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***Amendments to the  
Federal Sentencing Guidelines***  
*(Effective November 1, 2004, unless modified or  
rejected by Congress)*

***Highlights of Key Points***



***Prepared by the Office of Education & Sentencing Practice***

*Disclaimer: Information provided by Sentencing Commission Staff is offered to assist in understanding and applying the sentencing guidelines. This information does not necessarily represent the official position of the Commission, should not be considered definitive, and is not binding upon the Commission, the court, or the parties in any case.*

## INTRODUCTION

The guidelines amendments discussed in this document reflect changes to the Guidelines Manual that went into effect on November 1, 2004. The Commission submitted the proposed changes to Congress on May 1, 2004. The national legislature had 180 days to review the amendments and either approve or reject any part of the suggested amendments. Since Congress did not take any action, the guidelines amendments are in place today.

In this document, the Commission has outlined several key changes made to the guidelines. Most, but not all, of the amendments are mentioned here. These highlights contain a brief overview of the amendments in an effort to make the guidelines users aware of the changes. If you would like a more detailed explanation of the amendments, please refer to *Appendix C* of the 2004 Guidelines Manual. Beginning at Amendment 603 and concluding with Amendment 674, this section will provide a more thorough description of what changes were made and what impact they will have on sentencing practices.

**SENTENCING GUIDELINES  
AMENDMENT HIGHLIGHTS – 2004**

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## I. CHILD SEX CRIMES

The amendment affecting guidelines in the area of criminal sexual acts against minors is one of the most sweeping reforms in the Guidelines Manual for 2004. This amendment implements directives to the Commission regarding child pornography and sexual abuse offenses in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the “PROTECT Act”), Pub. L. 108-21. It makes changes to Chapter Two, Part A, Chapter Two, Part G, §§3D1.2 (Groups of Closely Related Counts), 5B1.3 (Conditions of Probation), 5D1.2 (Term of Supervised Release), 5D1.3 (Conditions of Supervised Release), and Appendix A.

First, the amendment consolidates §§2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor) and 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct) into one guideline - §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor):

- §2G2.2 provides two alternative base offense levels depending upon the statute of conviction. The base offense level is set at level 18 for a defendant convicted of the possession of child pornography under 18 U.S.C. § 2252(a)(4), 18 U.S.C. § 2252A(a)(5), or 18 U.S.C. § 1466A(b). However, the base offense level is 22 for a defendant convicted of any other offense referenced to this guideline including trafficking and receipt of child pornography.
- The amendment provides for a two-level decrease at §2G2.2(b)(1) for a defendant whose base offense level is level 22 but whose conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor, and whose conduct did not involve an intent to traffic these items.
- The Commission added a six-level enhancement at §2G2.2(b)(3)(D) for offenses that involve distribution to a minor with intent to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than sexual activity.
- The commentary at §2G2.2 adds several definitions, including definitions of “computer,” “image,” “interactive computer service,” and “minor,” to provide more guidance for these terms and uniformity in application of the guideline.
- The commentary also emphasizes that distribution includes advertising and posting material involving the sexual exploitation of a minor on a website for public viewing, but does not include soliciting such material. In response to a circuit conflict, the amendment adds an application note to make clear that the specific offense characteristic for material

portraying sadistic or masochistic conduct applies regardless of whether the defendant specifically intended to possess, receive, or distribute such material.

Second, section 103 of the PROTECT Act increased the mandatory minimum term of imprisonment from ten to fifteen years for offenses related to the production of child pornography under 18 U.S.C. § 2251. In response to the increase to the mandatory minimum term of imprisonment, the Commission decided to make a number of changes to §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material):

- The base offense level was raised from level 27 to level 32.
- There is a new specific offense characteristic at §2G2.1(b)(2), providing a two-level increase if the offense involved the commission of a sex act, or a four-level increase if the offense involved a sex act and conduct described in 18 U.S.C. § 2241(a) or (b).
- Likewise, there is a new amendment at §2G2.2(b)(3) which adds a two-level increase if the production offense also involved distribution.

Third, this amendment creates a new guideline - the transportation guideline - at §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor) to specifically address offenses under chapter 117 of title 18, United States Code. Prior to the amendment, chapter 117 offenses, primarily 18 U.S.C. §§ 2422 and 2423 were referenced by Appendix A to either §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct) or §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years [Statutory Rape] or Attempt to Commit Such Acts). Offenses under 18 U.S.C. §§ 2422 and 2423(a) were referenced to §2G1.1 but were then cross-referenced from §2G1.1 to §2A3.2 to account for the underlying behavior:

- The new guideline at 2G1.3 has a base offense level of 24 to account for the new mandatory minimum terms of imprisonment established by the PROTECT Act.
- It provides five specific offense characteristics to provide proportionate enhancements for aggravating conduct that may occur in connection with these cases. The guideline contains enhancements for commission of a sex act or commercial sex act, use of a computer, misrepresentations of identity, undue influence, custody issues, and involvement of a minor under the age of 12 years.
- The amendment also provides three cross-references to account for more serious sexual abuse conduct.

Fourth, in response to a circuit conflict, this amendment adds a condition to §§5B1.3 and 5D1.3 permitting the court to limit the use of a computer or an interactive computer service for sex offenses in which the defendant used such items.

Next, the amendment increases the base offense level at §2A3.1 (Criminal Sexual Abuse) from level 27 to level 30 to maintain proportionality between this guideline and §2G2.1. In addition, the base offense level at §2G2.1 was raised to level 32 by this amendment.

Sixth, the amendment increases the offense levels for two specific offense characteristics at §2A3.2. The amendment increases the custody, care, or supervisory control enhancement from two to four levels at §2A3.2(b)(1). In addition, the amendment raises §2A3.2(b)(3) from a two-level to a four-level increase.

Seventh, in response to section 401 of the PROTECT Act, the amendment increases the base offense level at §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts) from level 9 to a level 12.

Finally, the amendment increases the alternative base offense levels in §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact) to level 20, 16, or 12, depending on the conduct involved in the offense.

## **II. DRUGS** (Chapter Two, Part D)

The Commission made a number of changes to the drug guidelines in Chapter Two, Part D. One change involves a modification and an expansion to the Drug Quantity limitation; often referred to as the Mitigating Role Cap. Prior to this amendment, §2D1.1(a)(3) limited the maximum base offense level to level 30 for all offenders sentenced under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) who also received an adjustment at §3B1.2 (Mitigating Role). Instead this amendment implements a graduated reduction for offenders whose quantity level under §2D1.1(c) results in a base offense level greater than level 30 and who qualify for a mitigating role adjustment. Specifically, for defendants who receive an adjustment at §3B1.2, the base offense level will be reduced as follows:

- A two-level reduction if the base offense level determined at the Drug Quantity Table is level 32.
- A three-level reduction if the base offense level determined at the Drug Quantity Table is level 34 or 36.

- A four-level reduction if the base offense level under the Drug Quantity Table is level 38.
- This amendment also provides that mitigating role defendants can obtain identical reductions in offense levels listed for chemical quantities at §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical). Prior to this amendment, this reduction had not been applicable at this guideline.

Second, this amendment implements section 608 of the PROTECT Act which directed the Commission to review and consider amending the guidelines with respect to gamma-hydroxybutyric acid (“GHB”):

- The amendment modifies §2D1.1 to provide an approximate five year term of imprisonment (equivalent to base offense level 26, Criminal History Category I) for distribution of three gallons of GHB. In addition, the amendment provides for a ten year penalty (base offense level 32) for defendants who possess a quantity of 30 gallons.
- The amendment also increases penalties under §2D1.11 for offenses involving gamma-butyrolactone (“GBL”) which is a precursor for GHB. The quantities in §2D1.11 track the quantities used in §2D1.1.

Third, the amendment adds a two-level enhancement in §§2D1.1, 2D1.11, and 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material) for mass-marketing of a controlled substance, listed chemical, or prohibited equipment, respectively, through the use of an interactive computer service.

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

Fifth, this amendment addresses a circuit conflict regarding the interpretation of the last sentence in Application Note 12 of §2D1.1. Application Note 12 covers offenses involving an agreement to sell a specific quantity of a controlled substance. This amendment makes clear that the court shall exclude from the offense level calculation the amount of the controlled substance, if any, that the defendant establishes that he did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, regardless of whether the defendant agreed to be the seller or the buyer of the controlled substance.

Sixth, this amendment modifies the existing rule at Application Note 5 of §2D1.1 to provide a more uniform mechanism for determining sentences in cases

involving analogues of controlled substances or controlled substances not specifically referenced in the guidelines. The application note instructs that in the case of a controlled substance that is not specifically referenced in the guideline, to use the marijuana equivalency of the most closely related controlled substance referenced in the guideline in order to determine the base offense level.

This amendment also provides for a six-level enhancement at §2D1.12 if the offense involved stealing anhydrous ammonia or transporting stolen anhydrous ammonia.

### **III. HOMICIDE AND ASSAULT (Chapter Two, Part A, §3A1.2)**

This amendment increases the base offense levels for the homicide and manslaughter guidelines to address proportionality concerns and new proportionality issues prompted by changes to other Chapter Two guidelines pursuant to the PROTECT Act. It also amends the assault guidelines and the adjustment at §3A1.2 (Official Victim) to implement the directive in section 11008(e) of the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act (“the Justice Appropriations Act”), Pub. L. 107-273.

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

Second, the Commission increased the base offense levels in a number of these guidelines including:

- §2A1.2 (Second Degree Murder) from level 33 to level 38;
- §2A1.3 (Voluntary Manslaughter) from level 25 to level 29;
- §2A1.5 (Conspiracy or Solicitation to Commit Murder) from level 28 to level 33;
- §2A2.1 (Assault with Intent to Commit Murder) from level 28 to level 33 if the object of the offense would constitute first degree murder, and from level 22 to level 27 otherwise.

Third, the amendment adds a third alternative base offense level in §2A1.4 (Involuntary Manslaughter) of level 22 for reckless involuntary manslaughter offenses that involved the reckless operation of a means of transportation.



Next, this amendment makes a number of changes to the assault guidelines and the Chapter Three adjustment for Official Victim (§3A1.2) to implement the Congressional directive and the changes in statutory maximum terms of imprisonment for a number of offenses in the Justice Appropriations Act. Some of these include offenses against current or former officers or employees of the United States, including federal judges and magistrate judges, their families or persons assisting in the performance of those official duties, or offenses committed on account of those duties:

- In response to this directive, the Commission added a new specific offense characteristic in §2A2.2 (Aggravated Assault) to provide a two-level increase if the defendant was convicted under 18 U.S.C. § 111(b) or § 115.
- Also, the Commission amended the guideline to decrease the base offense level from level 15 to level 14.
- The specific offense characteristics addressing degrees of bodily injury each were increased by one level.
- Additionally, in §2A2.3 (Minor Assault), the alternative base offense levels each were increased by one level, a specific offense characteristic was added to provide a two-level enhancement if the victim sustained bodily injury, and a cross-reference to §2A2.2 was added.
- Similarly, §2A2.4 (Obstructing or Impeding Officers) was amended by increasing the base offense level to level 10, and by adding a specific offense characteristic providing a two-level increase if the victim sustained bodily injury.

The amendment restructures §3A1.2 and provides a two-tiered adjustment. The amendment maintains the three-level adjustment for offenses motivated by the status of the official victim, but increases the adjustment to six levels if that defendant's offense guideline was from Chapter Two, Part A. The six-level enhancement also applies to assaults against law enforcement officers or prison officials if the defendant committed the act in a manner creating a substantial risk of serious bodily injury.

#### **IV. PUBLIC CORRUPTION (Chapter Two, Part C)**

This amendment increases punishment for bribery, gratuity, and "honest services" cases while providing additional enhancements to address previously unrecognized aggravating factors inherent in some of these offenses.

In addition, to simplify guideline application, the amendment consolidates §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe) with §2C1.7 (Fraud Involving

Deprivation of the Intangible Right to the Honest Services of Public Officials) and the new guideline is §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe).

Furthermore, §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) is consolidated with §2C1.6 (Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper) into §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity).

Guidelines §§2C1.1 and 2C1.2 each are amended to include alternative base offense levels, with an increase of two levels for public official defendants who violate their offices or responsibilities by accepting bribes, gratuities, or anything else of value.

Finally, a new specific offense characteristic has been added to §§2C1.1 and 2C1.2 that provides a two-level increase if the offender is a public official whose position involves the security of the borders of the United States or the integrity of the process for generating documents related to naturalization, legal entry, legal residence, or other government identification documents.

## **V. IMMIGRATION (§2L2.2)**

The purpose of this amendment is to provide increased punishment for defendants who fraudulently use or obtain United States passports in §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use):

- The amendment adds a new specific offense characteristic at §2L2.2(b)(3) that provides an increase of four levels if the defendant fraudulently obtained or used a United States passport.
- Application Note 3 clarifies that “used” is to be construed broadly and includes the attempted renewal of a previously issued United States passport.
- Application Note 5 invites an upward departure if the defendant used a United States passport with the intent to engage in terrorist activity.

## **VI. BODY ARMOR (§2K2.6)**

This amendment addresses the new offense at 18 U.S.C. § 931 which prohibits the purchase, ownership, or possession of body armor by individuals who have been convicted of either a federal or state felony that is a crime of violence. The statutory maximum term of imprisonment for this offense is three years.

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

- Guideline 2K2.6 calls for a base offense level of 10 and provides for a four-level increase at §2K2.6(b)(1) “if the defendant used the body armor in connection with another felony offense.”
- The commentary also provides guidance for the scope of the terms “felony offense,” “defendant,” and “used” for purposes of §2K2.6(b)(1).

#### **VII. USE OF A MINOR (§2X6.1)**

This amendment creates a new guideline at §2X6.1 (Use of a Minor in a Crime of Violence) in response to a new offense at 18 U.S.C. § 25:

- That prohibits any person eighteen years of age or older from intentionally using a minor to commit a crime of violence or to assist in avoiding detection.
- §2X6.1 directs the court to increase by four levels the offense level from the guideline application to the underlying crime of violence.
- Application notes are included to explain that the adjustment under §3B1.4 (Use of a Minor To Commit a Crime) is inapplicable if §2X6.1 is applied.

#### **VIII. MANPADS (§2K2.1(b)(3))**

Before enactment of this amendment to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), the specific offense characteristic at (b)(3) generally called for a two-level enhancement if the offense involved a destructive device, without regard to the type of destructive device involved. This amendment increases that enhancement to fifteen levels if the destructive device was a man-portable air defense system (“MANPADS”), portable rocket, missile, or device used for launching a portable rocket or missile. It maintains the two-level enhancement for all other destructive devices.

#### **IX. HAZARDOUS MATERIALS (§2Q1.2)**

This amendment adds a two-level enhancement in §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides) for offenders convicted under 49 U.S.C. § 5124 or § 46312.

This amendment adds an application note authorizing an upward departure if the offense was calculated to influence or affect the conduct of the government by intimidation or coercion, or to retaliate against government conduct. This provision would also apply in cases in which a defendant who has a terrorist motive is not also convicted of a “federal crime of terrorism” that would trigger application of §3A1.4 (Terrorism).

## **X. IMPLEMENTATION OF THE CAN-SPAM ACT OF 2003**

This amendment responds to the directive in section 4(b) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“the CAN-SPAM Act”), Pub. L. 108-187. The act creates five new felony offenses which are codified at 18 U.S.C. § 1037 and directs the Commission to review and amend the guidelines to establish appropriate penalties for violations of 18 U.S.C. § 1037 and other offense that may be facilitated by sending large volumes of unsolicited electronic mail, including fraud, identity theft, obscenity, child pornography and sexual exploitation of children.

In response to the Congressional directive, the Commission determined that reference to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) is appropriate because 18 U.S.C. § 1037(a)(1) involves misappropriation of another’s computer, and 18 U.S.C. § 1037(a)(2) through (a)(5) involve deceit. In Application Note 4, the amendment provides that the mass marketing enhancement in §2B1.1(b)(2)(A)(ii) shall apply automatically to any defendant who is convicted of 18 U.S.C. § 1037, or who committed an offense involving conduct described in this statutory provision.

Also, a new specific offense characteristic at §2B1.1(b)(7) calls for a two-level increase if the defendant is convicted under 18 U.S.C. § 1037 and the offense involved obtaining electronic mail through improper means. The commentary provides examples of how one may obtain electronic mail through “improper means.”

## **XI. CHAPTER EIGHT COMPLIANCE PROGRAMS**

This amendment modifies existing provisions of Chapter Eight and provides a new guideline at §8B2.1 (Effective Compliance and Ethics Program). Most notably, §8B2.1 strengthens the existing criteria an organization must follow in order to establish and maintain an effective program to prevent and detect criminal conduct for purposes of mitigating its sentencing culpability for an offense. This amendment is the culmination of a multi-year review of the organizational guidelines, implements several recommendations issued on October 7, 2003, by the Commission’s Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (“the Advisory Group,”) and responds to

the Sarbanes-Oxley Act of 2002 (“the Act”), Pub. L. 107-204, Section 805 of the Act directed the Commission to review and amend the organizational guidelines and related policy statements to ensure that they are sufficient to deter and punish organizational misconduct.

The amendment revises the Introductory Commentary to Chapter Eight to highlight the importance of structural safeguards designed to prevent and detect criminal conduct. Among these safeguards is a regime of internal crime prevention and self-policing.

Under §8C2.5 (Culpability Score), an effective compliance and ethics program is one of the mitigating factors that can reduce an organization’s fine punishment under Chapter Eight. The absence of an effective program may be a reason for a court to place an organization on probation, and the implementation of an effective program may be a condition of probation for organizations under §8D1.4 (Recommended Conditions of Probation – Organizations).

In order to emphasize the importance of compliance and ethics programs and to provide more prominent guidance on the requirements for an effective program, the amendment elevates the criteria for an effective compliance program previously set forth in the Commentary to §8A1.2 (Application Instructions – Organizations) into a separate guideline.

## **XII. CAREER OFFENDER (§4B1.2)**

This amendment expands the definition of “crime of violence” in Application Note 1 to §4B1.2 (Definitions of Terms Used in Section 4B1.1) to include unlawful possession of any firearm described in 26 U.S.C § 5845(a) (“National Firearms Act”). This expansion includes sawed-off shotguns, short-barreled rifles, machineguns, silencers, and destructive devices. In addition, the amendment states that a felon in possession of such weapon as described in § 5845(a) is a “crime of violence.” Congress has determined that those firearms listed in § 5845(a) are inherently dangerous and when possessed unlawfully, serve only violent purposes and should therefore be considered as posing a serious potential risk to physical injury to another person.