Three; or

(B) the offense level from the table below decreased by the number of levels corresponding to any applicable adjustment from §3E1.1 (Acceptance of Responsibility):

	<u>Offense Statutory Maximum</u>	<u>Offense Level</u>
(i)	Life	<b>37</b>
(ii)	25 years or more	<b>34</b>
(iii)	20 years or more, but less than 25 years	<b>32</b>
(iv)	15 years or more, but less than 20 years	<b>29</b>
(v)	10 years or more, but less than 15 years	<b>24</b>
(vi)	5 years or more, but less than 10 years	<b>17</b>
(vii)	More than 1 year, but less than 5 years	<b>12.</b>

- (2) The criminal history category shall be the greater of: (A) the criminal history category determined under Chapter Four, Part A (Criminal History); or (B) criminal history Category V.
- (b) In any case in which the defendant's instant offense of conviction is a covered sex crime, neither §4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct:
- (1) The offense level shall be **5** plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than level **22**, the offense level shall be level **22**, decreased by the number of levels corresponding to any applicable adjustment from §3E1.1.
  - (2) The criminal history category shall be the criminal history category determined under Chapter Four, Part A.

Commentary

Application Notes:

1. *Definition.*—For purposes of this guideline, "minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

*"Minor victim" includes (A) an undercover law enforcement officer who represented to the defendant that the officer was a minor; or (B) any minor the officer represented to the defendant would be involved in the prohibited sexual conduct.*

2. *Covered Sex Crime as Instant Offense of Conviction.*—For purposes of this guideline, the instant offense of conviction must be a covered sex crime, *i.e.*: (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iii) of this note.
3. *Application of Subsection (a).*—

(A) *Definitions.*—For purposes of subsection (a):

- (i) "Offense statutory maximum" means the maximum term of imprisonment authorized for the instant offense of conviction that is a covered sex crime, including any increase in that maximum term under a sentencing enhancement provision (such as a sentencing enhancement provision contained in 18 U.S.C.

§ 2247(a) or § 2426(a)) that applies to that covered sex crime because of the defendant's prior criminal record.

- (ii) "Sex offense conviction" (I) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor; and (II) does not include trafficking in, receipt of, or possession of, child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

(B) Determination of Offense Statutory Maximum in the Case of Multiple Counts of Conviction.—In a case in which more than one count of the instant offense of conviction is a felony that is a covered sex crime, the court shall use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (a).

4. Application of Subsection (b).—

(A) Definition.—For purposes of subsection (b), "prohibited sexual conduct" means any of the following: (i) any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) the production of child pornography; or (iii) trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography. It does not include receipt or possession of child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

(B) Determination of Pattern of Activity.—

- (i) In General.—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.
- (ii) Occasion of Prohibited Sexual Conduct.—An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion.

5. Treatment and Monitoring.—

(A) Recommended Maximum Term of Supervised Release.—The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.

(B) Recommended Conditions of Probation and Supervised Release.—Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.

**Background:** This guideline *applies to offenders whose instant offense of conviction is a sex offense committed against a minor* is intended to provide lengthy incarceration for offenders who commit sex offenses against minors and who present a continuing danger to the public. ~~It applies to offenders whose instant offense of conviction is a sex offense committed against a minor victim. The relevant criminal~~



provisions provide for increased statutory maximum penalties for repeat sex offenders and make those increased statutory maximum penalties available if the defendant previously was convicted of any of several federal and state sex offenses (*see* 18 U.S.C. §§ 2247, 2426). In addition, section 632 of Public Law 102–141 and section 505 of Public Law 105–314 directed the Commission to ensure lengthy incarceration for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.

Section 401(i)(1)(A) of Public Law 108–21 directly amended Application Note 4(b)(i), effective April 30, 2003.

## 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, or sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code, is applicable)

\* \* \*

42 U.S.C. § 14905      2B1.1  
 42 U.S.C. § 16962      2H3.1  
 42 U.S.C. § 16984      2H3.1

## Part VI - Provisions Regarding Probation and Supervised Release

### §5B1.3.      Conditions of Probation

(a)      Mandatory Conditions--

- (1)      for any offense, the defendant shall not commit another federal, state or local offense (*see* 18 U.S.C. § 3563(a));
- (2)      for a felony, the defendant shall (A) make restitution, (B) give notice to victims of the offense pursuant to 18 U.S.C. § 3555, or (C) reside, or refrain from residing, in a specified place or area, unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the discretionary conditions set forth under 18 U.S.C. § 3563(b) (*see* 18 U.S.C. § 3563(a)(2));

Note: Section 3563(a)(2) of Title 18, United States Code, provides that, absent unusual circumstances, a defendant convicted of a felony shall abide by at least one of the conditions set forth in 18 U.S.C. § 3563(b)(2), (b)(3), and (b)(13). Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, those conditions were a fine ((b)(2)), an order of restitution ((b)(3)), and community service ((b)(13)). Whether or not the change was intended, the Act deleted the fine condition and renumbered the restitution and community service conditions in 18 U.S.C. § 3563(b), but failed to make a corresponding change in

the referenced paragraphs under 18 U.S.C. § 3563(a)(2). Accordingly, the conditions now referenced are restitution ((b)(2)), notice to victims pursuant to 18 U.S.C. § 3555 ((b)(3)), and an order that the defendant reside, or refrain from residing, in a specified place or area ((b)(13)).

- (3) for any offense, the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3563(a));
- (4) for a domestic violence crime as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a public, private, or non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3563(a));
- (5) for any offense, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3563(a));
- (6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013;
- (7) the defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments (see 18 U.S.C. § 3563(a));
- (8) if the court has imposed a fine, the defendant shall pay the fine or adhere to a court-established payment schedule (see 18 U.S.C. § 3563(a));
- (9) ~~a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student;~~ a sex offender shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16913) by (A) registering, and keeping such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction

of residence; (B) providing information required by 42 U.S.C. § 16914; and (C) keeping such registration current for the full registration period as set forth in 42 U.S.C. § 16915;

- (10) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- (b) The court may impose other conditions of probation to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (C) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (D) the need to protect the public from further crimes of the defendant; and (E) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve only such deprivations of liberty or property as are reasonably necessary for the purposes of sentencing indicated in 18 U.S.C. § 3553(a) (see 18 U.S.C. § 3563(b)).
- (c) (Policy Statement) The following "standard" conditions are recommended for probation. Several of the conditions are expansions of the conditions required by statute:
- (1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;
  - (2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
  - (3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
  - (4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);
  - (5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

- (6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;
  - (7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;
  - (8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;
  - (9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
  - (10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
  - (11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
  - (12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
  - (13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;
  - (14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.
- (d) (Policy Statement) The following "special" conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense -- a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(2) Debt Obligations

If an installment schedule of payment of restitution or a fine is imposed -  
- a condition prohibiting the defendant from incurring new credit charges  
or opening additional lines of credit without approval of the probation  
officer unless the defendant is in compliance with the payment schedule.

(3) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to  
victims, or orders the defendant to pay a fine -- a condition requiring the  
defendant to provide the probation officer access to any requested  
financial information.

(4) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of  
narcotics, other controlled substances or alcohol -- a condition requiring  
the defendant to participate in a program approved by the United States  
Probation Office for substance abuse, which program may include testing  
to determine whether the defendant has reverted to the use of drugs or  
alcohol.

(5) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of  
psychological or psychiatric treatment -- a condition requiring that the  
defendant participate in a mental health program approved by the United  
States Probation Office.

(6) Deportation

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

(7) Sex Offenses

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

(A) A condition requiring the defendant to participate in a program  
approved by the United States Probation Office for the treatment

and monitoring of sex offenders.

- (B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.
- (C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

\* So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(e) Additional Conditions (Policy Statement)

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

(1) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation.

(2) Home Detention

Home detention may be imposed as a condition of probation but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

(3) Community Service

Community service may be imposed as a condition of probation. See §5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of probation. See §5F1.5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and

nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation.

**§5D1.2. Term of Supervised Release**

- (a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:
- (1) At least three years but not more than five years for a defendant convicted of a Class A or B felony.
  - (2) At least two years but not more than three years for a defendant convicted of a Class C or D felony.
  - (3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor.
- (b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—
- (1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or
  - (2) a sex offense.
- (Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.
- (c) The term of supervised release imposed shall be not less than any statutorily required term of supervised release.

Commentary

Application Notes:

~~1. Definition.—For purposes of this guideline, "sex offense" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code, (ii) chapter 110 of such title, not including a recordkeeping offense, or (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iii) of this note.~~

1. Definitions.—For purposes of this guideline:

"Sex offense" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 109B of such title; (iii) chapter 110 of such title, not including a recordkeeping offense; (iv) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (v) an offense under 18 U.S.C. § 1201; or (vi) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (vi) of this note.

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

2. Safety Valve Cases.—A defendant who qualifies under §5C1.2 (Limitation on Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. See 18 U.S.C. § 3553(f). In such a case, the term of supervised release shall be determined under subsection (a).

3. Substantial Assistance Cases.—Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. See 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).

Background: This section specifies the length of a term of supervised release that is to be imposed. Subsection (b) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.

### **§5D1.3. Conditions of Supervised Release**

(a) Mandatory Conditions--

(1) the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3583(d));

(2) the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3583(d));

(3) the defendant who is convicted for a domestic violence crime as defined



in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3583(d));

- (4) the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3583(d));
  - (5) if a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (see 18 U.S.C. § 3624(e));
  - (6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013;
  - (7) ~~a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student;~~ a sex offender shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16913) by (A) registering, and keeping such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (B) providing information required by 42 U.S.C. § 16914; and (C) keeping such registration current for the full registration period as set forth in 42 U.S.C. § 16915;
  - (8) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- (b) The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the

need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

- (c) (Policy Statement) The following "standard" conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:
- (1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;
  - (2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
  - (3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
  - (4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);
  - (5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
  - (6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;
  - (7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;
  - (8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;
  - (9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

- (10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
  - (11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
  - (12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
  - (13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;
  - (14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;
  - (15) the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.
- (d) (Policy Statement) The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:
- (1) Possession of Weapons  
If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense -- a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.
  - (2) Debt Obligations  
If an installment schedule of payment of restitution or a fine is imposed - - a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.
  - (3) Access to Financial Information  
If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine -- a condition requiring the

defendant to provide the probation officer access to any requested financial information.

(4) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol -- a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

(5) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment -- a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) Deportation

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

(7) Sex Offenses

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

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects

upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

\* So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(e) Additional Conditions (Policy Statement)

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

(1) Community Confinement\*

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

\*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.

(2) Home Detention

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

(3) Community Service

Community service may be imposed as a condition of supervised release. See §5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of supervised release. See §5F1.5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

**Part V - Issues for Comment:**

1. *The Commission requests comment regarding how it should incorporate the mandatory minimum terms of imprisonment created or increased by the Adam Walsh Child Protection Act of 2006. There are four potential approaches to consider. First, the Commission can set the base offense level to correspond to the first offense level on the sentencing table with a guideline range in excess of the mandatory minimum. Historically, this is the approach the Commission has taken with respect to drug offenses. For example, a 10-year mandatory minimum would correspond to a base offense level of 32 (121 - 151 months). Second, the Commission can set the base offense level such that the guideline range is the first on the sentencing table to include the mandatory minimum term of imprisonment at any point within the range. Under this approach, a 10-year mandatory minimum would correspond to a base offense level of 31 (108 - 135 months). Third, the Commission could set the base offense level such that the corresponding guideline range is lower than the mandatory minimum term of imprisonment but then anticipate that certain frequently applied specific offense characteristics would increase the offense level and corresponding guideline range to encompass the mandatory minimum. The Commission took this approach in 2004 when it implemented the PROTECT Act. Fourth, the Commission could decide not to change the base offense levels and allow §5G1.1(b) to operate. Section 5G1.1(b) provides that if a mandatory minimum term of imprisonment is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.*
2. *Pursuant to the directive in section 141 of the Act, the Commission must consider, "whether the person committed an offense against a minor in connection with, or during, the period for which the person failed to register." In light of this consideration, the Commission requests comment regarding the scope of the proposed enhancement in §2A3.5(b)(1) of Option 1 and §2A3.5(b)(2) of Option 2 with respect to minors. Should the Commission expand the proposed six-level enhancement so that it would apply in the case of any non-sexual offense committed against a minor? As an alternative to providing tiered enhancements based on the type of offense committed against a minor (as presented in the proposed amendment), should the Commission structure the enhancement so that any offense committed against a minor would warrant an eight-level enhancement and any offense committed against a person other than a minor would warrant a six-level enhancement? If so, should the enhancement also provide a minimum offense level of [24]-[28]?*

3. *The proposed amendment provides in §2A3.5 a [2][4]-level reduction if the defendant voluntarily attempted to correct the failure to register. The Commission requests comment regarding this reduction. Specifically, how should the Commission address circumstances in which it was impossible for the defendant to register, for example, the defendant had a debilitating illness or severe mental impairment, or the jurisdiction in which the defendant works or is a student does not allow non-residents to register. Should the proposed reduction be extended to such circumstances or is there an alternative way in which the Commission should take such circumstances into account in the guidelines?*

*The Commission also requests comment regarding whether it should provide an instruction that the reduction does not apply if any of the proposed specific offense characteristics also apply.*

4. *The Adam Walsh Child Protection Act created a new offense at 18 U.S.C. § 2244(a)(5), with a statutory maximum term of imprisonment of life, for sexual contact that would have violated 18 U.S.C. § 2241(c) (Aggravated sexual abuse with children) had the sexual contact been a sexual act. The proposed amendment addresses this new offense in §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact) by increasing the minimum offense level in subsection (b)(1)(if the victim was under the age of 12 years) from level 20 to level 22. The Commission requests comment regarding whether it should amend §2A3.4 to account specifically for this new offense or whether the current provisions of the guideline are adequate to account for this new offense.*
5. *The proposed amendment references 18 U.S.C. § 2257A (Record keeping requirements) to §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email). For offenses in which the defendant refused to allow an inspection of records in violation of 18 U.S.C. § 2257(f)(5) or § 2257A, the Commission requests comment regarding whether it should provide an application note that provides for an upward departure in such cases or instructs the court to apply §3C1.1.*
6. *The Commission requests comment regarding the proposed new guideline in §2G2.6 that would implement 18 U.S.C. § 2252A(g). Specifically, the Commission requests comment regarding the appropriate base offense level for this new guideline given that the statute provides a mandatory minimum term of imprisonment of 20 years. Additionally, the proposed specific offense characteristics are targeted to offense conduct involving minors. Section 1591 is included as one of the predicate offenses under 18 U.S.C. § 2252A(g) but it is not limited to offenses committed against minors. The Commission requests comment regarding whether it should provide a specific offense characteristic, or expand a proposed specific offense characteristic, to cover all 18 U.S.C. § 1591 offenses. With respect to enhancements, is there additional conduct for which the Commission should consider providing specific offense characteristics? If so, for what conduct, and what is an appropriate increase for that conduct? The Commission further requests comment regarding whether this guideline should provide a decrease if the defendant's conduct was limited to possession or receipt of material involving the sexual exploitation of a minor and the defendant did not intend to traffic in or distribute such material.*

*The Commission also requests comment regarding whether it should provide an enhancement for the use of a computer or interactive an interactive computer service and if so, what would be an appropriate increase for such conduct. The Commission specifically asks whether this enhancement is appropriate if the base offense level is at the lower end of the proposed options.*

7. *The proposed amendment adds to the misleading domain name enhancement in subsection (b)(5) of §2G3.1 the use of embedded words or digital images in the source code of a website to deceive a minor into viewing matter that would be harmful to the minor. The Commission requests comment regarding whether it also should include an enhancement if the offense involved the use of embedded words or digital images to deceive a person other than a minor into viewing obscenity. If so, how many levels would be appropriate for such an enhancement and four levels if the offense deceived a minor into viewing harmful matter?*
8. *The Commission requests comment regarding the interaction of the age enhancement in §2G1.3(b)(5) and the proposed base offense levels. The proposed amendment presents options for reducing the age enhancement in §2G1.3(b)(5) to as far as four levels. Should the Commission consider providing an increase of less than eight levels in any case in which the age of the minor victim is taken into account by the base offense level (because age is an element of the offense)? For example, should four levels be applied if the base offense level takes into account the age of the minor and eight levels be applied if the base offense level does not take age into account?*
9. *The Commission requests comment regarding the interaction of §2G1.3 and §2A3.1, particularly with respect to the application of the cross reference in §2G1.3(c)(3) and the proportionality of resulting offenses levels for a case involving a minor who had not attained the age 12 years. Do any of the proposed offense levels in either guideline need to be increased in order to provide proportionality between §§2G1.3 and 2A1.3 in cases involving a minor who had not attained the age of 12 years, taking into account the new mandatory minimum penalties provided for offenses referenced to these two guidelines? For example, the proposed amendment provides a base offense level of [28][30] if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a). If §2G1.3(c)(3) applies because, for example, the offense involved interstate travel with a minor who had not attained the age of 12 years, the court would apply §2A3.1 and the resulting offense level under that guideline would be 34 (BOL of 30 plus 4 levels for age of minor). If the court does not apply the cross reference and stays in §2G1.3, the resulting offense level would be [36][38] (BOL of [28][30] plus 8 levels for the age of the minor). Are these offense levels appropriate given new mandatory minimum penalties and offense levels currently provided in §2G1.3 and §2A3.1, respectively, or should the Commission provide higher base offense levels in §2G1.3?*



### 3. Technical and Clarifying Amendments to the Sentencing Guidelines

**Synopsis of Proposed Amendment:** *This proposed amendment makes various technical and conforming changes to the guidelines.*

*Specifically, Part A of the proposed amendment corrects typographical errors in §§2B1.1(b)(13)(C), 2D1.11(a), 2K2.1 (Application Note 14), and 2L1.1(b)(1). The proposed amendment also updates Appendix A by eliminating an outdated statutory reference and by including a statutory reference for 18 U.S.C. § 931 to §2K2.6 (Possessing, Purchasing, or Owning Body Armor by Violent Felons).*

*In Part B, the proposed amendment addresses application of the grouping rules when a defendant is sentenced on multiple counts contained in different indictments as, for example, when a case is transferred to another district for purposes of sentencing, pursuant to Fed. R. Crim.P. 20(a). Section 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) is silent as to this issue. The four circuits that have addressed the issue have concluded that the grouping rules apply when a defendant is sentenced on multiple indictments. See United States v. Hernandez Coplin, 24 F.3d 312 (1st Cir. 1994) (holding that §5G1.2's rules regarding sentences imposed at the same time for different indictments must apply to Chapter 3, Part D); United States v. Herula, 464 F.3d 1132 (10th Cir. 2006) (holding that §5G1.2 required that §3D1.4 apply in cases involving multiple counts in separate indictments); United States v. Tolbert, 306 F.3d 244 (5th Cir. 2002) (holding that §5G1.2 requires that total punishment be determined by the grouping principles from Chapter 3, Part D, thus requiring grouping for counts contained in different indictments). See also United States v. Greer, 91 F.3d 996 (7th Cir. 1996) (holding that the district court had erred by not using §5G1.2 to sentence the defendant, who was sentenced for two separate crimes within minutes of each other).*

*The proposed amendment adopts the reasoning of these cases and clarifies that the grouping rules apply not only to multiple counts in the same indictment but also to multiple counts contained in different indictments when a defendant is sentenced on the indictments simultaneously. The proposed amendment provides clarifying language in the Introductory Commentary of Chapter Three, Part D, as well as in §3D1.1. The proposed language is the same language that currently is provided in §5G1.2 (Sentencing on Multiple Counts of Conviction) and relied on by the courts cited in the previous paragraph.*

#### **Proposed Amendment:**

##### **Part A:**

**§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

\* \* \*

(13) (Apply the greater) If—

(A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or

- (B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by **4** levels.
- (C) The cumulative adjustments from application of both subsections (b)(2) and ~~(b)(12)~~(13)(B) shall not exceed **8** levels, except as provided in subdivision (D).
- (D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

\* \* \*

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

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

\* \* \*

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

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

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~~)(6) 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.*

**§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);
- (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
- (3) **12**, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), and (B) the base offense level is determined under subsection (a)(~~2~~)(3), decrease by **3** levels.

\* \* \*

**Appendix A (Statutory Index)**

\* \* \*

18 U.S.C. § 930            2K2.5  
18 U.S.C. § 931            2K2.6  
\* \* \*  
~~18 U.S.C. § 3174~~ — ~~2J1.7~~

**Part B:**  
**Chapter 3, Part D - Multiple Counts**

Introductory Commentary

*This part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. These rules apply to multiple counts of conviction (A) contained in the same indictment or information, or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding. The single, "combined" offense level that results from applying these rules is used, after adjustment pursuant to the guidelines in subsequent parts, to determine the sentence. These rules have been designed primarily with the more commonly prosecuted federal offenses in mind.*

**§3D1.1.            Procedure for Determining Offense Level on Multiple Counts**

\* \* \*

Commentary

Application Notes:

1.     ***In General.**—For purposes of sentencing multiple counts of conviction, counts can be (A) contained in the same indictment or information; (B) contained in different indictments or informations for which sentences are to be imposed at the same time or contained in a consolidated proceeding.*

~~2.~~

\* \* \*

#### **4. Miscellaneous Laws**

**Synopsis of Proposed Amendment:** *This is a two-part amendment that implements recently enacted legislation. Part One of this proposed amendment operates to support the Respect for America’s Fallen Heroes Act, Pub. L. 109–228, which created a new offense in 38 U.S.C. § 2413, prohibiting certain demonstrations at Arlington National Cemetery and at cemeteries under control of the National Cemetery Administration. The penalty for a violation of 38 U.S.C. § 2413 is imprisonment of not more than one year, a fine, or both.*

*The proposed amendment references this new crime to §2B2.3, because the new crime shares with other crimes that are referred to the trespass guideline the basic element of unauthorized access to particular federal land or site. The proposed amendment expands the two-level enhancement in §2B2.3(b)(1) to include Arlington National Cemetery or a cemetery under the control of the National Cemetery Association. (Arlington National Cemetery is, of course, considered a national cemetery, but it is not maintained by the National Cemetery Administration. Rather, it is maintained by the Department of the Army and should be named separately in the Guidelines.).*

*Part Two of this proposed amendment operates to support the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA), Pub.L. 109–162. VAWA includes the International Marriage Broker Regulation Act of 2005 (IMBRA), which requires marriage brokers to collect background information about United States clients and places limitations on the marriage brokers’ sharing of information about foreign national clients. A violation of 8 U.S.C. § 1375a(d)(3)(C) is subject to a misdemeanor conviction with a base offense level of 6. The felony offenses covered under 8 U.S.C. § 1375a(d)(5)(B) will receive a base offense level of 9.*

*The proposed amendment refers the new offense to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Return Information) and expands the heading of the guideline to include the unauthorized disclosure of private information. Currently, the guideline covers the wrongful disclosure of certain tax information. In addition to expanding the guideline to cover IMBRA offenses, the Commission also may wish to consider referencing other similar privacy statutes to this guideline, such as 18 U.S.C. § 1905 (Disclosure of confidential information generally (by an officer or employee of the US)), 42 U.S.C. § 405(c)(2)(C)(viii)(I)-(IV) (pertaining to the unauthorized willful disclosure of social security account numbers and related information), and 42 U.S.C. § 1320d(6) (wrongful disclosure of individually identifiable health information), which currently are not included in Appendix A. The proposed amendment brackets language that would include the wrongful disclosure of confidential information covered by these additional statutes.*

*Following the proposed amendment is an issue for comment regarding implementation of 31 U.S.C. § 5363, which prohibits the acceptance of any financial instrument for unlawful Internet gambling. The offense was created by the Safety and Accountability for Every Port Act (SAFE Port Act), Pub. L. 109–347.*

#### **Proposed Amendment**

##### **I. Respect for America’s Fallen Heroes Act (Public Law 109–228)**

##### **§2B2.3. Trespass**

- (a) Base Offense Level: **4**
- (b) Specific Offense Characteristics
  - (1) If the trespass occurred (A) at a secured government facility; (B) at a nuclear energy facility; (C) on a vessel or aircraft of the United States; (D) in a secured area of an airport; (E) at a residence; (F) at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration; ~~(F)~~ (G) on a computer system used (i) to maintain or operate a critical infrastructure; or (ii) by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.
  - (2) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
  - (3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (i) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
- (c) Cross Reference
  - (1) If the offense was committed with the intent to commit a felony offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above.

Commentary

*Statutory Provisions:* 18 U.S.C. §§ 1030(a)(3), 1036; 38 U.S.C. § 2413; 42 U.S.C. § 7270b. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Airport" has the meaning given that term in section 47102 of title 49, United States Code.*

*"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that*

*provide essential services to the public.*

*"Felony offense" means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought or a conviction was obtained.*

*"Firearm" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions).*

*"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).*

*"Protected computer" means a computer described in 18 U.S.C. § 1030(e)(2)(A) or (B).*

2. Valuation of loss is discussed in the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

**Background:** Most trespasses punishable under federal law involve federal lands or property. The trespass section provides an enhancement for offenses involving trespass on secured government installations, such as nuclear facilities, to protect a significant federal interest. Additionally, an enhancement is provided for trespass at a residence.

\* \* \*

## APPENDIX A (Statutory Index)

38 U.S.C. § 787            2B1.1  
38 U.S.C. § 2413        2B2.3

## II. Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109–162)

### §2H3.1. Interception of Communications; Eavesdropping; Disclosure of Tax Return-Certain Personal Information

- (a) Base Offense Level (Apply the greater):
  - (1) **9**; or
  - (2) **6**, if the defendant was convicted of **8 U.S.C. § 1375a(d)(3)(C); 18 U.S.C. § 1905; 26 U.S.C. § 7213A; [or] 26 U.S.C. § 7216[; 42 U.S.C. § 405(c)(2)(C)(viii)(I)-(IV); or 42 U.S.C. § 1320d-6.**
- (b) Specific Offense Characteristic
  - (1) If the purpose of the offense was to obtain direct or indirect commercial

advantage or economic gain, increase by 3 levels.

(c) Cross Reference

- (1) If the purpose of the offense was to facilitate another offense, apply the guideline applicable to an attempt to commit that other offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 8 U.S.C. § 1375a(d)(3)(C), (d)(5)(B); 18 U.S.C. §§ 1905, 2511; 26 U.S.C. §§ 7213(a)(1)-(3), (a)(5), (d), 7213A, 7216; [42 U.S.C. §§ 405(c)(2)(C)(viii)(I)-(IV), 1320d-6;] 47 U.S.C. § 605. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline, "tax return" and "tax return information" have the meaning given the terms "return" and "return information" in 26 U.S.C. § 6103(b)(1) and (2), respectively.
2. Satellite Cable Transmissions.—If the offense involved interception of satellite cable transmissions for purposes of commercial advantage or private financial gain (including avoiding payment of fees), apply §2B5.3 (Criminal Infringement of Copyright) rather than this guideline.

Background: This section refers to conduct proscribed by 47 U.S.C. § 605 and the Electronic Communications Privacy Act of 1986, which amends 18 U.S.C. § 2511 and other sections of Title 18 dealing with unlawful interception and disclosure of communications. These statutes proscribe the interception and divulging of wire, oral, radio, and electronic communications. The Electronic Communications Privacy Act of 1986 provides for a maximum term of imprisonment of five years for violations involving most types of communication.

This section also refers to conduct relating to the disclosure and inspection of tax returns and tax return information, 26 U.S.C. §§ 7213(a)(1)-(3), (5), (d), 7213A, and 7216. These statutes provide for a maximum term of imprisonment of five years for most types of disclosure of tax return information, but provide a maximum term of imprisonment of one year for violations of 26 U.S.C. §§ 7213A and 7216.

\* \* \*

**APPENDIX A (Statutory Index)**

8 U.S.C. § 1328	2G1.1, 2G1.3
8 U.S.C. § 1375a	2H3.1



\* \* \*

42 U.S.C. § 300i-1	2Q1.4
[42 U.S.C. § 405(c)(2)(C)(viii)(I)-(IV)]	2H3.1]
* * *	

42 U.S.C. § 1320a-7b	2B1.1, 2B4.1
[42 U.S.C. § 1320d-6	2H3.1]

**Issue for Comment:**

*The SAFE Port Act, Pub. L. 109–347, created a new offense in 31 U.S.C. § 5363, prohibiting the acceptance of any financial instrument for unlawful Internet gambling Section 5366 of title 31, United States Code, and providing a statutory maximum term of imprisonment of not more than 5 years. The Commission requests comment regarding how it should implement the new offense. Specifically, should the offense be referenced to §2E3.1 (Gambling Offenses), which provides a base offense level of 6 or, alternatively, a base offense level of 12, if the offense was (A) engaging in a gambling business; (B) transmission of wagering information; or (C) committed as part of, or to facilitate, a commercial gambling operation. If the Commission should reference this statute to §2E3.1, are there additional amendments that should be made to this guideline in order to implement fully the new offense? For example, should the Commission provide a cross reference to either §2S1.1 (Laundering of Monetary Instruments) or §2S1.3 (Structuring Transactions to Evade Reporting Requirements) if the offense involves conduct more adequately covered by either of those guidelines? Alternatively, should 31 U.S.C. § 5363 be referenced to either §2S1.1 or §2S1.3 instead of §2E3.1, and if so, what other modifications, if any, should be made in those guidelines to implement fully the new offense?*

## 5. Re-Promulgation of Emergency Intellectual Property Amendment

**Synopsis of Proposed Amendment:** *This proposed amendment re-promulgates the emergency amendment, effective September 12, 2006, that responded to the directive contained in section 1(c) of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109–181. The directive, which required the Commission to promulgate an amendment under emergency amendment authority by September 12, 2006, instructs the Commission to "review, and if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 2318 or 2320 of title 18, United States Code." The directive further provides that the Commission shall:*

*determine whether the definition of "infringement amount" set forth in application note 2 of section 2B5.3 of the Federal sentencing guidelines is adequate to address situations in which the defendant has been convicted of one of the offenses [under section 2318 or 2320 of title 18, United States Code] and the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement, such as an anti-circumvention device, or the item in which the defendant trafficked was infringing and also was intended to facilitate infringement in another good or service, such as a counterfeit label, documentation, or packaging, taking into account cases such as U.S. v. Sung, 87 F.3d 194 (7th Cir. 1996).*

*The emergency amendment added subdivision (vii) to Application Note 2(A) of §2B5.3 (Criminal Infringement of Copyright or Trademark) to provide that the infringement amount is based on the retail value of the infringed item in a case under 18 U.S.C. §§ 2318 or 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service. This proposed amendment would re-promulgate this application note as a permanent amendment to §2B5.3.*

*The emergency amendment did not address the portion of the directive pertaining to anti-circumvention devices. This proposed amendment addresses that portion of the directive in two ways. First, the proposed amendment presents two options for addressing the trafficking in devices that circumvent a technological measure. Option One expands the specific offense characteristic in §2B5.3(b)(3) to include convictions under 17 U.S.C. § 1201(b) for trafficking in devices that circumvent a technological measure. Currently, §2B5.3(b)(3) provides a two-level enhancement and a minimum offense level of 12 for cases involving the manufacture, importation, or uploading of infringing items. The purpose of the enhancement in §2B5.3(b)(3) is to provide greater punishment for defendants who put infringing items into the stream of commerce, thereby enabling other individuals to infringe the copyright or trademark. See App. C (Amendment 594, effective Nov. 1, 2000). A defendant who traffics in devices that circumvent a technological measure similarly enables others to infringe a copyright and arguably warrants greater punishment. The minimum offense level guarantees the defendant will be in Zone D of the Sentencing Table. Under this option, the minimum offense level also works as a proxy for the infringement amount.*

*Options Two and Three address trafficking in devices used to circumvent a technological measure by providing a special rule under Application Note 1 for determining the infringement amount. Option Two adds trafficking cases to the note pertaining to the retail value of the infringing item. Under this option, the court would use the retail value of the device (the "infringing item") multiplied by the number of devices involved in the offense. Option Three is similar but provides two alternative measures under a new Application Note 1(C). It instructs the court to determine the infringement amount by using the*

greater of two calculations: (i) the retail value of the device multiplied by the number of such devices; and (ii) the number of such devices multiplied by the price a person legitimately using the device to access or make use of a copyrighted work would have paid.

All options use the statutory definition of "circumvent a technological measure" found in 17 U.S.C. § 1201(a)(3)(A), which is "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner."

Second, the proposed amendment adds an application note regarding the determination of the infringement amount in cases under 17 U.S.C. §§ 1201 and 1204 in which the defendant circumvented a technological measure. In such an offense, the "retail value of the infringed item" is the price the user would have paid to access lawfully the copyrighted work, and the "infringed item" is the accessed work.

Two issues for comment follow the proposed amendment. The first issue is regarding whether the Commission should amend §2B5.3 to provide a downward departure for cases in which the infringement amount overstates the seriousness of the offense. The second issue is regarding the interaction between the proposed provisions on circumventing a technological measure and application of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

#### **Proposed Amendment:**

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
  - (1) If the infringement amount (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
  - (2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by **2** levels.

Option 1:

- [(3) If the (A) offense involved the manufacture, importation, or uploading of infringing items; or (B) defendant was convicted under 17 U.S.C. §§ 1201(b) and 1204 for trafficking in devices used to circumvent a technological measure, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.]
- (4) If the offense was not committed for commercial advantage or private financial gain, decrease by **2** levels, but the resulting offense level shall be not less than level **8**.

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

Commentary

*Statutory Provisions:* 17 U.S.C. § 506(a), 1201, 1204; 18 U.S.C. §§ 2318-2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Circumvent a technological measure" has the meaning given that term in 17 U.S.C. § 1201(a)(3)(A).*

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

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

*"Infringing item" means the item that violates the copyright or trademark laws.*

*"Uploading" means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (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:

- (i) The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item.
- (ii) The retail price of the infringing item is not less than 75% of the retail price of the infringed item.

- (iii) *The retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding.*
- (iv) *The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511. (In a case involving such an offense, the "retail value of the infringed item" is the price the user of the transmission would have paid to lawfully receive that transmission, and the "infringed item" is the satellite transmission rather than the intercepting device.)*
- (v) *The retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.*
- (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.*
- (vii) *A case under 18 U.S.C. §§ 2318 or 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service.*
- (viii) *A case under 17 U.S.C. §§ 1201 and 1204 in which the defendant circumvented a technological measure. In such an offense, the "retail value of the infringed item" is the price the user would have paid to access lawfully the copyrighted work, and the "infringed item" is the accessed work.*

[Option 2:

- (B) *Use of Retail Value of Infringing Item.*—*The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. § 2319A. This note also applies in a case involving the trafficking of devices used to circumvent a technological measure in violation of 17 U.S.C. §§ 1201 and 1204. In such a case the ‘infringing item’ is the device.]*

[Option 3:

- (C) *Determination of Infringement Amount in Cases Involving Trafficking in Devices Used to Circumvent a Technological Measure.*—*In a case in which the defendant is convicted under 17 U.S.C. §§ 1201(b) and 1204 for trafficking in a device used to circumvent a technological measure, the infringement amount is the greater of the following:*
  - (i) *the number of such devices multiplied by the retail value of the device; or*

- (ii) *the number of such devices multiplied by the price a person legitimately using the device to access or make use of a copyrighted work would have paid.]*

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

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

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

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

- (A) *The offense involved substantial harm to the reputation of the copyright or trademark owner.*
- (B) *The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.*

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

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act of 1997, Pub. L. 105–147, by using the retail value of the infringed item, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a

reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be inappropriate. In these types of cases, use of the retail value of the infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.

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

*[Option 1: Subsection (b)(3)(B) and] Application Notes 1(a)(vii) and [Option 2: (viii)] [Option 3: 1(C)] implement the directive in section 1(c) of Public Law 109–181.*

#### **Issues for Comment:**

1. *The Commission requests comment regarding whether it should provide a downward departure provision for cases in which the infringement amount overstates the seriousness of the offense.*
2. *The Commission requests comment regarding the interaction of Application Note 4 pertaining to the application of §3B1.3 (Abuse of Position of Trust or Use of Special Skill). This application note, added in 2000 as part of the Commission’s implementation of the No Electronic Theft Act, provides that an adjustment under §3B1.3 shall apply in any case in which the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item. The Commission has received comment that not every de-encryption or circumvention case involves a "special skill" as that term is defined in §3B1.3 ("a skill not possessed by members of the general public and usually requiring substantial education, training or licensing"). Additionally, the proposed amendment specifically addresses cases involving the circumvention of a technological measure, either in the form of trafficking in devices used to circumvent a technological measure or in the determination of infringement amount in cases involving actual circumvention. Should the Commission delete Application Note 4 because the skill, whatever degree, needed to de-encrypt or circumvent a technological measure would be taken into account in §2B5.3? As an alternative, should the Commission modify the note to emphasize that §3B1.3 applies only when the defendant’s skill in de-encrypting or otherwise circumventing a technological measure was one not possessed by the general public, as contemplated by §3B1.3?*

## 6. Terrorism

**Synopsis of Proposed Amendment:** *This multi-part proposed amendment implements the USA PATRIOT Improvement and Reauthorization Act of 2005 (the "USA PATRIOT Act"), Pub. L. 109–177, and the Department of Homeland Security Appropriations Act, 2007 (the "Homeland Security Act"), Pub. L. 109–295.*

*Part I of the proposed amendment addresses section 122 of the PATRIOT Act, which created a new offense in 21 U.S.C. § 960a covering narco-terrorism. This new offense prohibits engaging in conduct that would be covered under 21 U.S.C. § 841(a) if committed under the jurisdiction of the United States, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity (defined in section 212(a)(3)(B) of the Immigration and Nationality Act) or terrorism (defined in section 140(d)(2) of the Foreign Relations Authorization Act). The penalty is not less than twice the minimum punishment under 21 U.S.C. § 841(b)(1) and not more than life. Section 960a also provides a mandatory term of supervised release of at least 5 years.*

*The proposed amendment presents two options for addressing this new offense, although under either option the sentence determination is the same. Option 1 would amend §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide a new base offense level of 6 plus the offense level specified in the Drug Quantity Table if the defendant was convicted under 21 U.S.C. § 960a (*see* proposed §2D1.1(a)(4)). Option 2 would create a new guideline in §2D1.14 (Narco-Terrorism) that would add 6 levels to the offense level determined under §2D1.1. Both options bracket the exclusion of the mitigating role cap in §2D1.1(a)(3) and the safety valve reduction in §2D1.1(b)(9) to highlight this discussion point for the Commission. The proposed amendment also provides a corresponding amendment to Appendix A (Statutory Index).*

*Part II of the proposed amendment addresses section 551 of the Homeland Security Act, which created a new offense in 18 U.S.C. § 554 regarding the construction of border tunnels and subterranean passages that cross the international boundary between the United States and another country. (The USA PATRIOT Act also amended title 18, United States Code, to provide a new offense in 18 U.S.C. § 554 for smuggling goods from the United States. For purposes of presenting proposed statutory references, the proposed amendments to Appendix A (Statutory Index) for border tunnels is presented in Part II and the proposed amendments to Appendix A (Statutory Index) for smuggling goods from the United States is presented in Part IV.) Section 554(a) prohibits the construction or financing of such tunnels and passages and provides a statutory maximum term of imprisonment of 20 years. Section 554(b) prohibits the knowing or reckless disregard of the construction on land the person owns or controls and provides a statutory maximum term of imprisonment of 10 years. Section 554(c) prohibits the use of the tunnels to smuggle an alien, goods (in violation of 18 U.S.C. § 545), controlled substances, weapons of mass destruction (including biological weapons), or a member of a terrorist organization (defined in 18 U.S.C. § 2339B(g)(6)) and provides a penalty of twice the maximum term of imprisonment that would have otherwise been applicable had the unlawful activity not made use of the tunnel or passage.*

*Section 551(c) of the Homeland Security Act also directs the Commission, under its regular amendment authority, to promulgate or amend the guidelines to provide for increased penalties for persons convicted of offenses under 18 U.S.C. § 554. In carrying out this directive, the Commission "shall—*

*(A) ensure that the sentencing guidelines, policy statements, and official commentary*



*reflect the serious nature of the offenses described in section 554 of title 18, United States Code, and the need for aggressive and appropriate law enforcement action to prevent such offenses;*

*(B) provide adequate base offense levels for offenses under such section;*

*(C) account for any aggravating or mitigating circumstances that might justify exceptions, including—*

*(i) the use of a tunnel or passage described in subsection (a) of such section to facilitate other felonies; and*

*(ii) the circumstances for which the sentencing guidelines currently provide applicable sentencing enhancements;*

*(D) ensure reasonable consistency with other relevant directives, other sentencing guidelines, and statutes;*

*(E) make any necessary and conforming changes to the sentencing guidelines and policy statements; and*

*(F) ensure that the sentencing guidelines adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code.*

*The proposed amendment provides a new guideline in §2X7.1 (Border Tunnels and Subterranean Passages) for this offense. If the defendant was convicted under 18 U.S.C. § 554(a) or (c), the base offense level would be 4 plus the offense level applicable to the underlying smuggling offense. If the defendant was convicted under 18 U.S.C. § 554(b), the proposed amendment provides a base offense level of 8.*

*Part III of the proposed amendment addresses other new offenses created by the PATRIOT Act. Based on an assessment of similar offenses already covered by the relevant guidelines, the proposed amendment provides for the following:*

*(A) The new offense in 18 U.S.C. § 554, pertaining to smuggling of goods from the United States is referenced to §§2B1.5 (Cultural Heritage), 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), and 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants).*

*(B) The new offense in 18 U.S.C. § 2282A, pertaining to mining of US navigable waters, is referenced to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2B1.1 (Fraud, Theft, and Property Damage), 2K1.4 (Arson; Property Damage by Use of Explosives), and 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)). The proposed amendment also adds vessel, maritime facility, and a vessel's cargo to §2K1.4(a)(1) and (a)(2) to cover conduct described in 18 U.S.C. § 2282A. The definitions provided for vessel, maritime facility, and aids to maritime navigation come from title 33 of the Code of Federal Regulations pertaining to the United States Coast Guard, specifically Navigation and Navigable Waters.*

*Section 2282B, pertaining to violence against maritime navigational aids, is referenced to §§2B1.1, 2K1.4, and 2X1.1. Section 2K1.4(a) is amended to provide a new base offense level of [16] [if the offense involved the destruction of or tampering with aids to maritime navigation][if the offense of conviction is 18 U.S.C. § 2282B].*

*(C) The new offense in 18 U.S.C. § 2283 pertaining to transporting biological and chemical weapons is referenced to §§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2M5.3*

*(Providing Material Support or Resources to Designated Foreign Terrorism Organizations of For a Terrorist Purpose), 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction). The new offense in 18 U.S.C. § 2284 pertaining to transporting terrorists is referenced to §§2M5.3, 2X2.1 (Aiding and Abetting), and 2X3.1 (Accessory After the Fact).*

*Part IV of the proposed amendment addresses two other statutes that were amended by the PATRIOT Act as follows:*

- (A) Section 2341 of title 18, United States Code, which provides definitions for offenses involving contraband cigarettes and smokeless tobacco, was amended to reduce the number of contraband cigarettes necessary to violate the substantive offenses set forth in 18 U.S.C. §§ 2342 and 2344 from 60,000 to 10,000. The proposed amendment makes conforming changes to the background commentary of §2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes). The proposed amendment also expands the headings of Chapter Two, Part E, Subpart 4 and §2E4.1 to include smokeless tobacco.*
- (B) The Act increased the statutory maximum term of imprisonment for offenses covered by the International Emergency Economic Powers Act (50 U.S.C. § 1705) from 10 years to 20 years to make penalties for these offenses commensurate with terrorist financing violations. The proposed amendment references 50 U.S.C. § 1705 to §2M5.3 and also modifies the heading of the guideline to include "specially designated global terrorist" because it is another list identifying terrorists and terrorist organizations.*

*Part V of the proposed amendment sets forth all of the proposed statutory references in Appendix A (Statutory Index) for the new offenses described in Parts III and IV.*

*Part VI of the proposed amendment presents two issues for comment. The first requests comment regarding whether current guideline penalties are sufficient for increases in statutory maximum terms of imprisonment to 18 U.S.C. §§ 545 and 549. The second issue for comment addresses a directive contained in the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162, regarding a defendant who is convicted of a Federal offense while wearing or displaying insignia and uniform received in violation of 18 U.S.C. § 716.*

## **Proposed Amendment:**

### **Part I - Narco-Terrorism**

#### **Option 1:**

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

- (a) Base Offense Level (Apply the greatest):**
  - (1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury**

resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

- (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (3) [Except if the defendant is convicted under 21 U.S.C. § 960a,] the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels[-; or]
- (4) [4][6] plus the offense level specified in the Drug Quantity Table set forth in subsection (c) if the defendant was convicted under 21 U.S.C. § 960a.

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
- (2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.
- (3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.
- (4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.
- (5) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.
- (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.
- (8) (Apply the greater):
  - (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
  - (B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.
  - (C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.
- (9) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), [and the defendant was not convicted under 21 U.S.C. § 960a,] decrease by **2** levels.]

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(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.
- (2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

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

Commentary

\* \* \*

Background: Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense.

The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 32 and 26 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.

The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.

[USE WITH OPTION TO ADD 6 LEVELS:

*Section 960a of title 21, United States Code, provides that a defendant shall be sentenced to a term of imprisonment of not less than twice the minimum punishment under 21 U.S.C. § 841(b)(1). Adding six levels to the offense level determined under the Drug Quantity Table for convictions under 21 U.S.C. § 960a establishes a guideline range with a lower limit as close to twice the statutory minimum as possible; e.g., offense level 32 plus [6] levels provides a range of 235 to 293 months, corresponding to a statutory minimum of 20 years or 240 months.]*

For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt. Consequently, the Commission adopted the policy that each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater.

Specific Offense Characteristic (b)(2) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in *Chapman v. United States*, 111 S.Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence (see *Chapman*; §5G1.1(b)).

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

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

## Option 2:

### **[§2D1.14. Narco-Terrorism**

- (a) Base Offense Level: [4][6] plus the offense level from §2D1.1 applicable for the underlying offense[, except that §2D1.1(a)(3) and (b)(9) shall not apply].

#### Commentary

Statutory Provision: 21 U.S.C. § 960a.

#### Application Note:

1. In General.—The base offense level is determined using the Drug Quantity Table in §2D1.1(c) and any appropriate specific offense characteristics in §2D1.1(b)(1) through (b)(8).

Background: This guideline implements 21 U.S.C. § 960a, which provides that a defendant shall be sentenced to a term of imprisonment of not less than twice the minimum punishment under 21 U.S.C.

*§ 841(b)(1). [Use the following with Option to add six levels under subsection (a): Adding six levels to the offense level determined under §2D1.1 establishes a guideline range with a lower limit as close to twice the statutory minimum as possible; e.g., offense level 32 plus 6 levels provides a range of 235 to 293 months, corresponding to a statutory minimum of 20 years or 240 months.]]*

## **Appendix A (Statutory Index)**

21 U.S.C. § 960(d)(7) 2D3.2  
21 U.S.C. § 960a [Option 1: 2D1.1][Option 2: 2D1.14]

## **Part II - Border Tunnels**

### **7. OFFENSES INVOLVING BORDER TUNNELS**

#### **§2X7.1. Border Tunnels and Subterranean Passages**

(a) Base Offense Level:

- (1) If the defendant was convicted under 18 U.S.C. § 554(c), [4] plus the offense level applicable to the underlying smuggling offense. If the resulting offense level is less than level [16], increase to level [16].
- (2) [16], if the defendant was convicted under 18 U.S.C. § 554(a); or
- (3) [8][9], if the defendant was convicted under 18 U.S.C. § 554(b).

#### Commentary

Statutory Provision: 18 U.S.C. § 554.

#### Application Note:

1. Definition.—For purposes of this guideline, "underlying smuggling offense" means the smuggling offense the defendant committed through the use of the tunnel or subterranean passage.

## **APPENDIX A (Statutory Index)**

18 U.S.C. § 553(a)(2) 2B1.1, 2B6.1  
18 U.S.C. § 554 2X7.1

## **Part III - Other New Offenses**

(A) 18 U.S.C. § 554 (Smuggling From the US)

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

\* \* \*

Commentary

*Statutory Provisions:* 16 U.S.C. §§ 470ee, 668(a), 707(b); 18 U.S.C. §§ 541-546, 554, 641, 661-662, 666, 668, 1152-1153, 1163, 1168, 1170, 1361, 1369, 2232, 2314-2315.

\* \* \*

§2M5.2. **Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License**

(a) Base Offense Level:

- (1) 26, except as provided in subdivision (2) below;
- (2) 14, if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten.

Commentary

*Statutory Provisions:* 18 U.S.C. § 554; 22 U.S.C. §§ 2778, 2780.

\* \* \*

§2Q2.1. **Offenses Involving Fish, Wildlife, and Plants**

\* \* \*

Commentary

*Statutory Provisions:* 16 U.S.C. §§ 668(a), 707(b), 1174(a), 1338(a), 1375(b), 1540(b), 3373(d); 18 U.S.C. § 545, 554. For additional statutory provision(s), see Appendix A (Statutory Index).

\* \* \*

**Background:** This section applies to violations of the Endangered Species Act, the Bald Eagle Protection Act, the Migratory Bird Treaty, the Marine Mammal Protection Act, the Wild Free-Roaming Horses and Burros Act, the Fur Seal Act, the Lacey Act, and to violations of 18 U.S.C. §§ 545 and 554 **whereif** the smuggling activity involved fish, wildlife, or plants.

(B) 18 U.S.C. §§ 2282A (Mining US Waters) and 2282B (Violence Against Navigational Aids)



§2K1.4.

Arson; Property Damage by Use of Explosives

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

- (1) **24**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; or (B) involved the destruction or attempted destruction of a dwelling, an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, ~~a ferry~~, **a maritime facility, a vessel, or a vessel's cargo**, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use;
- (2) **20**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than (i) a dwelling, or (ii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, ~~a ferry~~, **a maritime facility, a vessel, or a vessel's cargo**, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or (C) endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, ~~a ferry~~, **a maritime facility, a vessel, or a vessel's cargo**, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; ~~or~~
- (3) **[16,]** **[if the offense involved the destruction of or tampering with aids to maritime navigation][if the offense of conviction is 18 U.S.C. § 2282B];**  
**or**
- ~~(3)~~(4) **2** plus the offense level from §2B1.1 (Theft, Property Destruction, and Fraud).

(b) Specific Offense Characteristics

- (1) If the offense was committed to conceal another offense, increase by **2** levels.
- (2) If the base offense level is not determined under (a)~~(3)~~(4), and the offense occurred on a national cemetery, increase by **2** levels.

(c) Cross Reference

- (1) If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is

greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(a), (b), 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 1992, 1993(a)(1), (a)(2), (a)(3), (b), 2275, **2282A, 2282B, 2332a, 2332f**; 49 U.S.C. § 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Aids to maritime navigation" means any device external to a vessel intended to assist the navigator to determine position or save course, or to warn of dangers or obstructions to navigation.*

*"Explosives" includes any explosive, explosive material, or destructive device.*

*"Maritime facility" means any structure or facility of any kind located in, on, under, or adjacent to any waters subject to the jurisdiction of the United States and used, operated, or maintained by a public or private entity, including any contiguous or adjoining property under common ownership or operation.*

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

*"Mass transportation" has the meaning given that term in 18 U.S.C. § ~~1993(c)(5)~~1992(d)(7).*

*"State or government facility", "infrastructure facility", "place of public use", and "public transportation system" have the meaning given those terms in 18 U.S.C. § 2332f(e)(3), (5), (6), and (7), respectively.*

*"Vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.*

2. Risk of Death or Serious Bodily Injury.—Creating a substantial risk of death or serious bodily injury includes creating that risk to fire fighters and other emergency and law enforcement personnel who respond to or investigate an offense.
3. Upward Departure Provision.—If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

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

(C) **18 U.S.C. §§ 2283 (Transporting Biological, Chemical Materials) and 2284 (Transporting Terrorists)**

**§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials**

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a)-(e), (h), (i), (l)-(o), (p)(2), 844(d), (g), 1716, 2283; 26 U.S.C. § 5685.

\* \* \*

**§2M5.3. Providing Material Support or Resources to Designated Foreign Terrorist Organizations or For a Terrorist Purpose**

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ 2283, 2284, 2339B, 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(B)).

\* \* \*

**§2M6.1. Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, **Transport**, 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), 2283, 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).

\* \* \*

**§2X2.1. Aiding and Abetting**

The offense level is the same level as that for the underlying offense.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2, 2284, 2339, 2339A, 2339C(a)(1)(A).

\* \* \*

**§2X3.1.      Accessory After the Fact**

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ 3, 757, 1071, 1072, 2284, 2339, 2339A, 2339C(c)(2)(A), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(A)).

\* \* \*

**Part IV - Increased Penalties and Other Statutory Changes**

**(A)      18 U.S.C. § 2341 (Smokeless Tobacco and Counterfeit Cigarettes)**

**4.      TRAFFICKING IN CONTRABAND CIGARETTES AND SMOKELESS TOBACCO**

**§2E4.1.      Unlawful Conduct Relating to Contraband Cigarettes and Smokeless Tobacco**

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

(1)      **9**; or

(2)      the offense level from the table in §2T4.1 (Tax Table) corresponding to the amount of the tax evaded.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2342(a), 2344(a).

Application Note:

1.      "Tax evaded" refers to state excise tax.

Background: The conduct covered by this section generally involves evasion of state excise taxes. At least ~~60,000~~**10,000** cigarettes must be involved. Because this offense is basically a tax matter, it is

graded by use of the tax table in §2T4.1.

(B) 50 U.S.C. § 1705 - IEEPA violations

**§2M5.3. Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose**

- (a) Base Offense Level: **26**
- (b) Specific Offense Characteristic
  - (1) If the offense involved the provision of (A) dangerous weapons; (B) firearms; (C) explosives; (D) funds with the intent, knowledge, or reason to believe such funds would be used to purchase any of the items described in subdivisions (A) through (C); or (E) funds or other material support or resources with the intent, knowledge, or reason to believe they are to be used to commit or assist in the commission of a violent act, increase by **2** levels.
- (c) Cross References
  - (1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) otherwise, if the resulting offense level is greater than that determined above.
  - (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.
  - (3) If the offense involved the provision of (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

Commentary

*Statutory Provisions:* 18 U.S.C. §§ 2339B, 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(B)); **50 U.S.C. § 1705; 50 U.S.C. App. § 1701.**

Application Notes:

1. Definitions.—For purposes of this guideline:

"Biological agent", "chemical weapon", "nuclear byproduct material", "nuclear material", "toxin", and "weapon of mass destruction" have the meaning given those terms in Application Note 1 of the Commentary to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction).

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

"Explosives" has the meaning given that term in Application Note 1 of the Commentary to §2K1.4 (Arson; Property Damage by Use of Explosives).

"Foreign terrorist organization" has the meaning given the term "terrorist organization" in 18 U.S.C. § 2339B(g)(6).

"Material support or resources" has the meaning given that term in 18 U.S.C. § 2339B(g)(4).

*"Specially designated global terrorist" means any foreign person or person so designated pursuant to Executive Order 13224 of September 23, 2001.*

2. Departure Provisions.—

(A) In General.—*In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of the funds or other material support or resources involved, the extent of planning or sophistication, and whether there were multiple occurrences. In a case in which such factors are present in an extreme form, a departure from the guidelines may be warranted. See Chapter Five, Part K (Departures).*

(B) War or Armed Conflict.—*In the case of a violation during time of war or armed conflict, an upward departure may be warranted.*

**Part V - Statutory Index Amendments**

**Appendix A (Statutory Index)**

18 U.S.C. § 553(a)(2) 2B1.1, 2B6.1  
18 U.S.C. § 554 2B1.5, 2M5.2, 2Q2.1

\* \* \*

18 U.S.C. 2281 2A1.1, 2A1.2, 2A1.3,  
2A1.4, 2A2.1, 2A2.2,  
2A2.3, 2A4.1, 2B1.1,  
2B3.1, 2B3.2, 2K1.4,  
2X1.1

18 U.S.C. § 2282A 2A1.1, 2A1.2, 2B1.1,  
2K1.4, 2X1.1

18 U.S.C. § 2282B 2B1.1, 2K1.4, 2X1.1

18 U.S.C. § 2283	2K1.3, 2M5.3, 2M6.1	
18 U.S.C. § 2284	2M5.3, 2X2.1, 2X3.1	
		* * *
18 U.S.C. § 2339	2M5.3, 2X2.1, 2X3.1	
		* * *
50 U.S.C. § 783(c)	2M3.3	
50 U.S.C. § 1705	2M5.3	
		* * *
50 U.S.C. App. § 1701	2M5.1, 2M5.2, 2M5.3	

**Part VI - Issues for Comment:**

1. *The USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177 increased the statutory maximum terms of imprisonment for 18 U.S.C. § 545 from 5 years to 20 years and for 18 U.S.C. § 549 from 2 years to 10 years. The guidelines currently reference 18 U.S.C. § 545 offenses to §§2B1.5 (Cultural Heritage), 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), and 2T3.1 (Evading Import Duties; Smuggling). Section 549 offenses are referenced to §§2B1.1 (Theft, Fraud, and Property Damage) and 2T3.1. The Commission requests comment regarding whether the current referenced guidelines provide sufficient penalties for 18 U.S.C. §§ 545 and 549 offenses in light of the increased statutory maximum terms of imprisonment. If not, how should the Commission amend these guidelines to provide adequate punishment?*
2. *Part II of the proposed amendment creates a new guideline, §2X7.1 (Border Tunnels and Subterranean Passages) to implement the new offense in 18 U.S.C. § 554. The Commission requests comment regarding the proposed offense levels, specifically whether the offense levels for any of subsections ought to be higher than proposed, and if so, what would be appropriate offense levels for convictions under 18 U.S.C. § 554(a), (b), and (c), respectively?*
3. *Section 1191(c) of Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162, directs the Commission to amend the guidelines "to assure that the sentence imposed on a defendant who is convicted of a Federal offense while wearing or displaying insignia and uniform received in violation of section 716 of title 18, United States Code, reflects the gravity of this aggravating factor." Section 716, of title 18, United States Code, is a class B misdemeanor to which the guidelines do not apply. Notwithstanding, the Commission requests comment regarding how it should address this directive. For example, should the Commission provide a Chapter Three adjustment applicable in any case in which a uniform or insignia received in violation of 18 U.S.C. § 716 was worn or displayed during the commission of the federal offense? If so, how many levels would be appropriate for such an adjustment? If not, what alternatives should the Commission consider? Alternatively, should the Commission amend Chapter Five, Part K (Departures) to provide a new upward departure provision for such cases? The Commission also requests comment regarding whether, instead of an adjustment or departure, the Commission should provide an application note, perhaps in §1B1.9 (Class B or C Misdemeanors and Infractions), recognizing the directive but explaining that the guidelines do not apply to Class B or C misdemeanors.*

## 7. Drugs

**Synopsis of Proposed Amendment:** *This proposed amendment addresses new offenses created by the USA PATRIOT Improvement and Reauthorization Act of 2005 (the "PATRIOT Act"), Pub. L. 109–177, and the Adam Walsh Child Protection and Safety Act of 2006 (the "Adam Walsh Act"), Pub. L. 109–248.*

*First, the proposed amendment addresses 21 U.S.C. § 865, which provides a mandatory consecutive sentence of not more than 15 years' imprisonment for any drug offense involving the smuggling of methamphetamine or any listed chemical while using a facilitated entry program for entry into the United States. The proposed amendment provides a new two-level enhancement in §§2D1.1(b)(5) and 2D1.11(b)(5) if the defendant is convicted under 21 U.S.C. § 865. A proposed application note in both guidelines provides instruction as to how the court should impose a sentence in order to comply with the statutory requirement of a consecutive sentence.*

*Second, the proposed amendment provides three options for addressing the new offense in 21 U.S.C. § 841(g), which was created by the Adam Walsh Act. This offense prohibits the use of the Internet to distribute a date rape drug to any person, "knowing or with reasonable cause to believe that — (A) the drug would be used in the commission of criminal sexual conduct; or (B) the person is not an authorized purchaser." The statute defines "date rape drug" as "(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol; (ii) ketamine; (iii) flunitrazepam; or (iv) any substance which the Attorney General designates...to be used in committing rape or sexual assault." The penalty is not more than 20 years' imprisonment.*

*Option One provides a new [two-][four-]level enhancement in §2D1.1(b)(9) if the defendant was convicted under 21 U.S.C. § 841(g). Option Two focuses on the more serious conduct of distributing the drug knowing or having reason to believe it would be used to commit criminal sexual conduct. This option also requires a conviction under 21 U.S.C. § 841(g) but provides a four-level enhancement if the defendant knew or had reasonable cause to believe the drug would be used in the commission of criminal sexual conduct. Option Three adopts a tiered approach: if the defendant knew the drug was to be used to commit criminal sexual conduct, add six levels with a floor of 29; if the defendant had reasonable cause to believe the drug would be used to commit criminal sexual conduct, add three levels with a floor of 26; in all other cases involving a conviction under this section, that is to say, the defendant sold the drug to an unauthorized purchaser, add two levels. "Criminal sexual conduct" is defined as any offense covered by the criminal sexual abuse guidelines (Chapter 2, Part A, Section 3). (Section 841(g) of title 21, United States Code, does not define this term.)*

*Third, the proposed amendment addresses the new offense in 21 U.S.C. § 860a, which provides a mandatory consecutive term of imprisonment of not more than 20 years for manufacturing, distributing, or possessing with the intent to manufacture or distribute, methamphetamine on a premises in which a minor is present or resides. Two options are presented. The first option recognizes that currently §2D1.1(b)(8) provides a six-level enhancement and a minimum offense level of 30, if the offense involved the manufacture of methamphetamine or amphetamine and the offense created a substantial risk of harm to the life of a minor or incompetent (the "substantial risk of harm" enhancement). The Commission added this provision in 2000 in response to a very specific congressional directive contained in the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310. *See* USSG App. C (amendments 608 and 620 (effective Dec. 12, 2000, and Nov. 1, 2001, respectively)). To address the overlap of conduct covered by the substantial risk of harm enhancement and the new offense, the proposed amendment would apply in any case in which the defendant is convicted under 21 U.S.C. § 860a and the substantial risk of harm enhancement does not apply. Thus, two levels will be applied in a case in which a minor is*



*present, but in which the offense did not create a substantial risk of harm to the life of a minor. In any methamphetamine manufacturing case in which the government proves a substantial risk of harm to the life of a minor, the offense level will be increased by six levels and the defendant will be subject to a minimum offense level of 30. The second option, recognizing that manufacturing methamphetamine poses an inherent danger to minors, establishes an enhancement for manufacturing and possession with intent to manufacture that is separate and apart from proving substantial risk of harm to the life of the minor under existing §2D1.1(b)(8). Option Two adds six levels with a floor of 29 if the defendant manufactured or possessed with intent to manufacture methamphetamine on premises where a minor resides or was present. If a defendant distributed or possessed with intent to distribute where a minor resides or was present, add three levels with a floor of 15.*

*Fourth, the proposed amendment eliminates the offense level cap of 20 for ketamine. Ketamine is a schedule III controlled substance. Currently, the Drug Quantity Table provides a maximum of level 20 for most schedule III substances because such substances are subject to a statutory maximum of 5 years. If a defendant is convicted under 21 U.S.C. § 860a for distributing ketamine, however, the defendant is subject to a statutory maximum of 20 years. Accordingly, the Drug Quantity Table in §2D1.1(c) is modified to allow for sentencing of 21 U.S.C. § 860a offenses involving quantities of ketamine corresponding to offense levels greater than level 20. The proposed amendment also provides a marijuana equivalency in Application Note 10 for ketamine (1 unit of ketamine = 1 gram of marijuana).*

*Fifth, the proposed amendment adds to Application Note 10 a new drug equivalency table for 1,4-butanediol (BD) and gamma butyrolactone (GBL), both of which are included in the definition of date rape drugs under 21 U.S.C. § 841(g). Neither is a controlled substance. The proposed drug equivalency is 1 ml of BD or GBL equals 8.8 grams of marijuana.*

*Sixth, the proposed amendment updates Appendix A (Statutory Index) to include references to the new offenses.*

*Finally, issues for comment request input regarding the proposals addressing 21 U.S.C. §§ 841(g), 860a, and 865.*

#### **Proposed Amendment:**

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

- (a) Base Offense Level (Apply the greatest):
  - (1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
  - (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

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

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.

(4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.

(5) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.

~~(5)~~(6) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.

~~(6)~~(7) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.

~~(7)~~(8) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.

[Option 1 (21 U.S.C. § 841(g)):

(9) If the defendant was convicted under 21 U.S.C. § 841(g), increase by **[2][4]** levels.]

[Option 2 (21 U.S.C. § 841(g)):

- (9) If the defendant was convicted under 21 U.S.C. § 841(g) of knowing, or having reasonable cause to believe, that the drug would be used in the commission of criminal sexual conduct, increase by **[4]** levels.]

[Option 3 (21 U.S.C. § 841(g)):

- (9) (A) If the defendant committed the offense under 21 U.S.C. §841(g)(1)(A) and (i) knew that the date rape drug was to be used to commit criminal sexual conduct, add **6** levels; if the offense level is less than **29**, increase to **29**; or (ii) had reasonable cause to believe that the drug would be used to commit criminal sexual conduct, add **3** levels. If the offense level is less than **26**, increase to **26**.
- (B) If the defendant committed the offense under 21 U.S.C. § 841(g)(1)(B) and knew or had reasonable cause to believe that the buyer was not an authorized purchaser, increase by **2** levels.]

[Option 1: (21 U.S.C. § 860a):

- (10) If (A) the defendant was convicted under 21 U.S.C. § 860a; and (B) subsection (b)(11)(C) does not apply, increase by **2** levels.

~~(8)~~(11) (Apply the greater**est**):

- (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
- (B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.
- (C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

- ~~(9)~~(12) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Option 2: (21 U.S.C. § 860a):

~~(8)~~(10) (Apply the greater**est**):

- (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
- (B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.
- (C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.
- (D) (i) If (I) the defendant was convicted under 21 U.S.C. § 860a; and (II) the offense involved the manufacturing or possession with intent to manufacture methamphetamine on premises in which an individual under the age of 18 years is present or resides, add **[6]** levels. If the resulting offense level is less than **[29]**, increase to level **[29]**; or
  - (ii) If (I) the defendant was convicted under 21 U.S.C. § 860a; and (II) the offense involved the distribution or possession with intent to distribute methamphetamine on premises in which an individual under the age of 18 years is present or resides, increase by **[2][3]** levels. If the resulting offense level is less than **[15]**, increase to **[15]**.

~~(9)~~(11) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(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.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

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

## (c) DRUG QUANTITY TABLE

### Controlled Substances and Quantity\*

### Base Offense Level

- (1) ● 30 KG or more of Heroin; **Level 38**  
● 150 KG or more of Cocaine;  
● 1.5 KG or more of Cocaine Base;  
● 30 KG or more of PCP, or 3 KG or more of PCP (actual);  
● 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice";  
● 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual);  
● 300 G or more of LSD;  
● 12 KG or more of Fentanyl;  
● 3 KG or more of a Fentanyl Analogue;  
● 30,000 KG or more of Marihuana;  
● 6,000 KG or more of Hashish;  
● 600 KG or more of Hashish Oil;  
● **30,000,000 units or more of Ketamine;**  
● 30,000,000 units or more of Schedule I or II Depressants;  
● 1,875,000 units or more of Flunitrazepam.
- (2) ● At least 10 KG but less than 30 KG of Heroin; **Level 36**  
● At least 50 KG but less than 150 KG of Cocaine;  
● At least 500 G but less than 1.5 KG of Cocaine Base;  
● At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);  
● At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice";  
● At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);  
● At least 100 G but less than 300 G of LSD;  
● At least 4 KG but less than 12 KG of Fentanyl;  
● At least 1 KG but less than 3 KG of a Fentanyl Analogue;  
● At least 10,000 KG but less than 30,000 KG of Marihuana;  
● At least 2,000 KG but less than 6,000 KG of Hashish;  
● At least 200 KG but less than 600 KG of Hashish Oil;  
● **At least 10,000,000 but less than 30,000,000 units of Ketamine;**  
● At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;  
● At least 625,000 but less than 1,875,000 units of Flunitrazepam.
- (3) ● At least 3 KG but less than 10 KG of Heroin; **Level 34**  
● At least 15 KG but less than 50 KG of Cocaine;  
● At least 150 G but less than 500 G of Cocaine Base;  
● At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);  
● At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";  
● At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);  
● At least 30 G but less than 100 G of LSD;  
● At least 1.2 KG but less than 4 KG of Fentanyl;  
● At least 300 G but less than 1 KG of a Fentanyl Analogue;

- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam.

- (4)
- At least 1 KG but less than 3 KG of Heroin;
  - At least 5 KG but less than 15 KG of Cocaine;
  - At least 50 G but less than 150 G of Cocaine Base;
  - At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
  - At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
  - At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
  - At least 10 G but less than 30 G of LSD;
  - At least 400 G but less than 1.2 KG of Fentanyl;
  - At least 100 G but less than 300 G of a Fentanyl Analogue;
  - At least 1,000 KG but less than 3,000 KG of Marihuana;
  - At least 200 KG but less than 600 KG of Hashish;
  - At least 20 KG but less than 60 KG of Hashish Oil;
  - At least 1,000,000 but less than 3,000,000 units of Ketamine;
  - At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
  - At least 62,500 but less than 187,500 units of Flunitrazepam.

**Level 32**

- (5)
- At least 700 G but less than 1 KG of Heroin;
  - At least 3.5 KG but less than 5 KG of Cocaine;
  - At least 35 G but less than 50 G of Cocaine Base;
  - At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
  - At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
  - At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
  - At least 7 G but less than 10 G of LSD;
  - At least 280 G but less than 400 G of Fentanyl;
  - At least 70 G but less than 100 G of a Fentanyl Analogue;
  - At least 700 KG but less than 1,000 KG of Marihuana;
  - At least 140 KG but less than 200 KG of Hashish;
  - At least 14 KG but less than 20 KG of Hashish Oil;
  - At least 700,000 but less than 1,000,000 units of Ketamine;
  - At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
  - At least 43,750 but less than 62,500 units of Flunitrazepam.

**Level 30**

- (6)
- At least 400 G but less than 700 G of Heroin;
  - At least 2 KG but less than 3.5 KG of Cocaine;
  - At least 20 G but less than 35 G of Cocaine Base;
  - At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
  - At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but

**Level 28**

less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";

- At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;
- At least 160 G but less than 280 G of Fentanyl;
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 25,000 but less than 43,750 units of Flunitrazepam.

- (7)
- At least 100 G but less than 400 G of Heroin;
  - At least 500 G but less than 2 KG of Cocaine;
  - At least 5 G but less than 20 G of Cocaine Base;
  - At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
  - At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
  - At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
  - At least 1 G but less than 4 G of LSD;
  - At least 40 G but less than 160 G of Fentanyl;
  - At least 10 G but less than 40 G of a Fentanyl Analogue;
  - At least 100 KG but less than 400 KG of Marihuana;
  - At least 20 KG but less than 80 KG of Hashish;
  - At least 2 KG but less than 8 KG of Hashish Oil;
  - At least 100,000 but less than 400,000 units of Ketamine;
  - At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
  - At least 6,250 but less than 25,000 units of Flunitrazepam.

**Level 26**

- (8)
- At least 80 G but less than 100 G of Heroin;
  - At least 400 G but less than 500 G of Cocaine;
  - At least 4 G but less than 5 G of Cocaine Base;
  - At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
  - At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
  - At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
  - At least 800 MG but less than 1 G of LSD;
  - At least 32 G but less than 40 G of Fentanyl;
  - At least 8 G but less than 10 G of a Fentanyl Analogue;
  - At least 80 KG but less than 100 KG of Marihuana;
  - At least 16 KG but less than 20 KG of Hashish;
  - At least 1.6 KG but less than 2 KG of Hashish Oil;
  - At least 80,000 but less than 100,000 units of Ketamine;
  - At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
  - At least 5,000 but less than 6,250 units of Flunitrazepam.

**Level 24**



- (9) ● At least 60 G but less than 80 G of Heroin;  
 ● At least 300 G but less than 400 G of Cocaine;  
 ● At least 3 G but less than 4 G of Cocaine Base;  
 ● At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);  
 ● At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";  
 ● At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);  
 ● At least 600 MG but less than 800 MG of LSD;  
 ● At least 24 G but less than 32 G of Fentanyl;  
 ● At least 6 G but less than 8 G of a Fentanyl Analogue;  
 ● At least 60 KG but less than 80 KG of Marihuana;  
 ● At least 12 KG but less than 16 KG of Hashish;  
 ● At least 1.2 KG but less than 1.6 KG of Hashish Oil;  
 ● At least 60,000 but less than 80,000 units of Ketamine;  
 ● At least 60,000 but less than 80,000 units of Schedule I or II Depressants;  
 ● At least 3,750 but less than 5,000 units of Flunitrazepam.

**Level 22**

- (10) ● At least 40 G but less than 60 G of Heroin;  
 ● At least 200 G but less than 300 G of Cocaine;  
 ● At least 2 G but less than 3 G of Cocaine Base;  
 ● At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);  
 ● At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";  
 ● At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);  
 ● At least 400 MG but less than 600 MG of LSD;  
 ● At least 16 G but less than 24 G of Fentanyl;  
 ● At least 4 G but less than 6 G of a Fentanyl Analogue;  
 ● At least 40 KG but less than 60 KG of Marihuana;  
 ● At least 8 KG but less than 12 KG of Hashish;  
 ● At least 800 G but less than 1.2 KG of Hashish Oil;  
 ● At least 40,000 but less than 60,000 units of Ketamine;  
 ● At least 40,000 but less than 60,000 units of Schedule I or II Depressants;  
 ● 40,000 or more units of Schedule III substances (except Ketamine);  
 ● At least 2,500 but less than 3,750 units of Flunitrazepam.

**Level 20**

- (11) ● At least 20 G but less than 40 G of Heroin;  
 ● At least 100 G but less than 200 G of Cocaine;  
 ● At least 1 G but less than 2 G of Cocaine Base;  
 ● At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);  
 ● At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";  
 ● At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);  
 ● At least 200 MG but less than 400 MG of LSD;  
 ● At least 8 G but less than 16 G of Fentanyl;  
 ● At least 2 G but less than 4 G of a Fentanyl Analogue;  
 ● At least 20 KG but less than 40 KG of Marihuana;

**Level 18**

- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine);
- At least 1,250 but less than 2,500 units of Flunitrazepam.

- (12) ● At least 10 G but less than 20 G of Heroin;
- At least 50 G but less than 100 G of Cocaine;
  - At least 500 MG but less than 1 G of Cocaine Base;
  - At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
  - At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";
  - At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
  - At least 100 MG but less than 200 MG of LSD;
  - At least 4 G but less than 8 G of Fentanyl;
  - At least 1 G but less than 2 G of a Fentanyl Analogue;
  - At least 10 KG but less than 20 KG of Marihuana;
  - At least 2 KG but less than 5 KG of Hashish;
  - At least 200 G but less than 500 G of Hashish Oil;
  - At least 10,000 but less than 20,000 units of Ketamine;
  - At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
  - At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine);
  - At least 625 but less than 1,250 units of Flunitrazepam.

**Level 16**

- (13) ● At least 5 G but less than 10 G of Heroin;
- At least 25 G but less than 50 G of Cocaine;
  - At least 250 MG but less than 500 MG of Cocaine Base;
  - At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
  - At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
  - At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
  - At least 50 MG but less than 100 MG of LSD;
  - At least 2 G but less than 4 G of Fentanyl;
  - At least 500 MG but less than 1 G of a Fentanyl Analogue;
  - At least 5 KG but less than 10 KG of Marihuana;
  - At least 1 KG but less than 2 KG of Hashish;
  - At least 100 G but less than 200 G of Hashish Oil;
  - At least 5,000 but less than 10,000 units of Ketamine;
  - At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
  - At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine);
  - At least 312 but less than 625 units of Flunitrazepam.

**Level 14**

- (14) ● Less than 5 G of Heroin;
- Less than 25 G of Cocaine;
  - Less than 250 MG of Cocaine Base;

**Level 12**

- Less than 5 G of PCP, or less than 500 MG of PCP (actual);
  - Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
  - Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
  - Less than 50 MG of LSD;
  - Less than 2 G of Fentanyl;
  - Less than 500 MG of a Fentanyl Analogue;
  - At least 2.5 KG but less than 5 KG of Marihuana;
  - At least 500 G but less than 1 KG of Hashish;
  - At least 50 G but less than 100 G of Hashish Oil;
  - At least 2,500 but less than 5,000 units of Ketamine;
  - At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
  - At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine);
  - At least 156 but less than 312 units of Flunitrazepam;
  - 40,000 or more units of Schedule IV substances (except Flunitrazepam).
- (15) ● At least 1 KG but less than 2.5 KG of Marihuana; **Level 10**
- At least 200 G but less than 500 G of Hashish;
  - At least 20 G but less than 50 G of Hashish Oil;
  - At least 1,000 units but less than 2,500 units of Ketamine;
  - At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
  - At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine);
  - At least 62 but less than 156 units of Flunitrazepam;
  - At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).
- (16) ● At least 250 G but less than 1 KG of Marihuana; **Level 8**
- At least 50 G but less than 200 G of Hashish;
  - At least 5 G but less than 20 G of Hashish Oil;
  - At least 250 units but less than 1,000 units of Ketamine;
  - At least 250 but less than 1,000 units of Schedule I or II Depressants;
  - At least 250 but less than 1,000 units of Schedule III substances (except Ketamine);
  - Less than 62 units of Flunitrazepam;
  - At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
  - 40,000 or more units of Schedule V substances.
- (17) ● Less than 250 G of Marihuana; **Level 6**
- Less than 50 G of Hashish;
  - Less than 5 G of Hashish Oil;
  - Less than 250 units of Ketamine;
  - Less than 250 units of Schedule I or II Depressants;
  - Less than 250 units of Schedule III substances (except Ketamine);
  - Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
  - Less than 40,000 units of Schedule V substances.

\*Notes to Drug Quantity Table:

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of

the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

- (B) The terms "PCP (actual)", "Amphetamine (actual)", and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

- (C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.
- (D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marijuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marijuana. *Provided*, however, that if the actual weight of the marijuana is greater, use the actual weight of the marijuana.
- (F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, 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 LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.
- (H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
- (I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (*e.g.*, plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

#### Commentary

*Statutory Provisions:* 21 U.S.C. §§ 841(a), (b)(1)-(3), (7), (g), 860a, 865, 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. *"Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.*

*An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.*

*Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.*

2. *The statute and guideline also apply to "counterfeit" substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.*
3. *Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1; see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(c)(1), and 2D2.1(b)(1).*
4. *Distribution of "a small amount of marihuana for no remuneration", 21 U.S.C. § 841(b)(4), is treated as simple possession, to which §2D2.1 applies.*
5. *Analogues and Controlled Substances Not Referenced in this Guideline.—Any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. For purposes of this guideline "analogue" has the meaning given the term "controlled substance analogue" in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.*

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

- (A) *Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.*
- (B) *Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on*

*the central nervous system of a controlled substance referenced in this guideline.*

- (C) *Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.*

6. *Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.*
7. *Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a downward departure), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." See §5K1.1 (Substantial Assistance to Authorities). In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).*
8. *Interaction with §3B1.3.—A defendant who used special skills in the commission of the offense may be subject to an 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.*

*Note, however, that if an adjustment from subsection (b)(2)(B) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

9. *Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, methamphetamine, or oxycodone for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.*
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 marijuana. 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 marijuana.*
- (B) *Find the equivalent quantity of marijuana in the Drug Quantity Table.*
- (C) *Use the offense level that corresponds to the equivalent quantity of marijuana as the base offense level for the controlled substance involved in the offense.*

(See also Application Note 5.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kg of marihuana. In a case involving 100 gm of oxymorphone, the equivalent quantity of marihuana would be 500 kg, which corresponds to a base offense level of 28 in the Drug Quantity Table.

The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its marihuana equivalent, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level.

For certain types of controlled substances, the marihuana equivalencies in the Drug Equivalency Tables are "capped" at specified amounts (e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 999 grams of marihuana). Where there are controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies to determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts).

Note: Because of the statutory equivalences, the ratios in the Drug Equivalency Tables do not necessarily reflect dosages based on pharmacological equivalents.

Examples:

- a. The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 24.
- b. The defendant is convicted of selling 500 grams of marihuana (Level 8) and five kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 10 in the Drug Quantity Table.
- c. The defendant is convicted of selling 80 grams of cocaine (Level 16) and five kilograms of marihuana (Level 14). The cocaine is equivalent to 16 kilograms of marihuana. The total is therefore equivalent to 21 kilograms of marihuana, which has an offense level of 18 in the Drug Quantity Table.
- d. The defendant is convicted of selling 56,000 units of a Schedule III substance, 100,000 units of a Schedule IV substance, and 200,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 56 kilograms of marihuana (below the cap of 59.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 4.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 6.25 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 999 grams of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 1.25 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 59.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 61.99 (56 + 4.99 + .999) kilograms.

DRUG EQUIVALENCY TABLES

Schedule I or II Opiates\*

1 gm of Heroin =	1 kg of marihuana
1 gm of Alpha-Methylfentanyl =	10 kg of marihuana
1 gm of Dextromoramide =	670 gm of marihuana
1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/ PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (-phenyl-N-[1-(2-phenylethyl)-4- piperidiny] Propanamide) =	2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone =	500 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM)=	3 kg of marihuana

*\*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)\*



1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylamine =	40 gm of marihuana
1 gm of Amphetamine =	2 kg of marihuana
1 gm of Amphetamine (Actual) =	20 kg of marihuana
1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	20 kg of marihuana
1 gm of "Ice" =	20 kg of marihuana
1 gm of Khat =	.01 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria")=	100 gm of marihuana
1 gm of Methylphenidate (Ritalin)=	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P <sub>2</sub> P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P <sub>2</sub> P (in any other case) =	75 gm of marihuana
1 gm of Cocaine Base ("Crack") =	20 kg of marihuana
1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana

*\*Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)\*

1 gm of Bufotenine =	70 gm of marihuana
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg of marihuana
1 gm of Diethyltryptamine/DET =	80 gm of marihuana
1 gm of Dimethyltryptamine/DMT =	100 gm of marihuana
1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana

1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA=	500 gm of marihuana
1 gm of Paramethoxymethamphetamine/PMA =	500 gm of marihuana
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm of marihuana
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg of marihuana

*\*Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

#### Schedule I Marihuana

1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm of marihuana
1 gm of Hashish Oil =	50 gm of marihuana
1 gm of Cannabis Resin or Hashish =	5 gm of marihuana
1 gm of Tetrahydrocannabinol, Organic =	167 gm of marihuana
1 gm of Tetrahydrocannabinol, Synthetic =	167 gm of marihuana

#### Flunitrazepam \*\*

1 unit of Flunitrazepam =	16 gm of marihuana
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*\*\*Provided*, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

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

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

Gamma-hydroxybutyric Acid

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

Schedule III Substances (except ketamine)\*\*\*

1 unit of a Schedule III Substance = 1 gm of marihuana

\*\*\**Provided*, that the combined equivalent weight of all Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Ketamine

1 unit of ketamine = 1 gm of marihuana

Schedule IV Substances (except flunitrazepam)\*\*\*\*

1 unit of a Schedule IV Substance  
(except Flunitrazepam)= 0.0625 gm of marihuana

\*\*\*\**Provided*, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 4.99 kilograms of marihuana.

Schedule V Substances\*\*\*\*\*

1 unit of a Schedule V Substance = 0.00625 gm of marihuana

\*\*\*\*\**Provided*, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.

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

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

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

Date Rape Drugs (except flunitrazipam, GHB, or ketamine)

1 ml of 1,4-butanediol =	8.8 gm marihuana
1 ml of gamma butyrolactone =	8.8 gm marihuana

To facilitate conversions to drug equivalencies, the following table is provided:

MEASUREMENT CONVERSION TABLE

1 oz = 28.35 gm
1 lb = 453.6 gm
1 lb = 0.4536 kg
1 gal = 3.785 liters
1 qt = 0.946 liters
1 gm = 1 ml (liquid)
1 liter = 1,000 ml
1 kg = 1,000 gm
1 gm = 1,000 mg
1 grain = 64.8 mg.

11. If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (e.g., 100 doses of Mescaline at 500 mg per dose = 50 gms of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

Hallucinogens

MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm

<i>Psilocin*</i>	10 mg
<i>Psilocybe mushrooms (dry)</i>	5 gm
<i>Psilocybe mushrooms (wet)</i>	50 gm
<i>Psilocybin*</i>	10 mg
<i>2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*</i>	3 mg

Marihuana

<i>1 marihuana cigarette</i>	0.5 gm
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Stimulants

<i>Amphetamine*</i>	10 mg
<i>Methamphetamine*</i>	5 mg
<i>Phenmetrazine (Preludin)*</i>	75 mg

*\*For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.*

12. *Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.*

*If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.*

*In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance - actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.*

13. *Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13-15 even though they contain a small amount of a Schedule I or II controlled substance. For example,*

*Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13-15 is the appropriate classification.*

14. *If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.*

15. *LSD on a blotter paper carrier medium typically is marked so that the number of doses ("hits") per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.*

*In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.*

16. *In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.*

17. *For purposes of the guidelines, a "plant" is an organism having leaves and a readily observable root formation (e.g., a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).*

18. *If the offense involved importation of amphetamine or methamphetamine, and an adjustment from subsection (b)(2) applies, do not apply subsection (b)(4).*

19. *Hazardous or Toxic Substances.—Subsection [Option 1 (21 U.S.C. § 860a): (B)(~~8~~)(11)(A)] [Option 2 (21 U.S.C. § 860a): (b)(~~8~~)(10)(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 [Option 1 (21 U.S.C. § 860a): (B)(~~8~~)(11)(A)] [Option 2 (21 U.S.C. § 860a): (b)(~~8~~)(10)(A)] may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court*

*in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).*

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

(A) Factors to Consider.—*In determining, for purposes of subsection [Option 1 (21 U.S.C. § 860a): (B)(~~8~~)(11)(B)] [Option 2 (21 U.S.C. § 860a): (b)(~~8~~)(10)(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:*

- (i) *The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and the manner in which the chemicals or substances were stored.*
- (ii) *The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.*
- (iii) *The duration of the offense, and the extent of the manufacturing operation.*
- (iv) *The location of the laboratory (e.g., whether the laboratory is located in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm.*

(B) Definitions.—*For purposes of subsection [Option 1 (21 U.S.C. § 860a): (B)(~~8~~)(11)(C)] [Option 2 (21 U.S.C. § 860a): (b)(~~8~~)(10)(C)]:*

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

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

21. Applicability of Subsection [Option 1 (21 U.S.C. § 860a): (b)(~~9~~)(12)] [Option 2 (21 U.S.C. § 860a): (b)(~~9~~)(11)].—*The applicability of subsection [Option 1 (21 U.S.C. § 860a): (b)(~~9~~)(12)] [Option 2 (21 U.S.C. § 860a): (b)(~~9~~)(11)] 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 [Option 1 (21 U.S.C. § 860a): (b)(~~9~~)(12)] [Option 2 (21 U.S.C. § 860a): (b)(~~9~~)(11)] applies.*

22. Imposition of Consecutive Sentence for 21 U.S.C. § 860a or § 865. —*Sections 860a and 865 of title 21, United States Code, require the imposition of a mandatory consecutive term of imprisonment of not more than 20 years and 15 years, respectively. In order to comply with the relevant statute, the court should determine the appropriate "total punishment" and divide the sentence on the judgment form between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 860a or § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 860a or § 865. [For example, if the applicable adjusted guideline range is 151-188 months and the court determines a "total punishment" of 151 months is appropriate, a sentence of 130 months for*

*the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 860a or § 865 would achieve the "total punishment" in a manner that satisfies the statutory requirement of a consecutive sentence.]*

~~22~~23. Application of Subsection (b)(5)(6).—For purposes of subsection (b)(5)(6), "mass-marketing by means of an interactive computer service" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(5)(6) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "Interactive computer service", for purposes of subsection (b)(5)(6) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

~~23~~24. Application of Subsection (e)(1).—

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

(B) Upward Departure Provision.—If the defendant committed a sexual offense against more than one individual, an upward departure would be warranted.

~~24~~25. Application of Subsection (b)(6)(7).—For purposes of subsection (b)(6)(7), "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~~26. Application of Subsection (b)(7)(8).—For purposes of subsection (b)(7)(8), "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.

[to be used with Option 2 (21 U.S.C. § 841(g)):

27. Application of Subsection (b)(9).—For purposes of this subsection, "criminal sexual conduct" means an offense covered by Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse).]

Background: Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense.

The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 32 and 26 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.

The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; e.g., level 32 ranges from 121 to 151 months, where the



statutory minimum is ten years or 120 months.

*For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt. Consequently, the Commission adopted the policy that each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater.*

*Specific Offense Characteristic (b)(2) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.*

*Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).*

*Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.*

*The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S.Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence (see Chapman; §5G1.1(b)).*

*Subsection [Option 1 (21 U.S.C. § 860a): (B)(8)(11)(A)][Option 2 (21 U.S.C. § 860a): (b)(8)(10)(A)] implements the instruction to the Commission in section 303 of Public Law 103–237.*

*Subsections [Option 1 (21 U.S.C. § 860a): (b)(8)(11)(B)][Option 2 (21 U.S.C. § 860a): (b)(8)(10)(B)] and (C) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.*

\* \* \*

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

### Attempt or Conspiracy

- (a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e), as appropriate, except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (e) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels.
- (b) Specific Offense Characteristics
- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
  - (2) If the defendant is convicted of violating 21 U.S.C. § 841(c)(2) or (f)(1), or § 960(d)(2), (d)(3), or (d)(4), decrease by **3** levels, unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully.
  - (3) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
  - (4) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a listed chemical through mass-marketing by means of an interactive computer service, increase by **2** levels.
  - (5) **If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.**
- (c) Cross Reference
- (1) If the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance unlawfully, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, Trafficking) if the resulting offense level is greater than that determined above.

### Commentary

*Statutory Provisions:* 21 U.S.C. §§ 841(c)(1), (2), (f)(1), **865**, 960(d)(1), (2), (3), (4).

### Application Notes:

1. "Firearm" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions). The adjustment in subsection (b)(1) should be applied if the weapon was present, unless it is improbable that the weapon was connected with the offense.
2. "Offense involved unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully," as used in subsection (c)(1), means that the

defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), completed the actions sufficient to constitute the offense of unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully.

3. In certain cases, the defendant will be convicted of an offense involving a listed chemical covered under this guideline, and a related offense involving an immediate precursor or other controlled substance covered under §2D1.1 (Unlawfully Manufacturing, Importing, Exporting, or Trafficking). For example, P2P (an immediate precursor) and methylamine (a listed chemical) are used together to produce methamphetamine. Determine the offense level under each guideline separately. The offense level for methylamine is determined by using §2D1.11. The offense level for P2P is determined by using §2D1.1 (P2P is listed in the Drug Equivalency Table under Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)). Under the grouping rules of §3D1.2(b), the counts will be grouped together. Note that in determining the scale of the offense under §2D1.1, the quantity of both the controlled substance and listed chemical should be considered (see Application Note 12 in the Commentary to §2D1.1).

4. Cases Involving Multiple Chemicals.—

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

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

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

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

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

5. Convictions under 21 U.S.C. §§ 841(c)(2) and (f)(1), and 960(d)(2), (d)(3), and (d)(4) do not require that the defendant have knowledge or an actual belief that the listed chemical was to be used to manufacture a controlled substance unlawfully. In a case in which the defendant

*possessed or distributed the listed chemical without such knowledge or belief, a 3-level reduction is provided to reflect that the defendant is less culpable than one who possessed or distributed listed chemicals knowing or believing that they would be used to manufacture a controlled substance unlawfully.*

6. *Subsection (b)(3) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(3) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).*
7. *Application of Subsection (b)(4).—For purposes of subsection (b)(4), "mass-marketing by means of an interactive computer service" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(4) would apply to a defendant who operated a web site to promote the sale of Gamma-butyrolactone (GBL) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "Interactive computer service", for purposes of subsection (b)(4) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).*
8. *Imposition of Consecutive Sentence for 21 U.S.C. § 865.—Section 865 of title 21, United States Code, requires the imposition of a mandatory consecutive term of imprisonment of not more than 15 years. In order to comply with the relevant statute, the court should determine the appropriate "total punishment" and, on the judgment form, divide the sentence between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 865. [For example, if the applicable adjusted guideline range is 151-188 months and the court determines a "total punishment" of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 865 would achieve the "total punishment" in a manner that satisfies the statutory requirement of a consecutive sentence.]*

*Background: Offenses covered by this guideline involve list I chemicals (including ephedrine, pseudoephedrine, and phenylpropanolamine) and list II chemicals. List I chemicals are important to the manufacture of a controlled substance and usually become part of the final product. For example, ephedrine reacts with other chemicals to form methamphetamine. The amount of ephedrine directly affects the amount of methamphetamine produced. List II chemicals are generally used as solvents, catalysts, and reagents.*

#### **Appendix A (Statutory Index)**

21 U.S.C. § 841(f)(1) 2D1.11, 2D1.13  
21 U.S.C. § 841(g) 2D1.1

\* \* \*

21 U.S.C. § 860	2D1.2
21 U.S.C. § 860a	2D1.1
* * *	
21 U.S.C. § 864	2D1.12
21 U.S.C. § 865	2D1.1, 2D1.11

**Issues for Comment:**

1. *Section 201 of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109–248, created a new offense in 21 U.S.C. § 841(g) for "knowingly using the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that (A) the drug would be used in the commission of criminal sexual conduct; or (B) the person is not an authorized purchaser." The Commission requests comment regarding this offense, particularly with respect to the criminal sexual conduct aspect. The proposed amendment presents two options. Option One would provide a [two-][four-]level increase if the defendant was convicted under 21 U.S.C. § 841(g), regardless of what the defendant knew or had reasonable cause to believe. Option Two would provide a four-level increase if the defendant was convicted under 21 U.S.C. § 841(g) and the defendant knew or had reason to believe the drug would be used in the commission of criminal sexual conduct. Option Three would provide a six level increase with a floor of 29 if the defendant knew the drug would be used in the commission of criminal sexual conduct, and a three level increase with a floor of 26 if the defendant had reasonable cause to believe that the drug would be used to commit criminal sexual conduct. Where the defendant sold the drug using the internet to an unauthorized purchaser, add two levels. Is there an alternative approach that the Commission should consider with respect to the criminal sexual abuse aspect of the offense? For example, should the Commission provide a cross reference to the criminal sexual abuse guidelines (§§2A3.1-2A3.4) for defendants convicted under 21 U.S.C. § 841(g)(A) even though it is not the defendant who committed the criminal sexual conduct?*

*The Commission also requests comment regarding whether any enhancement for a conviction under 21 U.S.C. § 841(g) also should provide a minimum offense level. If so, what offense level would be appropriate?*

2. *Section 860a of title 21, United States Code, prohibits manufacturing or distributing, or possessing with the intent to manufacture or distribute, methamphetamine on a premises in which an individual under the age of 18 years is present or resides. Two options are presented. The first option uses the existing §2D1.1(b)(8)(C) in cases where the government proves that manufacturing methamphetamine poses a substantial risk of harm to the minor (add 6 levels with a floor of 30), and in all other cases (i.e. distribution and possession with intent to distribute), add two levels. The second option presumes that manufacturing methamphetamine on premises where a minor resides or was present poses a risk of harm and thus calls for adding six levels with a floor of 29. In distribution or possession with intent to distribute cases, option two would add three levels with a floor of 15. The Commission requests comment on which option is preferable, or whether there is an alternative approach that should be considered. If Option One's approach were to be adopted, the Commission requests comment regarding whether the substantial risk of harm enhancement (currently in §2D1.1(b)(8)(C) but proposed to be redesignated as §2D1.1(b)(11)(C)) should be expanded to include distribution of methamphetamine such that distribution offenses that create a substantial risk of harm to the life of a minor or incompetent also would be subject to the six-level enhancement and the minimum offense level of 30. Similarly, should it be expanded to include possession with intent to distribute or manufacture? If so, what would constitute a substantial risk of harm to the life of a minor or incompetent in a case involving methamphetamine distribution or possession with intent to*

*distribute or manufacture methamphetamine? With regard to Option Two, the Commission requests comment on whether the six level increase with a floor of 29, and the three level increase with a floor of 15, in manufacturing and distribution cases, respectively, is appropriate, or whether other levels would be more appropriate for the offense.*

*Both options presented in the proposed amendment are statute of conviction based. As an alternative to a statute of conviction based enhancement, the Commission requests comment regarding whether any enhancement that implements 21 U.S.C. § 860a should be relevant conduct based. Additionally, rather than limit an enhancement to the manufacture and/or distribution of methamphetamine where a minor resides or is present, should the Commission expand any enhancement to all drugs. Finally, should the Commission expand the enhancement to apply when this conduct occurs where an incompetent resides or is present?*

3. *The USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177, established a new offense at 21 U.S.C. § 865 that provides a mandatory consecutive sentence of not more than 15 years' imprisonment for any drug offense involving the smuggling of methamphetamine or methamphetamine precursor chemical while using a dedicated commuter lane, an alternative or accelerated inspection system, or other facilitated entry program for entry into the United States. The proposed amendment provides a two-level enhancement in §§2D1.1(b)(5) and 2D1.11(b)(5) if the defendant is convicted in 21 U.S.C. § 865.*

*The Commission requests comment regarding this proposed enhancement. Specifically, the Commission requests comment on the following:*

- (a) *Should this enhancement be greater than two levels and, if so, what would be appropriate? Additionally, should there be a minimum offense level and, if so, what offense level would be appropriate?*
- (b) *Should the Commission provide an enhancement in §§2D1.1 and 2D1.11 that applies if the offense involved the use of a facilitated entry program to import drugs, regardless of the type of drug the defendant is convicted of importing, or conspiring to import, under 21 U.S.C. § 960 or § 963, respectively?*
- (c) *Should the Commission amend §3B1.3 (Abuse of Position of Trust or Use of Special Skill), Application Note 2, to include offenses that involve use of a facilitated entry program into the United States among cases that receive the §3B1.3 adjustment? If so, should the Commission provide a special instruction in §§2D1.1 and 2D1.11 that §3B1.3 applies if the defendant is convicted of an offense under 21 U.S.C. § 865?*

## 8. Immigration

**Synopsis of Proposed Amendment:** *In April 2006, the Commission promulgated a number of amendments to the immigration guidelines, primarily focusing on smuggling offenses. These amendments became effective November 1, 2006. This proposed amendment addresses the number of aliens involved in an offense, the number of documents involved in an offense, and options for modifying to §2L1.2 (Unlawfully Entering or Remaining in the United States). Two issues for comment follow the proposed amendment. The first requests input regarding base offense levels in §§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 second issue requests comment regarding Lopez v. Gonzalez, 127 S.Ct. 625 (Dec. 5, 2006).*

### Number of Aliens and Number of Documents

*The proposed amendment provides two options for amending §2L1.1(b)(2) and 2L2.1(b)(2) regarding the number of aliens and number of documents, respectively, involved in the offense. The first option maintains the current structure of the table, which provides a three-level increase for offenses involving six to 24 aliens, a six-level increase for offenses involving 25 to 99 aliens, and a nine-level increase for offenses involving 100 or more aliens. Option One amends the table to provide a nine-level increase for offenses involving 100 to 199 aliens, a [12]-level increase for offenses involving 200 to 299 aliens, and a [15]-level increase for offenses involving 300 or more aliens. Option Two, in part, mirrors Option One by providing the same increases at the top end of the table for offenses involving 100 or more aliens. However, Option Two also provides smaller categories at the low end of the table. Offenses involving six to [15] aliens would receive an increase of three levels, [16 to 49] aliens would receive an increase of [six] levels, and [50 to 99] aliens would receive an increase of [nine] levels.*

### §2L1.2 (Unlawfully Entering or Remaining in the United States)

*The current structure of §2L1.2 requires the court, using the “categorical approach,” to assess whether a prior conviction qualifies for a particular category under the guideline. This analysis is often complicated by lack of documentation, competing case law decisions, and the volume of cases. In addition, §2L1.2 contains different definitions of covered offenses from the statute. Courts, then, are faced with making these assessments multiple times in the same case. The proposed amendment provides six options to address the complexity of this guideline.*

*The first, second, and third options amend the structure of §2L1.2 by using the statutory definition of aggravated felony in combination with the length of the sentence imposed for that prior felony conviction. Option One provides a 16-level increase for an aggravated felony in which the sentence of imprisonment imposed exceeded 13 months; a 12-level increase for an aggravated felony in which the sentence of imprisonment imposed was less than 13 months; and an eight-level increase for all other aggravated felonies. Option Two provides a 16-level increase for an aggravated felony in which the sentence of imprisonment imposed exceeded two years; a 12-level increase for an aggravated felony in which the sentence of imprisonment imposed was at least one year, but less than two years; and an eight-level increase for all other aggravated felonies. Option Three, mirroring the criminal history guidelines, provides a 16-level increase for an aggravated felony in which the sentence imposed exceeded 13 months; a 12-level increase for an aggravated felony in which the sentence imposed was at least 60 days but did not exceed 13 months; and an eight-level increase for*



all other aggravated felonies.

For Options One through Three, the proposed amendment also eliminates the categories of crimes of violence and drug trafficking offenses from §2L1.2(b)(1)(E) (three or more misdemeanor offenses).

The fourth option maintains the current structure of §2L1.2, except that the categories of offenses delineated under this guideline are defined by 8 U.S.C. §1101(a)(43), the statute providing definitions for “aggravated felonies”. Additionally, this option provides use of length of sentence of imprisonment imposed in conjunction with “crime of violence” to further distinguish between the numerous types of prior convictions that fall within this category.

The proposed amendment also provides for an upward departure in any case in which reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense. This note is modeled after §4A1.3 and could be used in conjunction with any of Options One through Four.

The fifth option provides an increased base offense level and a reduction if the prior conviction is not a felony.

The sixth option provides a 20-level increase for prior convictions for a national security or terrorism offense and creates further distinctions among type of conviction and length of prior sentence in relation to enhancements based on specific offense characteristics.

#### **Proposed 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);
- (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
- (3) **12**, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant’s spouse or child (or both the defendant’s spouse and child), and (B) the base offense level is determined under subsection (a)(2), decrease by **3** levels.
- (2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

Number of Unlawful Aliens  
Smuggled, Transported, or



	<u>Harbored</u>	<u>Increase in Level</u>
[Option 1 (number of aliens):	(A) 6-24	add <b>3</b>
	(B) 25-99	add <b>6</b>
	(C) 100 <del>or more</del> -199	add <b>9</b>
	(D) 200-299	add <b>[12]</b>
	(E) 300 or more	add <b>[15].]</b>

[Option 2 (number of aliens):	(A) 6-[15]	add <b>3</b>
	(B) [16-49]	add <b>[6]</b>
	(C) [50-99]	add <b>[9]</b>
	(D) [100-199]	add <b>[12]</b>
	(E) [200-299]	add <b>[15]</b>
	(F) [300 or more]	add <b>[18].]</b>

- (3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.
- (4) If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent, increase by **2** levels.
- (5) (Apply the Greatest):
- (A) If a firearm was discharged, increase by **6** levels, but if the resulting offense level is less than level **22**, increase to level **22**.
- (B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by **4** levels, but if the resulting offense level is less than level **20**, increase to level **20**.
- (C) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.
- (6) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.
- (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>
(A)	Bodily Injury	add <b>2</b> levels

- |  |     |  |                       |
|--|-----|--|-----------------------|
|  | (B) | Serious Bodily Injury                          | add <b>4</b> levels   |
|  | (C) | Permanent or Life-Threatening<br>Bodily Injury | add <b>6</b> levels   |
|  | (D) | Death  | add <b>10</b> 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**.
- (9) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by **2** levels.
- (c) Cross Reference
- (1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline.

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:

*"The offense was committed other than for profit" means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.*

*"Number of unlawful aliens smuggled, transported, or harbored" does not include the defendant.*

*"Aggravated felony" is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States).*

*"Child" has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).*

*"Spouse" has the meaning set forth in 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).*

*"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) *The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.*
  - (B) *The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).*
  - (C) *The offense involved substantially more than ~~100~~300 aliens.*
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).*
5. *Application of Subsection (b)(6).—Reckless conduct to which the adjustment from subsection (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)(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)(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)(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.

**§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**

- (a) Base Offense Level: **11**
- (b) Specific Offense Characteristics
  - (1) If the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant’s spouse or child (or both the defendant’s spouse and child), decrease by **3** levels.
  - (2) If the offense involved six or more documents or passports, increase

as follows:

	<u>Number of Documents/Passports</u>	<u>Increase in Level</u>
[Option 1:	(A) 6-24	add <b>3</b>
	(B) 25-99	add <b>6</b>
	(C) 100 <del>or more</del> -199	add <b>9</b> :
	(D) 200-299	add <b>[12]</b>
	(E) 300 or more	add <b>[15.]</b>
[Option 2:	(A) 6-[15]	add <b>3</b>
	(B) [16-49]	add <b>[6]</b>
	(C) [50-99]	add <b>[9]</b>
	(D) [100-199]	add <b>[12]</b>
	(E) [200-299]	add <b>[15]</b>
	(F) [300 or more]	add <b>[18.]</b>

- (3) If the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws, increase by **4** levels.
- (4) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.
- (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.

#### Commentary

Statutory Provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (4), 1325(b), (c); 18 U.S.C. §§ 1015, 1028, 1425-1427, 1542, 1544, 1546. For additional statutory provision(s), see Appendix A (Statutory Index).

#### Application Notes:

1. For purposes of this guideline—

*"The offense was committed other than for profit" means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.*

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

*"Child" has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act*

(8 U.S.C. § 1101(b)(1)).

"Spouse" has the meaning set forth in section 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

2. Where it is established that multiple documents are part of a set of documents intended for use by a single person, treat the set as one document.
3. Subsection (b)(3) provides an enhancement if the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. If the defendant knew, believed, or had reason to believe that the felony offense to be committed was of an especially serious type, an upward departure may be warranted.
4. Prior felony conviction(s) resulting in an adjustment under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).
5. **Application of Subsection (b)(2).**—If the offense involved substantially more than ~~100~~**300** documents, an upward departure may be warranted.

\* \* \*

~~§2L1.2.~~ **Unlawfully Entering or Remaining in the United States**

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

~~(b)~~ **Specific Offense Characteristic**

~~(1)~~ **Apply the Greatest:**

~~If the defendant previously was deported, or unlawfully remained in the United States, after=~~

~~(A)~~ a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels;

~~(B)~~ a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels;

~~(C)~~ a conviction for an aggravated felony, increase by **8** levels;

~~(D)~~ a conviction for any other felony, increase by **4** levels; or

~~(E)~~ three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

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Commentary

~~Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).~~

~~Application Notes:~~

~~I. Application of Subsection (b)(1):~~

~~(A) In General.—For purposes of subsection (b)(1):~~

- ~~(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.~~
- ~~(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.~~
- ~~(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.~~
- ~~(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.~~

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

- ~~(i) "Alien smuggling offense" has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).~~
- ~~(ii) "Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~
- ~~(iii) "Crime of violence" means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.~~
- ~~(iv) "Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.~~

- ~~(v) "Firearms offense" means any of the following:~~
- ~~(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).~~
  - ~~(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).~~
  - ~~(III) A violation of 18 U.S.C. § 844(h).~~
  - ~~(IV) A violation of 18 U.S.C. § 924(c).~~
  - ~~(V) A violation of 18 U.S.C. § 929(a).~~
  - ~~(VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~
- ~~(vi) "Human trafficking offense" means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~
- ~~(vii) "Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.~~
- ~~(viii) "Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).~~
- ~~2. Definition of "Felony".—For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.~~
- ~~3. Application of Subsection (b)(1)(C).—~~
- ~~(A) Definitions.—For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.~~
  - ~~(B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).~~

- ~~4. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):~~
- ~~(A) "Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.~~
- ~~(B) "Three or more convictions" means at least three convictions for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).~~
- ~~5. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.~~
- ~~6. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).~~

**[Option 1:**

**§2L1.2. Unlawfully Entering or Remaining in the United States**

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic
- (1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

- (A) a conviction for an aggravated felony for which a sentence of imprisonment exceeding 13 months was imposed, increase by **16** levels;
- (B) a conviction for an aggravated felony for which a sentence of imprisonment of 13 months or less was imposed, increase by **12** levels;
- (C) a conviction for an aggravated felony not covered by subdivision (b)(1)(A) or (b)(1)(B), increase by **8** levels;
- (D) a conviction for any other felony, increase by **4** levels; or
- (E) three or more convictions for misdemeanors, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:



1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

- (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.
- (ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.
- (iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.
- (iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

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

- (i) "Aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.
- (ii) "Aggravated felony not covered by subdivision (b)(1)(A) or (b)(1)(B)" means an aggravated felony for which the sentence imposed was a sentence other than imprisonment (e.g., probation).
- (iii) "Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.
- (iv) "Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

2. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):

- (A) "Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.
- (B) "Three or more convictions" means at least three convictions for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).

3. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

4. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).
- [5. Upward Departure Provision.—If reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense, an upward departure may be warranted.]

**[Option 2:**

**§2L1.2. Unlawfully Entering or Remaining in the United States**

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic
- (1) Apply the Greatest:
- If the defendant previously was deported, or unlawfully remained in the United States, after—
- (A) a conviction for an aggravated felony for which the sentence imposed exceeded 2 years, increase by **16** levels;
- (B) a conviction for an aggravated felony for which the sentence imposed was at least 12 months but did not exceed 2 years, increase by **12** levels;
- (C) a conviction for an aggravated felony, not covered in (b)(1)(A) or (b)(1)(B), increase by **8** levels;
- (D) a conviction for any other felony, increase by **4** levels; or
- (E) three or more convictions for misdemeanors, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—
- (A) In General.—For purposes of subsection (b)(1):
- (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

- (ii) *A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.*
- (iii) *A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.*
- (iv) *Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*

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

- (i) *"Aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.*
- (ii) *"Aggravated felony not covered by subdivision (b)(1)(A) or (b)(1)(B)" means an aggravated felony for which the sentence imposed was a sentence other than imprisonment (e.g., probation).*
- (iii) *"Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*
- (iv) *"Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.*

2. Application of Subsection (b)(1)(E).—*For purposes of subsection (b)(1)(E):*

- (A) *"Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.*
- (B) *"Three or more convictions" means at least three convictions for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).*

3. Aiding and Abetting, Conspiracies, and Attempts.—*Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.*

4. Computation of Criminal History Points.—*A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*

[5. Upward Departure Provision.—*If reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense,*

*an upward departure may be warranted.]]*

**[Option 3:**

**§2L1.2. Unlawfully Entering or Remaining in the United States**

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic
  - (1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

- (A) a conviction for an aggravated felony for which the sentence imposed exceeded 13 months, increase by **16** levels;
- (B) a conviction for an aggravated felony for which the sentence imposed was at least 60 days but did not exceed 13 months, increase by **12** levels;
- (C) a conviction for an aggravated felony not covered in (b)(1)(A) or (b)(1)(B), increase by **8** levels;
- (D) a conviction for any other felony, increase by **4** levels; or
- (E) three or more convictions for misdemeanors, increase by **4** levels.

Commentary

*Statutory Provisions:* 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

- (i) *A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.*
- (ii) *A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.*
- (iii) *A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.*

(iv) *Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*

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

(i) *"Aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.*

(ii) *"Aggravated felony not covered by subdivision (b)(1)(A) or (b)(1)(B)" means an aggravated felony for which the sentence imposed was a sentence other than imprisonment (e.g., probation).*

(iii) *"Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*

(iv) *"Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.*

2. Application of Subsection (b)(1)(E).—*For purposes of subsection (b)(1)(E):*

(A) *"Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.*

(B) *"Three or more convictions" means at least three convictions for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).*

3. Aiding and Abetting, Conspiracies, and Attempts.—*Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.*

4. Computation of Criminal History Points.—*A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*

[5. Upward Departure Provision.—*If reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense, an upward departure may be warranted.*]

**[Option 4:**

**§2L1.2. Unlawfully Entering or Remaining in the United States**

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

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

- (A) a conviction for an aggravated felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence for which the sentence imposed exceeded 13 months; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels;
- (B) a conviction for an aggravated felony that is a (i) drug trafficking offense for which the sentence imposed was 13 months or less; or (ii) crime of violence for which the sentence imposed was 13 months or less, increase by **12** levels;
- (C) a conviction for an aggravated felony not covered by subdivisions (b)(1)(A) or (b)(1)(B), increase by **8** levels;
- (D) a conviction for any other felony, increase by **4** levels; or
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

- (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.
- (ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.
- (iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.
- (iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is

*classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*

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

- (i) "Alien smuggling offense" has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).*
- (ii) "Child pornography offense" is an offense described in 8 U.S.C. § 1101(a)(43)(I).*
- (iii) "Crime of violence" has the meaning given that term in 18 U.S.C. § 16.*
- (iv) "Drug trafficking offense" has the meaning given that term in 18 U.S.C. § 924(c).*
- (v) "Firearms offense" is an offense described in 8 U.S.C. §§ 1101(a)(43)(C) and (E).*
- (vi) "Human trafficking offense" is an offense described in 8 U.S.C. § 1101(a)(43)(K).*
- (vii) "Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.*
- (viii) "National security or terrorism offense" is an offense described in 8 U.S.C. § 1101(a)(43)(L).*

2. **Definition of "Felony".—For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.**

3. **Application of Subsection (b)(1)(C).—**

- (A) Definitions.—For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.**
- (B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).**

4. **Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):**

- (A) "Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.**

(B) *"Three or more convictions" means at least three convictions for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).*

5. *Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.*
6. *Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*
- [7. *Upward Departure Provision.—If reliable information indicates that the elements of the offense set forth in the prior conviction under-represent the seriousness of that prior offense, an upward departure may be warranted.]]*

**[Option 5:**

**§2L1.2. Unlawfully Entering or Remaining in the United States**

(a) Base Offense Level: **[16] [20] [24]**

(b) Specific Offense Characteristic

[(1) If the defendant does not have a prior conviction for a felony, decrease by **[8][6][4]** levels.]

*Commentary*

*Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A.*

*Application Notes:*

1. *Definition of "Felony".—For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*
2. *Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.]*

**[Option 6:**

**§2L1.2. Unlawfully Entering or Remaining in the United States**

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

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was removed, deported, or unlawfully



remained in the United States, after—

- (A) a prior conviction for a national security or terrorism offense, increase by **20** levels;
- (B) a prior conviction resulting in a sentence of imprisonment of at least 13 months, or a prior conviction for murder, rape, a child pornography offense or an offense involving sexual abuse of a child, or three prior convictions resulting in sentences of imprisonment of at least 60 days, increase by **16** levels;
- (C) a prior conviction resulting in a sentence of imprisonment of at least 6 months, or two prior convictions resulting in sentences of imprisonment of at least 60 days, increase by **12** levels;
- (D) a prior conviction resulting in a sentence of imprisonment of at least 60 days, increase by **8** levels;
- (E) a prior conviction resulting in a sentence of imprisonment or a conviction for any other felony, increase by **4** levels.

Commentary

*Statutory Provisions:* 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

- (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.
- (ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.
- (iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.
- (iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

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

- (i) *"Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*
  - (ii) *"Offense involving sexual abuse of a child" means an offense where the victim is under 18 years of age and is any of the following: an offense described in 18 U.S.C. § 2242, a forcible sex offense, statutory rape, or sexual abuse of a minor.*
  - (iii) *"Sentence of imprisonment" has the meaning given in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.*
  - (iv) *"National security offense" means an offense to which the Chapter 2M guidelines apply. "Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).*
2. *Definition of "Felony".—For purposes of subsection (b)(1)(E), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*
  3. *Sentences of imprisonment are counted separately if they are for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History).*
  4. *Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.*
  5. *Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*

**Issues for Comment:**

1. *In April 2006, the Commission promulgated an amendment that increased the base offense level in §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) for offenses related to national security. See USSG App C (amendment 692)(effective Nov. 1, 2006). The Commission requests comment regarding whether it should increase the base offense levels in §2L1.1(a)(2) (providing level 23 for previous conviction for an aggravated felony) and (a)(3) (providing level 12, otherwise). Should the Commission increase the base offense levels in §§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)? If so, what offense levels would be appropriate for each relevant guideline?*

2. *The Commission requests comment regarding the Supreme Court's decision in Lopez v. Gonzalez, 126 S.Ct. 625 (Dec. 5, 2006). In Lopez, the Supreme Court held that state drug convictions for conduct treated as a felony by the state, but as a misdemeanor under the federal Controlled Substances Act, do not constitute aggravated felonies under the Immigration and Nationality Act. Under federal criminal law, a conviction for an aggravated felony subjects an alien who unlawfully re-enters the United States to an enhanced statutory maximum penalty (see 8 U.S.C. § 1326(b)(2)) and to an 8-level enhancement under the subsection (b)(1)(C) of §2L1.2. Section 2L1.2 defines "aggravated felony" as having the same meaning given that term in 8 U.S.C. § 1101(a)(43). Given that the guidelines reference the statutory definition of "aggravated felony," the Commission requests comment regarding whether the guidelines should be amended, if at all, in light of Lopez v. Gonzalez?*

**9. Issue for Comment: Reductions In Sentence Based on BOP Motion (Compassionate Release)**

*In April 2006, the Commission promulgated a new policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons), which became effective November 1, 2006. On May 15, 2006, the Commission published an issue for comment stating its intent to consider, in the 2006-2007 amendment cycle, developing further criteria and a list of specific examples of extraordinary and compelling reasons for sentence reduction pursuant to such statute. See 71 FR 28062. The Commission requested comment and specific suggestions for appropriate criteria and examples, as well as guidance regarding the extent of any such reduction and modifications to a term of supervised release.*

*The Commission received comment pursuant to this request and hereby requests any additional comment regarding appropriate criteria and examples of extraordinary and compelling reasons. For example, should the Commission modify §1B1.13 to provide that a reduction in a term of imprisonment should be made only if the extraordinary and compelling reason warranting the reduction involves a circumstance or condition that (i) was unknown to the court at the time of sentencing; (ii) was known to or anticipated by the court at the time of sentencing but that has changed substantially since that time; or (iii) was prohibited from being taken into account by the court at the time of sentencing but is no longer prohibited because of a change in applicable law? With respect to examples of extraordinary and compelling reasons, should the fact that the defendant is suffering from a terminal illness be a sufficient basis for a reduction, or should a reduction be limited to situations in which the defendant's terminal illness reduces the defendant's life expectancy to less than 12 months? Should examples of extraordinary and compelling reasons be limited to medical conditions, and if not, what other factors should provide a basis for a reduction under §1B1.13? Should the Commission provide for a combination approach, allowing the court to consider more than one reason, each of which alone is not extraordinary and compelling but that, taken together, make the rationale for a reduction extraordinary and compelling? Should §1B1.13 provide that the Bureau of Prisons may determine that, in any particular defendant's case, an extraordinary and compelling reason other than a reason identified by the Commission warrants a reduction?*

## 10. Issues for Comment: Criminal History

1. *The Commission has identified as a policy priority for this amendment cycle the continuation of its policy work on Chapter Four (Criminal History and Criminal Livelihood), in part because criminal history is among the most frequently cited reasons for a below guideline range sentence. See 71 FR 56578 (Sept. 27, 2006). The Commission has begun examining ways to improve the operation of Chapter Four.*

*As part of this process the Commission held two round-table discussions regarding criminal history in Washington, D.C., on November 1 and 3, 2006, to gather input from judges, academics, federal prosecutors, federal public defenders and other defense practitioners, probation officers, and other users of the federal sentencing guidelines. One topic of interest was the use of minor offenses (i.e., misdemeanor and petty offenses) in determining a defendant's criminal history score. Pursuant to §4A1.2(c), sentences for misdemeanors and petty offenses ("minor offenses") are counted for criminal history purposes with a limited number of exceptions. Some minor offenses are counted only if the sentence was a term of probation of at least one year or a term of imprisonment of at least 30 days, or the prior offense was similar to the instant offense. Examples of offenses that fall within this exception include reckless driving, disorderly conduct, driving with a suspended license, gambling, prostitution, and resisting arrest. See §4A1.2(c)(1) for the full list of offenses in this category. Certain minor offenses such as hitchhiking, juvenile status offenses and truancy, loitering, minor traffic infractions (e.g., speeding), public intoxication, and vagrancy are never counted in criminal history. See §4A1.2(c)(2). Furthermore, several circuit courts have developed varying tests to determine if a conviction falls within the list of offenses provided in §4A1.2(c)(1) or (c)(2).*

*The Commission requests comment regarding the use of minor offenses in determining a defendant's criminal history score. Specifically, how reflective of the defendant's culpability are minor offenses? Should the Commission consider specifically excluding other minor offenses from the criminal history determination and, if so, which offenses should be excluded? Conversely, should the Commission consider specifically including additional minor offenses for purposes of determining a defendant's criminal category? Should the Commission include any minor offense that has a term of probation of at least one year, or a term of imprisonment of at least 30 days, or if the prior offense was similar to the instant offense (as currently provided in §4A1.2(c)(1))?*

*The Commission also requests comment regarding whether there is an alternate point value that the Commission should consider assigning to minor offenses, or whether there is an alternative way of counting minor offenses for criminal history purposes. For example, should the Commission consider providing criminal history points only after a defendant has multiple convictions for minor offenses? Should the Commission consider not assigning or assigning some alternative point value for recency and status points to minor offenses? (See §4A1.1(d)-(e).) Alternatively, should minor offenses be used only for purposes of an upward departure under §4A1.3 (Departures Based on Inadequacy of Criminal History Category)?*

2. *Another topic of interest among the round-table participants was the definition of "related cases" under Application Note 3 of §4A1.2 (Definitions and Instructions for Computing Criminal History). Currently, prior sentences are considered related if there is not intervening arrest and they resulted from offenses that (A) occurred on the same occasion; (B) were part of a single common scheme or plan; or (C) were consolidated for trial or sentencing. Each of these criteria has been the subject of much litigation in the district and appellate courts, including a decision by the Supreme Court regarding the consolidation aspect of the definition. See *Buford v. United States*, 532 US 59 (2001). Furthermore, a*

*number of appellate opinions have suggested that the Commission reexamine the application of the definition of related cases when sentences are not separated by an intervening arrest. The Commission requests comment regarding the definition of "related cases." With respect to the instances described in subdivisions (A), (B), and (C), are there factors that would help the court determine whether a case is related to another case? For example, should the Commission provide a list of factors for the court to use in determining whether prior convictions are consolidated for sentencing? In general, is the current definition for related cases too restrictive and, if so, how should the definition be modified or expanded?*

**11. Issue for Comment: Implementation of the Telephone Records and Privacy Protection Act of 2006**

*The Telephone Records and Privacy Protection Act of 2006, Pub. L. 109–476, created a new offense in 18 U.S.C. § 1039 pertaining to the fraudulent acquisition or disclosure of confidential telephone records. Section 4 of the Act requires the Commission to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 1039 of title 18, United States Code." The Act requires the Commission to promulgate an amendment not later than 180 days after the enactment of the Act.*

*The Commission requests comment regarding how best to implement this legislation, particularly in light of the mandatory consecutive penalties provided for certain forms of aggravated conduct, and keeping in mind the Commission's simplification efforts. For example, should the Commission reference this offense to §2H3.1 as it is proposed to be amended in the Miscellaneous Laws proposed amendment? That proposed amendment expands the heading of the guideline to include the unauthorized disclosure of any private information, which would include confidential telephone records. If it should be referenced to §2H3.1, are there additional modifications (e.g. special offense characteristics) that should be made to that guideline to implement the new offense?*

## **12. Issue for Comment: Cocaine Sentencing Policy**

*The Commission identified as a policy priority for the current amendment cycle ending May 1, 2007, the “continuation of its work with the congressional, executive, and judicial branches of the government and other interested parties on cocaine sentencing policy”, including updating the Commission’s 2002 Report to Congress, Cocaine and Federal Sentencing Policy, which is available on the Commission’s website at [www.ussc.gov](http://www.ussc.gov).*

*In working to address this priority, the Commission currently is updating the information contained in its 2002 Report. As part of this process, the Commission gathered information at a public hearing it held on cocaine sentencing policy on November 14, 2006. At that hearing, the Commission received testimony from the executive and judicial branches of the federal government, State and local agencies, the defense bar, medical and drug treatment experts, academics, and community interest groups. Witnesses at that hearing expressed a variety of views about the nature and characteristics of cocaine offenses and offenders and suggested a number of proposals for addressing federal cocaine penalties. Testimony of the witnesses, as well as a transcript of the public hearing, can be found on the Commission’s website.*

*The Commission invites comment on any or all of the testimony received at the November 14, 2006, public hearing, including comment on any of the suggestions at that hearing or any other suggestions (such as possible changes in the Drug Quantity Table) for addressing federal cocaine penalties.*