
2000 Amendments to the Federal Sentencing Guidelines

(Effective November 1, 2000)



Prepared by the Office of Education & Sentencing Practice

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Sentencing Guidelines
2000 Amendment Highlights

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I. Congressional Interest Issues

A. **Methamphetamine** — This amendment responds to statutory changes to the quantity of methamphetamine substance triggering mandatory minimum penalties prescribed in the Methamphetamine Trafficking Penalty Enhancement Act of 1998. This amendment conforms methamphetamine (actual) penalties, as specified in the Drug Quantity Table, to the new mandatory minimums established in the Act. No changes were made to the methamphetamine (mixture) penalties.

B. **NET Act** — This multi-part amendment is in response to the directives to the Commission in the No Electronic Theft (NET) Act of 1997. **This amendment is promulgated under the Commission’s emergency amendment authority and is effective May 1, 2000 and will become permanent on November 1, 2000.**

This amendment increases the base offense level at §2B5.3 from six to eight to be consistent with the fraud guideline, and to reflect the “more than minimal planning” that occurs in the majority of infringement cases.

The NET Act directs the Commission to provide for consideration of the retail value of the infringed item. Prior to this amendment, the retail value of the “infringing item” was used to determine the monetary harm in copyright or trademark cases. This amendment directs the court to use the “infringement amount,” which is calculated using a formula set out in the application notes and will typically be the retail value of the “infringed item .”

This amendment also adds two new specific offense characteristics and minimum offense levels to address (1) the manufacture, importation, or uploading of infringing items; and, (2) the conscious or reckless risk of serious bodily injury or possession of a dangerous weapon in connection with the offense. A downward adjustment is provided if the offense was not committed for commercial advantage or private financial gain.

This amendment also provides two upward departure provisions and a new application note regarding the interaction of this guideline and §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

C. **Repromulgation of Telemarketing Amendment** — This amendment makes permanent, the temporary emergency amendment submitted to Congress on September 23, 1998, in response to directives contained in the Telemarketing Fraud Protection Act of 1998. The amendment provided (1) an enhancement in §2F1.1 (Fraud) for offenses that involve sophisticated means; and (2) an enhancement in §3A1.1 (Vulnerable Victim) for offenses that involve a large number of vulnerable victims. The amendment, particularly the sophisticated means enhancement, built on and broadened the amendment submitted on May

1, 1998, which created an enhancement in §2F1.1 for sophisticated concealment.

- D. Identity Theft/Wireless Phone Cloning** — This amendment represents the Commission’s response to the directives in the Identity Theft and Assumption Deterrence Act of 1998, and the Wireless Telephone Protection Act. Because of the overlap in some of the statutory definitions in these two acts, enhancements have been consolidated into a single amendment for purposes of sentencing guideline application.

This is a four-part amendment. First, this amendment provides an enhancement and a minimum offense level for offenses involving (1) the use or possession of equipment that is used to manufacture access devices; (2) the production of, and trafficking in, unauthorized and counterfeit access devices, such as stolen credit cards and wireless cloned telephones; and (3) the possession or production of documents to commit identity theft.

Second, this amendment provides a rebuttable presumption that the offense involved “more than minimal planning” when the enhancement for identity theft or wireless cloning applies. However, the specific offense characteristics for “sophisticated means” at §2F1.1(b)(6) will not apply unless it is based on conduct other than that which triggers the identity theft or wireless telephone cloning offense.

Third, this amendment adds a new application note to §2F1.1 which extends the minimum loss rule for stolen credit cards at §2B1.1 (Application Note 4) to all unauthorized and counterfeit access devices (with a limited exception), and increases the minimum loss amount to \$500 for each access device.

Fourth, this amendment invites an upward departure if the offense level does not adequately reflect the seriousness of the offense conduct, as for example, when there are multiple victims of an identity theft or an individual is subjected to an arrest as a result of the identity theft.

- E. Sexual Predators** — This amendment responds to directives to the Commission in the Protection of Children from Sexual Predators Act of 1998. This is a multi-part amendment which effects guidelines §§2A3.1-2A3.4, 2G1.1, 2G2.1, 2G2.2, 2G2.4 and 2G3.1.

The amendment provides enhancements in §§2A3.1-2A3.4 (Sexual Abuse), §2G1.1 (Prostitution and Promotion of Prohibited Sexual Conduct), and, §2G2.1 (Child Pornography Production), if the offense involved: (1) the use of a computer or an Internet-access device; and/or, (2) the misrepresentation of a criminal participant’s identity. These enhancements reflect the concern of Congress over the increased access to children provided by computers and the Internet, and the “anonymous nature” of on-line relationships, which allow users to misrepresent

their identity. In §2A3.2 and §2G1.1, an additional prong was added to the misrepresentation of identity enhancement so that the enhancement applies if (1) a participant misrepresented the participant's identity; or (2) a participant otherwise unduly influenced the victim to engage in the prohibited sexual conduct. Commission data indicated that many of the offenses sentenced under these guidelines involve some aspect of undue influence over the victim on the part of the defendant or other criminally responsible person.

The amendment also makes several other modifications to the sexual abuse and pornography guidelines. First, in response to a specific congressional directive, this amendment establishes an alternative base offense level of level 18 in §2A3.2 (Criminal Sexual Abuse of a Minor) if the offense involved a violation of chapter 117 of title 18, United States Code (relating to transportation of minors for illegal sexual activity). However, the amendment provides for a three-level decrease if a defendant receives the higher alternative base offense level of 18 and none of the other specific offense characteristics apply. This reduction recognizes not all defendants convicted under chapter 117 have necessarily engaged in the more aggravated form of sexual abuse of a minor.

In §2G1.1 (Prostitution and Promotion of Prohibited Sexual Conduct), this amendment reworks, without substantive change, the base offense level for offenses involving a minor. Second, the guideline was amended to ensure that prostitution must be involved in order for the enhancement for use of coercion, threats, or drugs to apply. The Commission also modified cross-reference language to clarify that §2A3.1 (Criminal Sexual Abuse) is to be applied whenever the offense involves criminal sexual abuse with a minor under the age of 12 years, regardless of the "consent" of the victim.

This amendment also expands the definition of "distribution" in §2G3.1 (Importing, Mailing, or Transporting Obscene Matter), and §2G2.2 (Possession, Receipt, transportation, Trafficking of Material Involving the Sexual Exploitation of a Minor) to cover all acts of distribution, including those for which the distributor received nothing of value in return. The amendment also modifies a specific offense characteristic to provide for additional, alternative enhancements depending upon why the materials were distributed and to whom they were distributed.

Finally, the amendment adds two new offenses to the Statutory Index (Appendix A) and references them to the appropriate sexual offense guideline. It also makes numerous commentary changes including the adoption or expansion of definitions of terms used in these guidelines, such as "item", "minor", "participant", and "victim".

- F. Firearms**—This amendment is in response to statutory changes made in the Act to Throttle the Criminal Use of Guns. This amendment has four parts.

First, the amendment conforms the guideline definition of “brandish” found at §1B1.1 (Application Note 1(c)) with the statutory definition in 18 U.S.C. § 924(c). The definition of “dangerous weapon” in §1B1.1 (Application Note 1(d)) is also amended to clarify under what circumstances an object that is not an actual dangerous weapon should be treated as one for purposes of guideline application.

Second, the amendment clarifies that a sentence greater than the minimum term required by 18 U.S.C. § 924(c) and § 929(a) is an upward departure from the guideline sentence. Application Note 1 in §2K2.4 is amended to invite such departures in certain circumstances.

Third, the amendment revises §2K2.4 and §4B1.2 to clarify guideline application for offenders convicted under 18 U.S.C. § 924(c) who might also qualify as career offenders under the rules and definitions provided in §4B1.1 and §4B1.2. This amendment prohibits the use of section 924(c) convictions either to trigger application of the career offender guideline (§4B1.1), or to determine the appropriate offense level under that guideline. However, prior convictions for violating section 924(c) still qualify as “prior felony convictions” under the career offender guideline in most circumstances.

Fourth, this amendment makes clear that defendants sentenced for violations of section 924(c) may not receive weapon enhancements for the underlying offense (and other related offenses) for weapons possessed by codefendants or weapons possessed by the defendant other than those named in the 924(c) count. This portion of the amendment was made retroactive.

II. Circuit Conflicts

- A. Bankruptcy Fraud** — This amendment resolves a circuit conflict regarding whether the fraud guideline enhancement for "violation of any judicial or administrative order, injunction, decree, or process" (§2F1.1(b)(4)(B)) applies to falsely completing bankruptcy schedules and forms.

This amendment adds an enhancement for making a false statement in a bankruptcy proceeding. In addition, a change in the commentary makes clear that in cases other than bankruptcy fraud, an enhancement for violation of a judicial order or process only applies if a defendant violates a prior specific order to take or not take a specified action.

- B. Drug Sales in Protected Location or to a Protected Individual** — This amendment resolves a circuit conflict regarding whether the enhancements in §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply on the basis of relevant conduct or only when the defendant is convicted of drug sales in a protected location or to a

protected individual. The amendment modifies the guidelines and commentary at §1B1.1(a) and §1B1.2(a), and the Statutory Index (Appendix A) to address the circuit conflict, as well as, confusion regarding the use and application of the Statutory Index (Appendix A).

This amendment clarifies that the courts must apply the offense guideline referenced for the statute of conviction listed in the Statutory Index unless the case involves a stipulation to a more serious offense or additional offenses as set forth in §1B1.2(a). This amendment will make it clear that a court may not look to the defendant's relevant conduct in determining the offense guideline to be used. Therefore, in order for the enhanced penalties in §2D1.2 to apply, the defendant must be convicted of an offense referenced to that guideline. This amendment was made retroactive.

- C. Post-Sentencing Rehabilitative Efforts** — This amendment addresses a circuit conflict regarding whether sentencing courts may consider post-conviction rehabilitation while in prison or on probation as a basis for downward departure at re-sentencing following an appeal. Specifically, this amendment creates a new departure policy statement at §5K2.19 which prohibits post-sentencing rehabilitative efforts as a factor for departure when resentencing a defendant initially sentenced to a term of imprisonment.
- D. Aberrant Behavior Departure** — This amendment resolves a circuit conflict regarding whether a “single act of aberrant behavior ” includes multiple acts occurring over a period of time for purposes of downward departure. Under the new policy statement at §5K2.20 a departure may be warranted “in an extraordinary case if the defendant’s criminal conduct constituted aberrant behavior”. The amendment provides, in pertinent part, that “aberrant behavior” means a single criminal occurrence or single criminal transaction." The Commission intends that the phrases "single criminal occurrence" and "single criminal transaction" will be somewhat broader than "single act", but will be limited in potential applicability to offenses (1) committed without significant planning; (2) of limited duration; and (3) that represent a marked deviation by the defendant from an otherwise law-abiding life. This amendment provides prohibitions on departure under this provision if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than 1 criminal history point ; or (5) the defendant has a prior federal or state felony conviction.
- E. Dismissed/Uncharged Conduct Departure** — This amendment addresses a circuit conflict regarding whether a court can base an upward departure on conduct that was dismissed or uncharged as part of a plea agreement in the case. This amendment modifies §1B1.4 and §6B1.2, with an accompanying new departure policy statement at §5K2.21, to make clear that the court may accept a plea agreement and nevertheless depart upward based on charges dismissed or uncharged pursuant to that agreement.

III. Technical Amendments

- A. **§2D1.11, Listed Chemicals** —This amendment corrects a typographical error in the Chemical Quantity Table in the listed chemicals regarding quantities of Isosafrole and Safrole by changing those quantities from grams to kilograms. This portion of the amendment was made retroactive.

In addition, this amendment corrects an omission made during prior Commission deliberations on the Comprehensive Methamphetamine Control Act of 1996 by adding an enhancement in §2D1.11 and §2D1.12 for environmental damage.

- B. **§5B1.3, Conditions of Probation; §5D1.3 Conditions of Supervised Release** — This amendment updates these guidelines by including a new sex offender condition as a specific mandatory condition rather than in a footnote.