

AMENDMENTS TO THE SENTENCING GUIDELINES

Pursuant to section 994(p) of title 28, United States Code, the United States Sentencing Commission hereby submits to the Congress the following amendments to the sentencing guidelines and the reasons therefor. As authorized by such section, the Commission specifies an effective date of November 1, 2005, for these amendments.

Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary

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

"§2B1.6. Aggravated Identity Theft

- (a) If the defendant was convicted of violating 18 U.S.C. § 1028A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

Commentary

Statutory Provision: 18 U.S.C. § 1028A. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Imposition of Sentence.—
 - (A) In General.—Section 1028A of title 18, United State Code, provides a mandatory term of imprisonment. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 1028A is the term required by that statute. Except as provided in subdivision (B), 18 U.S.C. § 1028A also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.
 - (B) Multiple Convictions Under Section 1028A.—Section 1028A(b)(4) of title 18, United State Code, provides that in the case of multiple convictions under 18 U.S.C. § 1028A, the terms of imprisonment imposed on such counts may, in the discretion of the court, run concurrently, in whole or in part, with each other. See the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance regarding imposition of sentence on multiple counts of 18 U.S.C. § 1028A.

2. Inapplicability of Chapter Two Enhancement.—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. A sentence under this guideline accounts for this factor for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). ‘Means of identification’ has the meaning given that term in 18 U.S.C. § 1028(d)(7).
3. Inapplicability of Chapters Three and Four.—Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2.".

The Commentary to §3B1.3 captioned "Application Notes" is amended in Note 1 by inserting "Definition of ‘Public or Private Trust’.—" before "'Public or private trust' refers to", and by striking the second paragraph; by redesignating Notes 2 through 4 as Notes 3 through 5, respectively; and by inserting after Note 1 the following:

- "2. Application of Adjustment in Certain Circumstances.—Notwithstanding Application Note 1, or any other provision of this guideline, an adjustment under this guideline shall apply to the following:
 - (A) An employee of the United States Postal Service who engages in the theft or destruction of undelivered United States mail.
 - (B) A defendant who exceeds or abuses the authority of his or her position in order to obtain unlawfully, or use without authority, any means of identification. ‘Means of identification’ has the meaning given that term in 18 U.S.C. § 1028(d)(7). The following are examples to which this subdivision would apply: (i) an employee of a state motor vehicle department who exceeds or abuses the authority of his or her position by knowingly issuing a driver’s license based on false, incomplete, or misleading information; (ii) a hospital orderly who exceeds or abuses the authority of his or her position by obtaining or misusing patient identification information from a patient chart; and (iii) a volunteer at a charitable organization who exceeds or abuses the authority of his or her position by obtaining or misusing identification information from a donor’s file.".

Section 3D1.1 is amended by striking subsection (b) and inserting the following:

- "(b) Exclude from the application of §§3D1.2-3D1.5 the following:
- (1) Any count for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of §5G1.2(a).
 - (2) Any count of conviction under 18 U.S.C. § 1028A. See Application Note 2(B) of the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance on how sentences for multiple counts of conviction under 18 U.S.C. § 1028A should be imposed."

The Commentary to §5G1.2 captioned "Application Notes" is amended in Note 2 by inserting "(A) In General.—" before "Subsection (a) applies"; by inserting "and 18 U.S.C. § 1028A (requiring a mandatory term of imprisonment of either two or five years, based on the conduct involved, and also requiring, except in the circumstances described in subdivision (B), the sentence imposed to run consecutively to any other term of imprisonment)" after "imprisonment"; by striking "Note, however," and all that follows through "§ 3624(e)."; and by adding at the end the following:

- "(B) Multiple Convictions Under 18 U.S.C. § 1028A.—Section 1028A of title 18, United States Code, generally requires that the mandatory term of imprisonment for a violation of such section be imposed consecutively to any other term of imprisonment. However, 18 U.S.C. § 1028A(b)(4) permits the court, in its discretion, to impose the mandatory term of imprisonment on a defendant for a violation of such section ‘concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission. . .’.

In determining whether multiple counts of 18 U.S.C. § 1028A should run concurrently with, or consecutively to, each other, the court should consider the following non-exhaustive list of factors:

- (i) The nature and seriousness of the underlying offenses. For example, the court should consider the appropriateness of imposing consecutive, or partially consecutive, terms of imprisonment for multiple counts of 18 U.S.C. § 1028A in a case in which an underlying offense for one of the 18 U.S.C. § 1028A offenses is a crime of violence or an offense enumerated in 18 U.S.C. § 2332b(g)(5)(B).

- (ii) Whether the underlying offenses are groupable under §3D1.2 (Multiple Counts). Generally, multiple counts of 18 U.S.C. § 1028A should run concurrently with one another in cases in which the underlying offenses are groupable under §3D1.2.
 - (iii) Whether the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are better achieved by imposing a concurrent or a consecutive sentence for multiple counts of 18 U.S.C. § 1028A.
- (C) Imposition of Supervised Release.—In the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e)."

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1028 the following:

"18 U.S.C. § 1028A 2B1.6".

Reason for Amendment: This amendment implements sections 2 and 5 of the Identity Theft Penalty Enhancement Act, Public Law 108–275, 118 Stat. 831 ("the Act"), which create two new criminal offenses at 18 U.S.C. § 1028A and direct the Sentencing Commission to expand the upward adjustment at §3B1.3 (Abuse of Position of Trust/Special Skill). This amendment also provides guidance to the courts on imposing sentences for multiple violations of section 1028A.

The Act creates a new offense at 18 U.S.C. § 1028A(a)(1) that prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, specific enumerated felonies. These felonies consist of various types of fraud, including mail and wire fraud in connection with passports, visas and other immigration, nationality, and citizenship laws, programs under the Social Security Act, and the acquisition of firearms. A conviction under section 1028A(a)(1) carries a two-year mandatory term of imprisonment that must run consecutively to any other term of imprisonment, including the sentence for the underlying felony conviction. The Act also creates a new offense at 18 U.S.C. § 1028A(b)(1) that prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, specific felonies enumerated in 18 U.S.C. § 2332b(g)(5)(B) ("federal crimes of terrorism"). Section 1028A(b)(1) provides a five-year mandatory term of imprisonment that must run consecutively to any other term of imprisonment, including the sentence for the underlying felony conviction. As described below, section 1028A(b)(4) creates an exception to the requirement for consecutive terms of imprisonment in cases involving multiple violations of the statute sentenced at the same time.

First, in response to the creation of these new criminal offenses, the amendment creates a

new guideline at §2B1.6 (Aggravated Identity Theft). This guideline is patterned after §2K2.4 (Use of a Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to a Certain Crimes). Because the new offenses carry a fixed, mandatory consecutive term of imprisonment, the new guideline, as does §2K2.4, provides that the guideline sentence is the term of imprisonment required by statute. To avoid unwarranted double-counting, the amendment contains an application note that prohibits the application of any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense in cases in which a sentence under §2B1.6 is imposed in conjunction with a sentence for an underlying offense. Also, consistent with §2K2.4, the new guideline at §2B1.6 contains an application note that provides that adjustments under Chapters Three and Four are inapplicable to sentences under this guideline.

Second, in response to the directive in section 5 to amend §3B1.3 (Abuse of Trust or Use of Special Skill) to include a "defendant [who] exceeds or abuses the authority of his or her position in order to obtain unlawfully or use without authority any means of identification," the Commission created Application Note 2 to §3B1.3 to include such defendants within the scope of the guideline. The application note contains several examples to illustrate the types of conduct intended to be within the scope of the new provision.

Third, the amendment adds a number of provisions at appropriate guidelines in order to provide guidance to courts in accordance with section 2 of the Act (18 U.S.C. § 1028A(b)(4)). That section states that "a term of imprisonment imposed on a person for violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission" The amendment states a general rule, at §5G1.2 (Sentencing on Multiple Counts of Conviction), Application Note 2(B), providing that the court has discretion to impose concurrent or consecutive, or partially concurrent and partially consecutive, terms of imprisonment for multiple violations of 18 U.S.C. § 1028A. A non-exhaustive list of factors for courts to consider in making this determination is provided, including the nature and seriousness of the underlying offenses and whether the offenses would be groupable under §3D1.2 (Multiple Counts).

Finally, the amendment modifies §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) to make clear that section 1028A offenses are excluded from the general grouping rules in §§3D1.2 - 3D1.5 and makes conforming additions and changes to the new guideline at §2B1.6 (Aggravated Identity Theft) in Application Note 1 and §3D1.1(b)(1) and (2).

2. Amendment: Section 2R1.1(a) is amended by striking "10" and inserting "12".

Section 2R1.1(b) is amended by striking subdivision (2) and inserting the following:

"(2) If the volume of commerce attributable to the defendant was more than \$1,000,000, adjust the offense level as follows:

| <u>Volume of Commerce (Apply the Greatest)</u> | <u>Adjustment to Offense Level</u> |
|--|------------------------------------|
| (A) More than \$1,000,000 | add 2 |
| (B) More than \$10,000,000 | add 4 |
| (C) More than \$40,000,000 | add 6 |
| (D) More than \$100,000,000 | add 8 |
| (E) More than \$250,000,000 | add 10 |
| (F) More than \$500,000,000 | add 12 |
| (G) More than \$1,000,000,000 | add 14 |
| (H) More than \$1,500,000,000 | add 16. |

For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level."

The Commentary to §2R1.1 captioned "Application Notes" is amended by striking Note 1 and inserting the following:

"1. Application of Chapter Three (Adjustments).—Sections 3B1.1 (Aggravating Role), 3B1.2 (Mitigating Role), 3B1.3 (Abuse of Position of Trust or Use of Special Skill), and 3C1.1 (Obstructing or Impeding the Administration of Justice) may be relevant in determining the seriousness of the defendant's offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, the 4-level increase at §3B1.1(a) should be applied to reflect the defendant's aggravated role in the offense. For purposes of applying §3B1.2, an individual defendant should be considered for a mitigating role adjustment only if he were responsible in some minor way for his firm's participation in the conspiracy."

The Commentary to §2R1.1 captioned "Application Notes" is amended in Note 2 by striking the first sentence and inserting the following:

"Considerations in Setting Fine for Individuals.—In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, the defendant's role, and the degree to which the defendant personally profited from the offense (including salary, bonuses, and career enhancement)."

The Commentary to §2R1.1 captioned "Background" is amended in the second paragraph by striking the "The Commission" and all that follows through "general deterrence."; in the third paragraph by striking "confinement of six months or longer" and inserting "some period of confinement"; and in the last paragraph by striking the last sentence.

Reason for Amendment: This amendment responds to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108–237 (the "Act"). The Act increased the statutory maximum term of imprisonment for antitrust offenses under 15 U.S.C. §§ 1 and 3(b) from three to ten years. The amendment responds to congressional concern about the seriousness of antitrust offenses and provides for antitrust penalties that are more proportionate to those for sophisticated frauds sentenced under §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The Commission has long recognized the similarity of antitrust offenses to sophisticated frauds.

The amendment increases the base offense level for antitrust offenses in §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) to level 12. The higher base offense level ensures that penalties for antitrust offenses will be coextensive with those for sophisticated frauds sentenced under §2B1.1 and recognizes congressional concern about the inherent seriousness of antitrust offenses. The penalties for sophisticated fraud have been increased incrementally due to a series of amendments to §2B1.1, while no commensurate increases for antitrust offenses had occurred. Raising the base offense level of §2R1.1 helps restore the historic proportionality in the treatment of antitrust offenses and sophisticated frauds.

The "volume of commerce" table at §2R1.1(b)(2) is amended to provide up to 16 additional offense levels for the defendant whose offense involves more than \$1,500,000,000, while the new table's first threshold is raised from \$400,000 to \$1,000,000. The new volume of commerce table: (1) recognizes the depreciation in the value of the dollar since the table was last revised in 1991; (2) responds to data indicating that the financial magnitude of antitrust offenses has increased significantly; and (3) provides greater deterrence of large scale price-fixing crimes.

Application Note 1 to §2R1.1 is amended to emphasize the potential relevance of such Chapter Three enhancements as §3B1.1 (Aggravating Role), §3B1.3 (Abuse of Position of Trust or Use of Special Skill), and §3C1.1 (Obstructing or Impeding the Administration of Justice) in determining the appropriate sentence for an antitrust offender. Application Note 2 also is amended to highlight the potential relevance of the defendant's role in the offense in determining the amount of fine to be imposed. Finally, the amendment strikes outdated background commentary.

3. Amendment: Section 2A2.4 is amended by striking the Commentary captioned "Background".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 15 in the first sentence by inserting "involving fraudulent conduct that is" after "establishes an offense"; and in the second sentence by inserting "involves fraudulent conduct that" after "the offense".

Section 2B3.3(c)(1) is amended by inserting "; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions" after "Official Right".

Section 2C1.3(c)(1) is amended by inserting "; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions" after "Official Right".

Section 2C1.8(c)(1) is amended by inserting "; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions" after "Official Right".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 5 in the first paragraph by striking "whether a greater quantity of the analogue is needed to produce a substantially similar effect on the central nervous system as" and inserting "whether the same quantity of analogue produces a greater effect on the central nervous system than".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 19 by striking "(b)(5)(A)" each place it appears and inserting "(b)(6)(A)"; in Note 20 by striking "(b)(5)(B) or (C)" and inserting "(b)(6)(B) or (C)"; and by striking "(b)(5)(C)" and inserting "(b)(6)(C)"; and in Note 21 by striking "(b)(6)" each place it appears and inserting "(b)(7)".

The Commentary to §2D1.1 captioned "Background" is amended in the ninth paragraph by striking "(b)(5)(A)" and inserting "(b)(6)(A)"; in the last paragraph and by striking "(b)(5)(B) and (C)" and inserting "(b)(6)(B) and (C)".

Section 2D1.11(e) is amended in subdivision (1) by striking "2271 L or more of Gamma-butyrolactone;" and inserting "1135.5 L or more of Gamma-butyrolactone;";

in subdivision (2) by striking "At least 681.3 L but less than 2271 L of Gamma-butyrolactone;" and inserting "At least 340.7 L but less than 1135.5 L of Gamma-butyrolactone;";

in subdivision (3) by striking "At least 227.1 L but less than 681.3 L of Gamma-

butyrolactone;" and inserting "At least 113.6 L but less than 340.7 L of Gamma-butyrolactone;"

in subdivision (4) by striking "At least 159 L but less than 227.1 L of Gamma-butyrolactone;" and inserting "At least 79.5 L but less than 113.6 L of Gamma-butyrolactone;"

in subdivision (5) by striking "At least 90.8 L but less than 159 L of Gamma-butyrolactone;" and inserting "At least 45.4 L but less than 79.5 L of Gamma-butyrolactone;"

in subdivision (6) by striking "At least 22.7 L but less than 90.8 L of Gamma-butyrolactone;" and inserting "At least 11.4 L but less than 45.4 L of Gamma-butyrolactone;"

in subdivision (7) by striking "At least 18.2 L but less than 22.7 L of Gamma-butyrolactone;" and inserting "At least 9.1 L but less than 11.4 L of Gamma-butyrolactone;"

in subdivision (8) by striking "At least 13.6 L but less than 18.2 L of Gamma-butyrolactone;" and inserting "At least 6.8 L but less than 9.1 L of Gamma-butyrolactone;"

in subdivision (9) by striking "At least 9.1 L but less than 13.6 L of Gamma-butyrolactone;" and inserting "At least 4.5 L but less than 6.8 L of Gamma-butyrolactone;" and

in subdivision (10) by striking "Less than 9.1 L of Gamma-butyrolactone;" and inserting "Less than 4.5 L of Gamma-butyrolactone;"

The Commentary to §2K2.1 captioned "Statutory Provisions" is amended by striking "(e)-(i), (k)-(o)" and inserting "(e)-(h), (j)-(n)".

Section 2M6.1 is amended by striking "(a)(4)*" in subsection (b)(1)(A) and inserting "(a)(4)(A)"; and by striking "*Note: The reference to '(a)(4)' should be to '(a)(4)(A)'".

Section 3D1.2(d) is amended by striking "2C1.7,".

The Commentary to §5D1.2 captioned "Application Notes" is amended in Note 2 by inserting "Limitation on" before "Applicability of Statutory".

Section 8C2.1(a) is amended by striking ", 2C1.7".

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

| | |
|------------------------|--------------|
| "18 U.S.C. § 924(i) | 2K2.1 |
| 18 U.S.C. § 924(j)(1) | 2A1.1, 2A1.2 |
| 18 U.S.C. § 924(j)(2) | 2A1.3, 2A1.4 |
| 18 U.S.C. § 924(k)-(o) | 2K2.1", |

and inserting the following:

| | |
|------------------------|--------------|
| "18 U.S.C. § 924(i)(1) | 2A1.1, 2A1.2 |
| 18 U.S.C. § 924(i)(2) | 2A1.3, 2A1.4 |
| 18 U.S.C. § 924(j)-(n) | 2K2.1". |

Reason for Amendment: This ten-part amendment consists of technical and conforming amendments to various guidelines.

First, this amendment deletes unnecessary background commentary in §2A2.4 (Obstructing or Impeding Officers).

Second, this amendment makes minor clarifying amendments to Application Note 15 in the fraud guideline, §2B1.1, to make clear that, in order for the cross reference at §2B1.1(c)(3) to apply, the conduct set forth in the count of conviction must establish a fraud or false statement-type offense.

Third, this amendment makes technical amendments to several guidelines to conform to changes made in the public corruption guidelines in the 2004 amendment cycle (see Appendix C to the Guidelines Manual, Amendment 666). Specifically, the proposed amendment corrects title references to §2C1.1 in §§2B3.3(c)(1), 2C1.3(c)(1), and 2C1.8(c)(1) and strikes references to §2C1.7 in §§3D1.2(d) and 8C2.1.

Fourth, this amendment clarifies Application Note 5 in the drug guideline, §2D1.1, regarding drug analogues. The current note suggests that drug analogues are less potent than the drug for which it is an analogue. However, by statute, analogues can only be the same or more potent.

Fifth, this amendment redesignates incorrect references in a number of Application Notes in the drug guideline, §2D1.1.

Sixth, this amendment conforms §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to changes made in the drug guideline, §2D1.1, in the 2004 amendment cycle (see Appendix C to the Guidelines Manual, Amendment 667). Specifically, the proposed amendment amends the Chemical Quantity Table in §2D1.11(e) so that the amount of gamma-butyrolactone (GBL), at any particular offense level, is the amount that provides a 100 percent yield of gamma-hydroxybutyric acid (GHB).

Seventh, this amendment updates the statutory provisions in §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to account for redesignations of 18 U.S.C. § 924 offenses.

Eighth, this amendment corrects a typographical error in §2M6.1 (Weapons of Mass Destruction).

Ninth, this amendment corrects the title to §5C1.2 (Limitation on Applicability of Statutory Minimum Sentence in Certain Cases) in Application Note 2 of §5D1.2 (Terms of Supervised Release.).

Tenth, this amendment corrects Appendix A (Statutory Index) to account for redesignations of 18 U.S.C. § 924 offenses.