

**United States Sentencing Commission Public Meeting Minutes
January 13, 2009**

Acting Chair Ricardo H. Hinojosa called the meeting to order at 11:35 a.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Ricardo H. Hinojosa, Acting Chair
- William B. Carr, Jr., Vice Chair
- Judge Ruben Castillo, Vice Chair
- Judge William K. Sessions, III, Vice Chair
- Dabney L. Friedrich, Commissioner
- Beryl A. Howell, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was not present:

- Edward F. Reilly, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Judith Sheon, Staff Director
- Ken Cohen, General Counsel

The Acting Chair called for a motion to adopt the minutes of the November 20, 2008, public meeting. Commissioner Howell made the motion to adopt the minutes, with Vice Chair Castillo seconding the motion. Hearing no further discussion, the Acting Chair called for a vote and the motion was adopted by voice vote.

Acting Chair Hinojosa reported that he resigned as Chair of the Commission effective January 2, 2009. Prior to the effective date of his resignation, he delegated the duties of the Chair of the Commission to an Acting Chair to be selected by the Commission, and the Commission selected him to be the Acting Chair pending the nomination and confirmation of a new Chair.

Acting Chair Hinojosa announced that Michael E. Horowitz's term as a member of the Commission has expired. The Acting Chair and other commissioners expressed their appreciation for Mr. Horowitz's service on the Commission. Mr. Horowitz stated that it was an honor to have served on the Commission.

Acting Chair Hinojosa reported that William B. Carr, Jr., has been appointed as a Vice Chair to the Commission and welcomed him to the Commission. The Acting Chair noted it was Vice Chair Carr's first public meeting, having been confirmed in November 2008.

The Staff Director announced that the Commission will hold its Annual National Seminar on the Federal Sentencing Guidelines on June 10-12, 2009, in New Orleans, LA. Ms. Sheon also noted that the Commission has added several new publications to its webpage, including Overview of Federal Criminal Cases, Fiscal Year 2007 and Changing Face of Federal Criminal Sentencing: Seventeen Years of Growth in the Federal Sentencing Caseload.

Acting Chair Hinojosa called on Mr. Cohen to inform the Commission on possible votes to publish in the Federal Register a set of proposed guideline amendments and issues for public comment.

Mr. Cohen stated that the first proposed amendment, attached hereto as Exhibit A, would implement the Identity Theft Restitution and Enforcement Act of 2008 (“the Act”), Title II of Pub. L. 110–326, and other related issues arising from case law. The Act includes a directive to the Commission to study 13 factors relevant to identity theft offenses. The proposed amendment includes options to amend §§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), 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information), and 3B1.3 (Abuse of Position of Trust or Use of Special Skill) to account for various factors listed in the directive. The proposed amendment also includes several issues for comment regarding what amendments to the guidelines may be appropriate in light of the Act. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to publish the proposed amendment, with Commissioner Howell seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit B, would implement the Ryan Haight Online Pharmacy Consumer Protection Act of 2008 (the “Act”), Pub. L. 110–465. The Act, in relevant part, amends the Controlled Substances Act (21 U.S.C. § 801 et seq.) to create two new offenses involving controlled substances, amends the statutory penalties for Schedule III, IV, and V controlled substance offenses, and adds a sentencing enhancement for Schedule III controlled substance offenses where “death or serious bodily injury results from the use of such substance.” The proposed amendment includes options to amend §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and 2D3.1 (Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy) to account for the new offenses and changes to the statutory penalties. The proposed amendment also includes several issues for comment. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a

60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed amendment, with Vice Chair Carr seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit C, would implement the Drug Trafficking Vessel Interdiction Act of 2008 (the “Act”), Pub. L. 110–407. The Act creates a new offense at 18 U.S.C. § 2285 (Operation of Submersible Vessel or Semi-Submersible Vessel Without Nationality), which prohibits the use of a submersible or semi-submersible vessel in international waters that is not registered with any nation’s maritime authority. The proposed amendment amends §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to include a sentencing enhancement for the use of a submersible or semi-submersible vessel in drug trafficking. The proposed amendment also creates a new guideline at §2X7.2 (Submersible and Semi-Submersible Vessels) for the new offense at 18 U.S.C. § 2285. Three issues for comment also are included. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Sessions made a motion to publish the proposed amendment, with Vice Chair Castillo seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the proposed issues for comment, attached hereto as Exhibit D, concern the Court Security Improvement Act of 2007 (the “Act”), Public L. 110–177. The Commission responded to the two new offenses created by the Act during the amendment cycle ending May 1, 2008 (*see* USSG Supp. to App. C, Amendment 718). The three issues for comment are outlined regarding what additional amendments may be appropriate in light of the Act. Mr. Cohen advised the commissioners that a motion to publish the proposed issues for comment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed issues for comment, with Commissioner Friedrich seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed issues for comment, attached hereto as Exhibit E, concern the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008

(the “Act”), Public L. 110–177. The Act creates two new federal offenses, amends a number of federal statutes, and contains a directive to the Commission relating to certain alien harboring offenses. The three issues for comment are outlined regarding what amendments to the guidelines may be appropriate in light of the Act. Mr. Cohen advised the commissioners that a motion to publish the proposed issues for comment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Carr made a motion to publish the proposed issues for comment, with Commissioner Howell seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit F, is a multi-part amendment responding to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues. The proposed amendment also includes one issue for comment. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Sessions made a motion to publish the proposed amendment, with Vice Chair Castillo seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.¹

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit G, includes three possible options to address a circuit conflict regarding the undue influence enhancement at §§2A3.2(b)(2)(B)(ii) (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Year (Statutory Rape) or Attempt to Commit Such Acts) and 2G1.3(b)(2)(B) (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). The proposed amendment also includes one issue for comment. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Carr made a motion to publish the proposed amendment, with Commissioner Howell seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

¹Commissioner Howell abstained from the vote on Part K of the proposed amendment.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit H, clarifies Application Note 1 in §3C1.3 (Commission of Offense While on Release) regarding how the court is to determine the applicable guideline range. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed amendment, with Vice Chair Castillo seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit I, clarifies guideline application issues regarding the sentencing of counterfeiting offenses involving “bleached notes.” Bleached notes are genuine United States currency stripped of its original image through the use of solvents or other chemicals and then reprinted to appear to be notes of higher denomination than intended by the Treasury. Courts in different circuits have resolved differently the question of whether offenses involving bleached notes should be sentenced under §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) or §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 proposed amendment resolves this issue to provide that offenses involving bleached notes are to be sentenced under §2B5.1. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Sessions made a motion to publish the proposed amendment, with Commissioner Howell seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit J, is a multi-part amendment that makes various technical and conforming changes to the guidelines. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed amendment, with Commissioner Friedrich seconding. Hearing no discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least three commissioners voted in favor of the motion.

Acting Chair Hinojosa called on Mr. Cohen to inform the Commission on a possible vote to

adopt a new charter for the Commission's Practitioners Advisory Group and the publication of a solicitation for applications for membership on the Practitioners Advisory Group.

Mr. Cohen stated that a motion was in order to adopt the proposed new charter for the Commission's Practitioners Advisory Group and for the publication of a solicitation for membership on Practitioners Advisory Group. Mr. Cohen stated that a 60-day period for accepting applications would be appropriate.

Acting Chair Hinojosa called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to adopt the proposed motion, with Vice Chair Carr seconding. Commissioner Howell thanked the past and present members of the Practitioners Advisory Group for their service to the Commission. Hearing no further discussion, the Acting Chair called for a vote and the motion was adopted with the Acting Chair noting that at least four commissioners voted in favor of the motion.

Acting Chair Hinojosa noted that the Sentencing Reform Act of 1984 was enacted twenty-five years ago and that to mark the event, the Commission will hold several regional hearings to hear the views of judges, practitioners, and other interested parties on federal sentencing. The first such regional hearing will be held February 10-11, 2009, in Atlanta, GA.

Acting Chair Hinojosa asked if there was any further business before the Commission. Ex-officio Commissioner Wroblewski stated that the Department of Justice fully supports the Commission's work and believes that the Commission is fulfilling all of its responsibilities.

The Acting Chair asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Howell made a motion to adjourn, with Commissioner Friedrich seconding. The Acting Chair called for a vote on the motion, and the motion was adopted by voice vote. The meeting was adjourned at 12:15 p.m.

EXHIBIT A

PROPOSED AMENDMENT: IDENTITY THEFT

Synopsis of Proposed Amendment: *This proposed amendment addresses the Identity Theft Restitution and Enforcement Act of 2008 (the "Act"), Title II of Pub. L. 110–326, and other related issues arising from case law. The Act contains a directive to the Commission at section 209. Section 209(a) of the Act directs the Commission to—*

review its guidelines and policy statements applicable to persons convicted of offenses under sections 1028, 1028A, 1030, 2511, and 2701 of title 18, United States Code, and any other relevant provisions of law, in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by such guidelines and policy statements.

The offenses that are the subject of the directive in section 209 of the Act, and the guidelines to which they are referenced, are as follows:

- (1) *18 U.S.C. § 1028 (fraud and related activity in connection with identification documents, authentication features, and information) makes it unlawful to engage in fraud and related activity in connection with "identification documents" (e.g., government-issued documents such as drivers' licenses) or "authentication features" (i.e., features used on such documents to determine whether such documents are authentic, such as watermarks or holograms). A violator is subject to a fine under title 18, United States Code, and imprisonment. The statutory maximum term of imprisonment varies from 1 year to 30 years, depending on the circumstances of the offense. For example, the statute provides imprisonment up to 30 years (if terrorism is involved); 20 years (if a drug trafficking crime or a crime of violence is involved, or if the violator is a repeat offender); and 15 years, 5 years, and 1 year, in other specified circumstances.*

Offenses under 18 U.S.C. § 1028 are referenced in Appendix A of the Guidelines Manual (Statutory Index) to §§2B1.1 (Theft, Property Destruction, and Fraud), 2L2.1 (Trafficking in a Document Relating to Naturalization), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization).

- (2) *18 U.S.C. § 1028A (aggravated identity theft) makes it unlawful to transfer, possess, or use a "means of identification" (i.e., a name or number used to identify a specific individual, such as a social security number) of another person during and in relation to another felony (such as a fraud or an immigration violation). A violator is subject to a mandatory consecutive term of imprisonment of 2 years or, if the other felony was a terrorism offense, 5 years.*

Offenses under 18 U.S.C. § 1028A are referenced in Appendix A (Statutory Index)

to §2B1.6 (*Aggravated Identity Theft*).

(3) 18 U.S.C. § 1030 (*fraud and related activity in connection with computers*) provides for several offenses as follows:

(A) 18 U.S.C. § 1030(a)(1) makes it unlawful to retain national security information after having obtained it by computer without authority, or to disclose such information to a person not entitled to receive it. A violator is subject to a fine under title 18, United States Code, and imprisonment up to 10 years (for a first offense) or 20 years (for a repeat offender).

Offenses under 18 U.S.C. § 1030(a)(1) are referenced in the Statutory Index to §2M3.2 (Gathering National Defense Information).

(B) 18 U.S.C. § 1030(a)(2) makes it unlawful to obtain by computer, without authority, information of a financial institution or of a federal agency. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 1 year (for a first offense), 5 years (for an offense involving valuable information, an offense for purposes of commercial advantage or financial gain, or an offense in furtherance of another crime or tort), or 10 years (for a repeat offender).

Offenses under 18 U.S.C. § 1030(a)(2) are referenced in the Statutory Index to §2B1.1 (Theft, Property Destruction, and Fraud).

(C) 18 U.S.C. § 1030(a)(3) makes it unlawful to access, without authority, a nonpublic computer of a federal agency. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 1 year (for a first offense) or 10 years (for a repeat offender).

Offenses under 18 U.S.C. § 1030(a)(3) are referenced in the Statutory Index to §2B2.3 (Trespass).

(D) 18 U.S.C. § 1030(a)(4) makes it unlawful to access a "protected computer" (*i.e.*, a computer of a financial institution or a federal agency) without authority and, by means of doing so, further an intended fraud and obtain a thing of value. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 5 years (for a first offense) or 10 years (for a repeat offender).

Offenses under 18 U.S.C. § 1030(a)(4) are referenced in the Statutory Index to §2B1.1 (Theft, Property Destruction, and Fraud).

- (E) *18 U.S.C. § 1030(a)(5) makes it unlawful to use a computer to cause damage to a "protected computer" (i.e., a computer of a financial institution or a federal agency). A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 1 year, 5 years, 10 years, 20 years, or life, depending on the circumstances.*

Offenses under 18 U.S.C. § 1030(a)(5) are referenced in the Statutory Index to §2B1.1 (Theft, Property Destruction, and Fraud).

- (F) *18 U.S.C. § 1030(a)(6) makes it unlawful to traffic in any password or similar information through which a computer may be accessed without authorization, if the trafficking affects interstate or foreign commerce or if the computer is used by or for a federal agency. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 1 year (for a first offense) or 10 years (for a repeat offender).*

Offenses under 18 U.S.C. § 1030(a)(6) are referenced in the Statutory Index to §2B1.1 (Theft, Property Destruction, and Fraud).

- (G) *18 U.S.C. § 1030(a)(7) makes it unlawful to threaten to cause damage to, or obtain information from, a "protected computer" (i.e., a computer of a financial institution or a federal agency), without authority and with intent to extort. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 5 years (for a first offense) or 10 years (for a repeat offender).*

Offenses under 18 U.S.C. § 1030(a)(7) are referenced in the Statutory Index to §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

- (H) *18 U.S.C. § 1030(b) makes it unlawful to conspire to commit, or attempt to commit, a section 1030(a) offense. A violator is subject to the same penalty as for the section 1030(a) offense.*

Offenses under 18 U.S.C. § 1030(b) are referenced in the Statutory Index to §2X1.1 (Attempt, Solicitation, or Conspiracy).

- (4) *18 U.S.C. § 2511 (interception and disclosure of wire, oral, or electronic communications prohibited) makes it unlawful to intercept or disclose any wire, oral, or electronic communication. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 5 years.*

Offenses under 18 U.S.C. § 2511 are referenced in the Statutory Index to §§2B5.3

(Criminal Infringement of Copyright or Trademark) and 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information).

- (5) *18 U.S.C. § 2701 (unlawful access to stored communications) makes it unlawful to access, without authority, a facility through which an electronic communication service is provided and obtain, alter, or prevent authorized access to a wire or electronic communication stored in that facility. A violator is subject to a fine under title 18, United States Code, and imprisonment. If the offense is committed for commercial advantage, malicious damage, or commercial gain, or in furtherance of a crime or tort, the maximum term of imprisonment is 5 years (for a first offender) or 10 years (for a repeat offender); otherwise, the maximum term of imprisonment is 1 year (for a first offender) or 5 years (for a repeat offender).*

Offenses under 18 U.S.C. § 2701 are referenced in the Statutory Index to §2B1.1 (Theft, Property Destruction, and Fraud).

Section 209(b) of the Act requires that, in determining the appropriate sentence for the above referenced crimes, the Commission “shall consider the extent to which the current guidelines and policy statements may or may not adequately account for the following factors in order to create an effective deterrent to computer crime and the theft or misuse of personally identifiable data”:

- (1) *The level of sophistication and planning involved in such offense.*
- (2) *Whether such offense was committed for purpose of commercial advantage or private financial benefit.*
- (3) *The potential and actual loss resulting from the offense including—*
 - (A) *the value of information obtained from a protected computer, regardless of whether the owner was deprived of use of the information; and*
 - (B) *where the information obtained constitutes a trade secret or other proprietary information, the cost the victim incurred developing or compiling the information.*
- (4) *Whether the defendant acted with intent to cause either physical or property harm in committing the offense.*
- (5) *The extent to which the offense violated the privacy rights of individuals.*

- (6) *The effect of the offense upon the operations of an agency of the United States Government, or of a State or local government.*
- (7) *Whether the offense involved a computer used by the United States Government, a State, or a local government in furtherance of national defense, national security, or the administration of justice.*
- (8) *Whether the offense was intended to, or had the effect of, significantly interfering with or disrupting a critical infrastructure.*
- (9) *Whether the offense was intended to, or had the effect of, creating a threat to public health or safety, causing injury to any person, or causing death.*
- (10) *Whether the defendant purposefully involved a juvenile in the commission of the offense.*
- (11) *Whether the defendant's intent to cause damage or intent to obtain personal information should be disaggregated and considered separately from the other factors set forth in USSG 2B1.1(b)(14) [currently §2B1.1(b)(15)].*
- (12) *Whether the term "victim" as used in USSG 2B1.1, should include individuals whose privacy was violated as a result of the offense in addition to individuals who suffered monetary harm as a result of the offense.*
- (13) *Whether the defendant disclosed personal information obtained during the commission of the offense.*

Section 209(c) of the Act requires that in responding to the directive, the Commission:

- (1) *assure reasonable consistency with other relevant directives and with other sentencing guidelines;*
- (2) *account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges;*
- (3) *make any conforming changes to the sentencing guidelines; and*
- (4) *assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.*

The proposed amendment and issues for comment address the factors set forth in section 209(b) of the Act, and other related issues arising under the Act and under case law, in the following manner:

(A) Level of Sophistication and Planning Involved in the Offense

Synopsis of Proposed Amendment: *The proposed amendment responds to subsection (b)(1) of the directive, which concerns the level of sophistication involved in the offense, by amending the commentary in §2B1.1 relating to fraud offenses that involve sophisticated means. Specifically, the proposed amendment responds to a concern about whether, in a case involving computers, the defendant’s use of any technology or software to conceal the identity or geographic location of the perpetrator qualifies as “especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense” within the meaning of the sophisticated means enhancement in §2B1.1(b)(9) and Application Note 8(B) of that guideline. The proposed amendment adds this conduct to the list in Application Note 8(B) of examples of conduct that ordinarily indicates sophisticated means.*

Two issues for comment are also included.

Proposed Amendment:

§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

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Commentary

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Application Notes:

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

* * *

(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. In a scheme involving computers, using any technology or software to conceal the identity or geographic location of the perpetrator ordinarily indicates sophisticated means.*

Issues for Comment:

1. *The Commission requests comment regarding the factor described in section 209(b)(1) of the Act (the level of sophistication and planning involved in the offense). The guidelines currently address this factor as follows:*

- (1) *Section 2B1.1(b)(9) contains a 2-level enhancement, and a minimum offense level of 12, if the offense involved sophisticated means.*
- (2) *Section 2B1.1(b)(4) contains a 2-level enhancement if the offense involved receiving stolen property and the defendant was in the business of receiving and selling stolen property, which Application Note 5 provides is to be determined in part on the regularity and sophistication of the defendant's activities.*

Is the factor adequately addressed by these provisions? Should the Commission increase the amount, or the scope, of these enhancements, or of the minimum offense level, or any combination of those? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements, minimum offense levels, or both?

2. *The Commission requests comment regarding whether §3B1.3 (Abuse of Position of Trust or Use of Special Skill) should apply to a person who has self-trained computer skills. Does the guideline adequately address such a person? Should the guideline include language that unequivocally includes such a person, or should it include language that unequivocally excludes such a person?*

(B) Whether the Offense Was Committed for Purpose of Commercial Advantage or Private Financial Benefit

Issue for Comment:

1. *The Commission requests comment regarding the factor described in section 209(b)(2) of the Act (whether the offense was committed for purpose of commercial advantage or private financial benefit). The guidelines currently address this factor as follows:*

- (1) *Section 2H3.1 provides a 3-level enhancement at subsection (b)(1)(B) if the purpose of an offense under 18 U.S.C. § 2511 was to obtain direct or indirect commercial advantage or economic gain, and a cross reference at subsection (c)(1) that applies if the purpose of the offense was to facilitate another offense.*
- (2) *Section 2B1.5(b)(4) provides a 2-level enhancement if the offense was committed for pecuniary gain or otherwise involved a commercial purpose.*

- (3) Sections 2B1.1(b)(1), 2B2.3(b)(3), and 2B5.3(b)(1) provide enhancements based on the monetary amounts involved in the offense.

Is the factor adequately addressed by these provisions? Should the Commission increase the amount, or the scope, of these enhancements, or the scope of the cross reference? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements or cross references?

(C) The Potential and Actual Loss Resulting from the Offense Including (A) the Value of Information Obtained from a Protected Computer, Regardless of Whether the Owner Was Deprived of Use of the Information; and (B) Where the Information Obtained Constitutes a Trade Secret or Other Proprietary Information, the Cost the Victim Incurred Developing or Compiling the Information

Synopsis of Proposed Amendment: *The proposed amendment responds to subsection (b)(3) of the directive by revising §2B1.1 (Theft, Property Destruction, and Fraud). Specifically, it addresses two types of information: information that the victim retains but that is copied by the defendant, and information that constitutes a trade secret or other proprietary information of the victim. Two options are presented. Option 1 adds to the rule of construction for cases under 18 U.S.C. § 1030 (Fraud and related activity in connection with computers) regarding pecuniary harm in Application Note 3(A)(v)(III), specifying that any reduction in the value of proprietary information that resulted from the offense should be included in the loss calculation. Option 2 adds a provision in Application Note 3(C), specifying that, if the fair market value of copied information is unavailable or insufficient, the court may consider the cost the victim incurred in originally developing the information or the reduction in the value of the information that resulted from the offense.*

Four issues for comment are also included.

Proposed Amendment:

§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

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Commentary

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Application Notes:

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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.

* * *

(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:

* * *

[Option 1:

(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; *and any reduction in the value of proprietary information (e.g., trade secrets) that resulted from the offense.*]

* * *

(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:

[Option 2:

(i) The fair market value of the property unlawfully taken, *copied*, 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) *In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction that resulted from the offense in the value of that information.*

(iii) 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.*
- (vi) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.]*

* * *

Issues for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(3) of the Act (the potential and actual loss resulting from the offense including (A) the value of information obtained from a protected computer, regardless of whether the owner was deprived of use of the information; and (B) where the information obtained constitutes a trade secret or other proprietary information, the cost the victim incurred developing or compiling the information). The guidelines currently address this factor as follows:

- (1) *Sections 2B1.1(b)(1), 2B2.3(b)(3), and 2B5.3(b)(1) provide enhancements based on the monetary amounts involved in the offense.*
- (2) *Section 2B1.1, Application Note 19(A)(iv), provides an upward departure if the offense created a risk of substantial loss beyond the loss determined for purposes of §2B1.1(b)(1).*
- (3) *Section 2B1.1, Application Note 19(A)(v), provides an upward departure if, in a case involving stolen information from a "protected computer", the defendant sought the stolen information to further a broader criminal purpose.*

Is the factor adequately addressed by these provisions? Should the Commission increase the amount, or the scope, of these enhancements? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements? Should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

2. Should the definition of "loss" in §2B1.1 be amended to provide greater guidance to the court on how to estimate loss in cases involving information obtained from a protected computer without depriving the owner of the use of the information, or information obtained that constitutes a trade secret or other proprietary information? For such cases, should §2B1.1 include a special rule for including and quantifying (or providing a stipulated amount for) the loss, such as the special rule in Application Note 3(F)(i) relating to credit cards?

3. The Commission requests comment regarding whether §2B1.1 adequately accounts for a case in which an individual suffers pecuniary harm, but the pecuniary harm is immediately reimbursed

by a third party. In such a case, the pecuniary harm may not be treated as "loss", and the individual may not be treated as a "victim", for purposes of §2B1.1.

Five circuit courts have addressed the issue of whether an individual who is fully reimbursed for his or her temporary financial loss by a third party is a "victim" for purposes of §2B1.1(b)(2). The Fifth Circuit in *United States v. Conner*, 537 F.3d 480, 489 (5th Cir. 2008), and the Sixth Circuit in *United States v. Yagar*, 404 F.3d 967, 971 (6th Cir. 2005), have held that individuals who have been fully reimbursed for temporary financial losses by a third party are not "victims" within the meaning of §2B1.1(b)(2). Although the Second Circuit in *United States v. Abiodun*, 536 F.3d 162, 168 (2d Cir.), cert. denied, ___ S. Ct. ___, 2008 WL 4619522 (2008) and the Ninth Circuit in *United States v. Pham*, 545 F.3d 712, 721 (9th Cir. 2008) have agreed with the reasoning of these courts, they have further held that individuals who were fully reimbursed for their financial losses by third parties may be deemed victims for purposes of §2B1.1(b)(2) so long as they suffered an adverse effect, measurable in monetary terms, as a result of the defendant's conduct (e.g., the costs associated with obtaining reimbursements from banks or credit card companies). The Eleventh Circuit in *United States v. Lee*, 427 F.3d 881, 895 (11th Cir. 2005), did not agree. While acknowledging that the facts of its case were significantly different in that the monetary losses were neither short-lived nor immediately reimbursed by third parties, the *Lee* court held that the operative time for determining whether someone is a victim is the time of the offense, irrespective of any subsequent remedial action.

Should the Commission amend the guidelines to address this circumstance and, if so, how?

4. The Commission requests comment regarding whether §3B1.3 (Abuse of Position of Trust or Use of Special Skill) should apply to a person who is an officer, employee, or insider of a business who participates in an offense involving proprietary information (e.g., trade secrets) of that business. Does the guideline adequately address such a person? Should the guideline include language that unequivocally includes such a person, or should it include language that unequivocally excludes such a person?

(D) Whether the Defendant Acted with Intent to Cause Either Physical or Property Harm in Committing the Offense

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(4) of the Act (whether the defendant acted with intent to cause either physical or property harm in committing the offense). The guidelines currently address this factor as follows:

- (1) Section 2B1.1(b)(13) provides a 2-level enhancement if the offense involved the conscious or reckless risk of death or serious bodily injury, or possession of a dangerous weapon in connection with the offense.
- (2) Section 2B1.1(c) provides a cross reference under which the court applies a

firearms or explosives guideline if firearms or explosives are involved.

- (3) *Section 2H3.1(c) provides a cross reference under which the court applies another offense guideline if the purpose was to facilitate another offense.*
- (4) *Section 2B1.1, Application Note 19, provides an upward departure if the offense caused or risked substantial non-monetary harm, such as physical harm or property harm.*
- (5) *Section 2H3.1, Application Note 5, provides an upward departure if the offense caused or risked substantial non-monetary harm, such as physical harm or property harm.*
- (6) *Section 5K2.5 (Property Damage or Loss) provides an upward departure if the offense caused property damage or loss not taken into account by the guidelines.*

Is the factor adequately addressed by these provisions? If not, should the Commission increase the amount, or the scope, of these enhancements, or the scope of the cross reference or departure provisions? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding a comparable enhancements or cross references? Alternatively, should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

(E) The Extent to Which the Offense Violated the Privacy Rights of Individuals

Synopsis of Proposed Amendment: *The proposed amendment responds to subsection (b)(5) of the directive (the extent to which the offense violated the privacy rights of individuals) by revising §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). Two options are presented. Option 1 creates a new specific offense characteristic in §2H3.1 with three alternative enhancements if the offense involved the personal information or means of identification of specified numbers of individuals. Specifically, it provides an enhancement of [2] levels for offenses involving the personal information or means of identification of [10]-[50] or more individuals; an enhancement of [4] levels for [50]-[250] or more individuals; and an enhancement of [6] levels for [250]-[1,000] or more individuals. The graduated levels ensure incremental punishment for increasingly serious conduct. Option 2 amends Application Note 5 to §2H3.1, suggesting that an upward departure may be warranted not only in a case in which the offense involved confidential phone records information or tax return information of a substantial number of individuals (as the application note currently provides), but also in a case in which the offense involved personal information or means of identification of a substantial number of individuals.*

The proposed amendment defines the term "personal information", for purposes of §2H3.1, in the same manner as the term "personal information" is defined for purposes of

§2B1.1(b)(15). The proposed amendment clarifies, for purposes of both guidelines, that information is "personal information" only if it involves an identifiable individual.

An issue for comment is also included.

Proposed Amendment:

§2H3.1. Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information

* * *

(b) Specific Offense Characteristics

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[Option 1: (3) (Apply the greatest) If the defendant is convicted under 18 U.S.C. § 2511 and the offense involved personal information or means of identification of—

(A) [10]-[50] or more individuals, increase by [2] levels;

(B) [50]-[250] or more individuals, increase by [4] levels; or

(C) [250]-[1,000] or more individuals, increase by [6] levels.]

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Commentary

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Application Notes:

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4. Definitions.—For purposes of ~~subsection (b)(2)(B)~~ *this guideline:*

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

"Covered person" has the meaning given that term in 18 U.S.C. § 119(b).

"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)).

"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).

"Personal information" means sensitive or private information involving an identifiable individual (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.

"Restricted personal information" has the meaning given that term in 18 U.S.C. § 119(b).

5. Upward Departure.—*There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. The following are examples of cases in which an upward departure may be warranted:*

[Option 2:

- (i) *The offense involved **personal information, means of identification, confidential phone records information, or tax return information of a substantial number of individuals.**]*
- (ii) *The offense caused or risked substantial non-monetary harm (e.g. physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.*

* * *

§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

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Commentary

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Application Notes:

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

- (A) Definitions.—*For purposes of subsection (b)(15):*

* * *

*"Personal information" means sensitive or private information **involving an identifiable individual** (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.

* * *

Issue for Comment:

1. *The Commission requests comment regarding the factor described in section 209(b)(5) of the Act (the extent to which the offense violated the privacy rights of individuals). In many cases, non-monetary harm (such as a violation of privacy rights) may be difficult or impossible to quantify. See, e.g., §2B1.1, comment. (backg'd.). For that reason, non-monetary harm is typically accounted for by the guidelines through a minimum offense level or an upward departure. The guidelines currently address this factor as follows:*

- (1) *Section 2B1.1, Application Note 19 provides an upward departure if the offense resulted in a substantial invasion of a privacy interest. It also provides an upward departure if, 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; or (iii) the defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.*
- (2) *Section 2H3.1, Application Note 5, provides an upward departure if the offense involved private information or resulted in a substantial invasion of a privacy interest.*
- (3) *Section 2B1.1(b)(15)(A) provides a 2-level enhancement if an offense under 18 U.S.C. § 1030 involved an intent to obtain personal information, and §2H3.1(b)(2)(B) provides a 10-level enhancement if an offense under 18 U.S.C. § 119 involved the use of a computer to make restricted personal information about a covered person publicly available.*

Is the factor adequately addressed through these provisions? If not, should the Commission increase the amount, or the scope, of these enhancements? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements? Should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

(F) The Effect of the Offense upon the Operations of an Agency of the United States Government, or of a State or Local Government

Issue for Comment:

1. *The Commission requests comment regarding the factor described in section 209(b)(6) of the Act (the effect of the offense upon the operations of an agency of the United States Government, or of a State or local government). The guidelines currently address this factor as follows:*

- (1) *Section 5K2.7 (Disruption of Government Function) provides an upward departure if the defendant's conduct resulted in a significant disruption of a governmental function.*
- (2) *Section 5K2.14 (Public Welfare) provides an upward departure if national security, public health, or safety was significantly endangered.*

Is the factor adequately addressed through these upward departure provisions? Alternatively, should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

(G) Whether the Offense Involved a Computer Used by the United States Government, a State, or a Local Government in Furtherance of National Defense, National Security, or the Administration of Justice

Issue for Comment:

1. *The Commission requests comment regarding the factor described in section 209(b)(7) of the Act (whether the offense involved a computer used by the United States Government, a State, or a local government in furtherance of national defense, national security, or the administration of justice). The guidelines currently address this factor as follows:*

- (1) *Section 2B1.1 provides a 2-level enhancement at subsection (b)(15)(A)(i) if an offense under 18 U.S.C. § 1030 involved a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security.*
- (2) *Section 2B2.3(b)(1) provides a 2-level enhancement if a trespass occurred on a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security.*
- (3) *Section 2B3.2(b)(3)(B) provides a 3-level enhancement if the offense involved preparation to carry out a threat of damage to a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security.*
- (4) *Section 2B1.1, Application Note 19, provides an upward departure in a case in*

which subsection (b)(15)(A)(iii) applies and the disruption to the critical infrastructure is so substantial as to have a debilitating impact on national security, national economic security, or national public health or safety.

- (5) *Section 5K2.7 (Disruption of Government Function) provides an upward departure if the defendant's conduct resulted in a significant disruption of a governmental function.*
- (6) *Section 5K2.14 (Public Welfare) provides an upward departure if national security, public health, or safety was significantly endangered.*

Is the factor adequately addressed through these provisions? Should the Commission increase the amount, or the scope, of these enhancements? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements? Should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

(H) Whether the Offense Was Intended to, or Had the Effect of, Significantly Interfering with or Disrupting a Critical Infrastructure

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(8) of the Act (whether the offense was intended to, or had the effect of, significantly interfering with or disrupting a critical infrastructure). The guidelines currently address this factor as follows:

- (1) *Section 2B1.1 provides a 2-level enhancement at subsection (b)(15)(A)(i) if an offense under 18 U.S.C. § 1030 involved a computer system used to maintain or operate a critical infrastructure, and a 6-level enhancement (and a minimum offense level of 24) at subsection (b)(15)(A)(iii) if an offense under section 1030 caused a substantial disruption of a critical infrastructure.*
- (2) *Section 2B2.3(b)(1) provides a 2-level enhancement if a trespass occurred on a computer system used to maintain or operate a critical infrastructure.*
- (3) *Section 2B3.2(b)(3)(B) provides a 3-level enhancement if the offense involved preparation to carry out a threat of damage to such a computer system.*
- (4) *Section 2B1.1, Application Note 19, provides an upward departure in a case in which subsection (b)(15)(A)(iii) applies and the disruption to the critical infrastructure is so substantial as to have a debilitating impact on national security, national economic security, or national public health or safety.*
- (5) *Section 5K2.14 (Public Welfare) provides an upward departure if national*

security, public health, or safety was significantly endangered.

Is the factor adequately addressed through these provisions? Should the Commission increase the amount, or the scope, of these enhancements (or of the minimum offense level)? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements (or minimum offense levels)? Should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

(I) Whether the Offense Was Intended to, or Had the Effect of, Creating a Threat to Public Health or Safety, Causing Injury to any Person, or Causing Death

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(9) of the Act (whether the offense was intended to, or had the effect of, creating a threat to public health or safety, causing injury to any person, or causing death). The guidelines currently address this factor as follows:

- (1) Section 2B1.1(b)(13) provides a 2-level enhancement, and a minimum offense level of 14, if the offense involved the conscious or reckless risk of death or serious bodily injury.*
- (2) Section 2B3.2(b)(3)(B) provides a 3-level enhancement if the offense involved preparation to carry out a threat of serious bodily injury, and §2B3.2(b)(4) provides an enhancement if the victim sustained bodily injury, with the amount of the enhancement ranging from 2 to 6 levels according to the seriousness of the injury.*
- (3) Section 2B5.3(b)(5) provides a 2-level enhancement, and a minimum offense level of 13, if the offense involved the conscious or reckless risk of serious bodily injury.*
- (4) Section 2B1.1, Application Note 19, provides an upward departure if the offense caused or risked substantial non-monetary harm, or in a case in which subsection (b)(15)(A)(iii) applies and the disruption to the critical infrastructure is so substantial as to have a debilitating impact on national security, national economic security, or national public health or safety.*
- (5) Section 5K2.14 (Public Welfare) provides an upward departure if national security, public health, or safety was significantly endangered.*

Is the factor adequately addressed through these provisions? If not, should the Commission increase the amount, or the scope, of these enhancements (or minimum offense levels)? Should

the Commission amend other guidelines to address this factor, such as by adding comparable enhancements (or minimum offense levels)? Should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

(J) Whether the Defendant Purposefully Involved a Juvenile in the Commission of the Offense

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(10) of the Act (whether the defendant purposefully involved a juvenile in the commission of the offense). The guidelines currently address this factor in §3B1.4 (Using a Minor to Commit a Crime), which provides a 2-level adjustment if the defendant used or attempted to use a minor to commit the offense or assist in avoiding detection of, or apprehension for, the offense.

Is the factor adequately addressed by this adjustment? Should the Commission increase the amount, or the scope, of this adjustment? Should the Commission amend other guidelines to address this factor, such as by adding enhancements comparable to this adjustment?

(K) Whether the Defendant’s Intent to Cause Damage or Intent to Obtain Personal Information Should Be Disaggregated and Considered Separately from the Other Factors Set Forth in §2B1.1(b)(15)

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(11) of the Act (whether the defendant’s intent to cause damage or intent to obtain personal information should be disaggregated and considered separately from the other factors set forth in §2B1.1(b)(15)).

For example, subsection (b)(15) currently applies only to offenses under 18 U.S.C. § 1030. Should the intent to cause damage or intent to obtain personal information be disaggregated only within the context of 18 U.S.C. § 1030 cases? Should the defendant’s intent to cause damage or intent to obtain personal information be a factor that applies to other offenses as well?

(L) Whether the Term “Victim” as Used in §2B1.1 Should Include Individuals Whose Privacy Was Violated as a Result of the Offense in Addition to Individuals Who Suffered Monetary Harm as a Result of the Offense

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(12) of the Act (whether the term “victim” as used in §2B1.1 should include individuals whose privacy was violated as a result of the offense in addition to individuals who suffered monetary harm as a

result of the offense). In many cases, non-monetary harm (such as a violation of privacy rights) may be difficult or impossible to quantify. *See, e.g., §2B1.1, comment. (backg'd).* For that reason, non-monetary harm is typically accounted for by the guidelines through a minimum offense level or an upward departure.

The guidelines currently address this factor as follows:

- (1) Section 2B1.1, Application Note 19, provides an upward departure if the offense resulted in a substantial invasion of a privacy interest. It also provides an upward departure if, 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; or (iii) the defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.
- (2) Section 2H3.1, Application Note 5, provides an upward departure if the offense involved private information, or resulted in a substantial invasion of privacy interest.

Is the factor adequately addressed through these upward departure provisions? Alternatively, should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

The definition of "victim" in §2B1.1, Application Note 1, currently applies only to a person who sustained any part of the "actual loss" or to an individual who sustained bodily injury. Should the Commission modify that definition to also apply to an individual whose privacy was violated? If so, what standard should be used to determine whether an individual's privacy was violated? Should the guidelines seek to quantify the loss of such an individual, for purposes of the loss table in subsection (b)(1)? If so, what standard would be used to quantify the loss? For example, in a case in which a computer-related invasion of privacy occurs, should the guidelines include a special rule for including and quantifying (or providing a stipulated amount for) the loss, such as the special rule in Application Note 3(F)(i) relating to credit cards? If the Commission were to revise the applicability of §2B1.1 to individuals whose privacy was violated, should the Commission do so for all offenses under §2B1.1, or only for certain categories of cases, such as cases involving identity theft, cases involving computers, or cases involving violations of certain specified statutes?

Should the definition of "reasonably foreseeable pecuniary harm" in §2B1.1 be amended to expressly include such harm as the reasonably foreseeable costs to the victim of correcting

business, financial, and government records that erroneously indicate the victim's responsibility for particular transactions or applications; the reasonably foreseeable costs of repairing any computer data, program, system, or information that was altered or impaired in connection with the offense; and the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense? Should the Commission make such a change only for identity theft cases, such as by amending §2B1.1, Application Note 3(A)(v), to provide a special rule for identity theft cases? Alternatively, should the Commission make such a change for all cases under §2B1.1, such as by amending Application Note 3(A)(iv), or for some other category of cases?

(M) Whether the Defendant Disclosed Personal Information Obtained During the Commission of the Offense

Issue for Comment:

1. The Commission requests comment regarding the factor described in section 209(b)(13) of the Act (whether the defendant disclosed personal information obtained during the commission of the offense). The guidelines currently address this factor as follows:

- (1) Section 2B1.1, Application Note 19, which provides an upward departure if the offense resulted in a substantial invasion of a privacy interest.*
- (2) Section 2H3.1, Application Note 5, provides an upward departure if the offense involved private information or resulted in a substantial invasion of a privacy interest.*
- (3) Section 2B1.1(b)(15)(A) provides a 2-level enhancement if an offense under 18 U.S.C. § 1030 involved an intent to obtain personal information.*
- (4) Section 2H3.1(b)(2)(B) provides a 10-level enhancement if an offense under 18 U.S.C. § 119 (protection of individuals performing certain official duties) involved the use of a computer to make restricted personal information about a covered person publicly available.*

Is the factor adequately addressed through these provisions? Should the Commission increase the amount, or the scope, of these enhancements? Should the Commission amend other guidelines to which these offenses are referenced to address this factor, such as by adding comparable enhancements? Should these upward departure provisions be incorporated as enhancements in the guidelines to which these offenses are referenced?

If the Commission were to amend the guidelines to more adequately address this factor, what should constitute a "disclosure", and what should constitute "personal information"?

(N) Other Issues Relating to the Directive Not Otherwise Addressed Above

Issues for Comment:

- 1. The Commission requests comment regarding section 209(a) of the Act, which directs the Commission to review its guidelines and policy statements applicable to persons convicted of offenses under 18 U.S.C. §§ 1028 (fraud and related activity in connection with identification documents, authentication features, and information), 1028A (aggravated identity theft), 1030 (fraud and related activity in connection with computers), 2511 (interception and disclosure of wire, oral, or electronic communications prohibited), and 2701 (unlawful access to stored communications), and any other relevant provisions of law, in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by such guidelines and policy statements. Section 209(b) of the Act directed the Commission, in determining the appropriate sentence for those offenses, to “consider the extent to which the current guidelines and policy statements may or may not adequately account for the following factors in order to create an effective deterrent to computer crime and the theft or misuse of personally identifiable data”, and provided a list of factors. Other than the specific factors set forth in section 209(b), which are addressed more specifically in the issues for comment set forth above, are there aggravating or mitigating circumstances existing in cases involving those offenses that might justify additional amendments to the guidelines?*
- 2. Should the Commission create a new guideline specifically for identity theft cases? If so, what should the new guideline provide?*

(O) Technical Amendments

Synopsis of Proposed Amendment: *The proposed amendment makes two technical changes. First, it corrects several places in the Guidelines Manual that erroneously refer to subsection "(b)(15)(iii)" of §2B1.1; the reference should be to subsection (b)(15)(A)(iii).*

Second, it clarifies Application Note 2(B) of §3B1.3 (Abuse of Position of Trust or Use of Special Skill). There is a concern that Application Note 2(B) is internally inconsistent in a case in which the defendant, as discussed in the example in Application Note 2(B)(i), is an employee of a state motor vehicle department who knowingly issues without proper authority a driver's license based on false, incomplete, or misleading information. Arguably, to "obtain" or "use" a means of identification (the terms used in the first sentence of Application Note 2(B)) does not necessarily include to "issue" a means of identification (the term used in the example in Application Note 2(B)(i)). The proposed amendment clarifies the first sentence of Application Note 2(B) so that it expressly covers not only obtaining or using, but also issuing or transferring, a means of identification.

Proposed Amendment:

§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

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Commentary

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Application Notes:

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

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(B) Subsection (b)(15)(A)(iii).—*If the same conduct that forms the basis for an enhancement under subsection (b)(15)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(14)(B), do not apply the enhancement under subsection (b)(14)(B).*

* * *

19. Departure Considerations.—

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(B) Upward Departure for Debilitating Impact on a Critical Infrastructure.—*An upward departure would be warranted in a case in which subsection (b)(15)(A)(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.*

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§3B1.3. Abuse of Position of Trust or Use of Special Skill

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Commentary

Application Notes:

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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:

* * *

- (B) *A defendant who exceeds or abuses the authority of his or her position in order to obtain, transfer, or issue 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.*

* * *

EXHIBIT B

PROPOSED AMENDMENT: RYAN HAIGHT ONLINE PHARMACY CONSUMER PROTECTION ACT OF 2008

Synopsis of Proposed Amendment: *This proposed amendment addresses changes made by the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Public Law 110–465 (the “Act”). The Act amends the Controlled Substances Act (21 U.S.C. § 801 et seq.) (the “CSA”) to create two new offenses involving controlled substances. The first is 21 U.S.C. § 841(h) (Offenses Involving Dispensing of Controlled Substances by Means of the Internet), which prohibits the delivery, distribution, or dispensing of controlled substances over the Internet without a valid prescription. The applicable statutory maximum term of imprisonment is determined based upon the controlled substance being distributed. The second new offense is 21 U.S.C. § 843(c)(2)(A) (Prohibiting the Use of the Internet to Advertise for Sale a Controlled Substance), which prohibits the use of the Internet to advertise for sale of a controlled substance. This offense has a statutory maximum term of imprisonment of four years.*

In addition to the new offenses, the Act increased the statutory maximum terms of imprisonment for all Schedule III controlled substance offenses (from 5 years to 10 years), for all Schedule IV controlled substance offenses (from 3 years to 5 years), and for Schedule V controlled substance offenses if the offense is committed after a prior drug conviction (from 2 years to 5 years). The Act added a sentencing enhancement for Schedule III controlled substance offenses where “death or serious bodily injury results from the use of such substance.” The Act also includes a directive to the Commission that states:

The United States Sentencing Commission, in determining whether to amend, or establish new, guidelines or policy statements, to conform the Federal sentencing guidelines and policy statements to this Act and the amendments made by this Act, should not construe any change in the maximum penalty for a violation involving a controlled substance in a particular schedule as being the sole reason to amend, or establish a new, guideline or policy statement.

First, the proposed amendment provides three options for incorporating the new sentencing enhancement for cases involving Schedule III controlled substances where “death or serious bodily injury results from the use of such substance.” The enhancement carries a statutory maximum term of imprisonment of 15 years. Option 1 proposes a new alternative base offense level at §2D1.1 of [12]-[34]. Option 2 proposes a new specific offense characteristic at §2D1.1 that provides an enhancement of [4]-[11] levels; Option 2 also includes, as a sub-option, a minimum offense level of [12]-[34]. Option 3 proposes a new invited upward departure provision for §2D1.1.

Second, the proposed amendment revises the title of §2D3.1 (Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy) to reflect the new offense at 21 U.S.C. § 843(c)(2)(A) (Prohibiting the Use of the Internet

to Advertise for Sale a Controlled Substance). The new offense is already referenced in Appendix A (Statutory Index) to §2D3.1.

Third, the proposed amendment amends Appendix A (Statutory Index) to refer the new offense at 21 U.S.C. § 841(h) (Offenses Involving Dispensing of Controlled Substances by Means of the Internet) to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

Several issues for comment are also included.

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

[Option 1:

- (3) **[12]-[34]**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- ~~(34)~~ 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.
- (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.
- (7) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.
- (8) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.
- (9) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.
- (10) (Apply the greatest):
 - (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 defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
 - (C) If—

- (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or
- (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

- (D) 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.

[Option 2:

- (11) If the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance, increase by [4]-[11] levels. [If the resulting offense level is less than level [12]-[34], increase to level [12]-[34].]

- (+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.

[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;
● 4.5 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 1.5 KG but less than 4.5 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 500 G but less than 1.5 KG 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 150 G but less than 500 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 50 G but less than 150 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 35 G but less than 50 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 20 G but less than 35 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 5 G but less than 20 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 4 G but less than 5 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 3 G but less than 4 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 2 G but less than 3 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;

Level 18

- At least 20 KG but less than 40 KG of Marihuana;
- 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 1 G but less than 2 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 500 MG but less than 1 G 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; **Level 12**
- Less than 25 G of Cocaine;
 - Less than 500 MG of Cocaine Base;
 - 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 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 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: cannabiniol, 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: cannabiniol, 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. *Use of Drug Equivalency Tables.—*
- (A) *Controlled Substances Not Referenced in Drug Quantity Table.—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:

- (i) Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana.
- (ii) Find the equivalent quantity of marihuana in the Drug Quantity Table.
- (iii) Use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.

(See also Application Note 5.) For example, in the Drug Equivalency Tables set forth in this Note, 1 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.

- (B) Combining Differing Controlled Substances (Except Cocaine Base).—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. To determine a single offense level in a case involving cocaine base and other controlled substances, see subdivision (D) of this note.

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.

- (C) Examples for Combining Differing Controlled Substances (Except Cocaine Base).—

- (i) 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.
- (ii) 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.
- (iii) 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.

- (iv) *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.*

(D) Determining Base Offense Level in Offenses Involving Cocaine Base and Other Controlled Substances.—

- (i) In General.—*Except as provided in subdivision (ii), if the offense involves cocaine base ("crack") and one or more other controlled substance, determine the combined offense level as provided by subdivision (B) of this note, and reduce the combined offense level by 2 levels.*

- (ii) Exceptions to 2-level Reduction.—*The 2-level reduction provided in subdivision (i) shall not apply in a case in which:*

- (I) *the offense involved 4.5 kg or more, or less than 250 mg, of cocaine base; or*
- (II) *the 2-level reduction results in a combined offense level that is less than the combined offense level that would apply under subdivision (B) of this note if the offense involved only the other controlled substance(s) (i.e., the controlled substance(s) other than cocaine base).*

- (iii) Examples.—

- (I) *The case involves 20 gm of cocaine base, 1.5 kg of cocaine, and 10 kg of marihuana. Under the Drug Equivalency Tables in subdivision (E) of this note, 20 gm of cocaine base converts to 400 kg of marihuana (20 gm x 20 kg = 400 kg), and 1.5 kg of cocaine converts to 300 kg of marihuana (1.5 kg x 200 gm = 300 kg), which, when added to the 10 kg of marihuana results in a combined equivalent quantity of 710 kg of marihuana. Under the Drug Quantity Table, 710 kg of marihuana corresponds to a combined offense level of 30, which is reduced by two levels to level 28. For the cocaine and marihuana, their combined equivalent quantity of 310 kg of marihuana corresponds to a combined offense level of 26 under the Drug Quantity Table. Because the combined offense level for all three drug types after the 2-level reduction is not less than the combined base offense level for the cocaine and marihuana, the combined offense level for all three drug types remains level 28.*

- (II) *The case involves 5 gm of cocaine base and 6 kg of heroin. Under the Drug Equivalency Tables in subdivision (E) of this note, 5 gm of cocaine base*

converts to 100 kg of marihuana (5 gm x 20 kg = 100 kg), and 6 kg of heroin converts to 6,000 kg of marihuana (6,000 gm x 1 kg = 6,000 kg), which, when added together results in a combined equivalent quantity of 6,100 kg of marihuana. Under the Drug Quantity Table, 6,100 kg of marihuana corresponds to a combined offense level of 34, which is reduced by two levels to 32. For the heroin, the 6,000 kg of marihuana corresponds to an offense level 34 under the Drug Quantity Table. Because the combined offense level for the two drug types after the 2-level reduction is less than the offense level for the heroin, the reduction does not apply and the combined offense level for the two drugs remains level 34.

(E) 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 (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] 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 ₂ P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P ₂ P (in any other case) =	75 gm of marihuana
1 gm 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-Methylenedioxyamphetamine/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

***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 flunitrazepam, 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
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg

Marihuana

1 marihuana cigarette	0.5 gm
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Stimulants

Amphetamine*	10 mg
Methamphetamine*	5 mg
Phenmetrazine (Preludin)*	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 marijuana cutting having roots, a rootball, or root hairs is a marijuana 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 (b)(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 (b)(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 (b)(10)(C)(ii) or (D), 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 (b)(10)(D):

"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).

[Option 2:

21. Applicability of Subsection (b)(~~11~~12).—The applicability of subsection (b)(~~11~~12) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(~~11~~12) 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.

23. Application of Subsection (b)(6).—For purposes of subsection (b)(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)(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)(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)).
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.
25. Application of Subsection (b)(7).—For purposes of subsection (b)(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.
26. Application of Subsection (b)(8).—For purposes of subsection (b)(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.

[Option 3:

27. Upward Departure Provision.—If the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance, an upward departure may be warranted.]

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 (b)(10)(A) implements the instruction to the Commission in section 303 of Public Law 103-237.

Subsections (b)(10)(C)(ii) and (D) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106-310.

* * *

§2D3.1. Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Scheduled Substances; Attempt or Conspiracy

* * *

APPENDIX A - STATUTORY INDEX

* * *

21 U.S.C. § 841(g)	2D1.1
21 U.S.C. § 841(h)	2D1.1

* * *

Issues for Comment:

1. *The Commission requests comment regarding whether offenses involving Schedule III substances are adequately addressed by the guidelines. The Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Public Law 110–465 (the "Act"), increased the statutory maximum term of imprisonment for those offenses from 5 years to 10 years. Should the Commission revise the guidelines to more adequately address these offenses and, if so, how? If the Commission should revise the guidelines as they relate to Schedule III substances, what justifies doing so?*

For example, under the Drug Quantity Table in §2D1.1, the maximum base offense level for an offense involving Schedule III substances (except Ketamine) is 20, which applies to 40,000 or more units of the substance concerned. Should the maximum base offense level be increased (or eliminated entirely) so that in a case in which the number of units involved is more than 40,000, a higher base offense level applies? If so, what higher base offense levels are appropriate, and what number of units should correspond to those higher base offense levels?

Under the Drug Equivalency Tables in §2D1.1, 1 unit of a Schedule III substance is equivalent to 1 gm of marijuana. Should a different equivalency apply? If so, what should that different equivalency be?

2. *The Commission requests comment regarding whether offenses involving Schedule IV substances are adequately addressed by the guidelines. The Act increased the statutory maximum term of imprisonment for those offenses from 3 years to 5 years. Should the Commission revise the guidelines to more adequately address these offenses and, if so, how? If the Commission should revise the guidelines as they relate to Schedule IV substances, what justifies doing so?*

For example, under the Drug Quantity Table in §2D1.1, the maximum base offense level for an offense involving Schedule IV substances (except Flunitrazepam) is 12, which applies to 40,000 or more units of the substance concerned. Should the maximum base offense level be increased (or eliminated entirely) so that in a case in which the number of units involved is more than 40,000, a higher base offense level applies? If so, what higher base offense levels are appropriate, and what number of units should correspond to those higher base offense levels?

Under the Drug Equivalency Tables in §2D1.1, 1 unit of a Schedule IV substance (except Flunitrazepam) is equivalent to 0.0625 gm of marihuana. Should a different equivalency apply? If so, what should that different equivalency be? For example, should the Commission amend the Drug Equivalency Tables to provide that 1 unit of a Schedule IV substance (except Flunitrazepam) is equivalent to 0.125 gm of marihuana?

3. The Commission requests comment regarding whether offenses involving Schedule V substances are adequately addressed by the guidelines. For those offenses, the Act did not increase the statutory maximum term of imprisonment for a first offense (which is 1 year), but did increase the statutory maximum term of imprisonment if the offense is committed after a prior drug conviction (from 2 years to 5 years). Should the Commission revise the guidelines to more adequately address these offenses and, if so, how? If the Commission should revise the guidelines as they relate to Schedule V substances, what justifies doing so?

For example, under the Drug Quantity Table in §2D1.1, the maximum base offense level for an offense involving Schedule V substances is 8, which applies to 40,000 or more units of the substance concerned. Should the maximum base offense level be increased (or eliminated entirely) so that in a case in which the number of units involved is more than 40,000, a higher base offense level applies? If so, what higher base offense levels are appropriate, and what number of units should correspond to those higher base offense levels?

Under the Drug Equivalency Tables in §2D1.1, 1 unit of a Schedule V substance is equivalent to 0.00625 gm of marihuana. Should a different equivalency apply? If so, what should that different equivalency be?

4. The Commission requests comment regarding whether offenses involving hydrocodone substances are adequately addressed by the guidelines. Currently, the guidelines do not distinguish between hydrocodone substances and other Schedule III substances (except Ketamine). The Act increased the statutory maximum term of imprisonment for all Schedule III offenses, including hydrocodone offenses, from 5 years to 10 years. Should hydrocodone be treated differently than other Schedule III substances and, if so, how? If the Commission should revise the guidelines as they relate to hydrocodone, what justifies doing so?

For example, under the Drug Quantity Table in §2D1.1, the maximum base offense level for an offense involving Schedule III substances (except Ketamine) is 20, which corresponds to 40,000 or more units of the substance concerned. Should the maximum base offense level be increased (or eliminated entirely) so that in a case in which the number of units involved is more than 40,000, a higher base offense level applies? If so, what higher base offense levels are appropriate, and what number of units should correspond to those higher base offense levels?

Under the Drug Equivalency Tables in §2D1.1, 1 unit of a Schedule III substance, including hydrocodone, is equivalent to 1 gm of marihuana. Should a different equivalency apply to hydrocodone? If so, what should that different equivalency be? Should the guidelines take into account (as is done for oxycodone) the weight of the hydrocodone itself (i.e., the "hydrocodone actual"), rather than the number of units of hydrocodone? If so, what base offense levels should apply, and to what weights of hydrocodone actual should those base offense levels correspond? For example, should the Commission amend the Drug Equivalency

Tables to provide that 1 gm of hydrocodone actual is equivalent to 1,675 gm of marihuana?

EXHIBIT C

PROPOSED AMENDMENT: SUBMERSIBLE VESSELS

Synopsis of Proposed Amendment: *This proposed amendment implements the Drug Trafficking Vessel Interdiction Act of 2008, Pub. L. 110–407 (the “Act”). The Act creates a new offense at 18 U.S.C. § 2285 (Operation of Submersible Vessel or Semi-Submersible Vessel Without Nationality), which provides: “Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to evade detection, shall be fined under this title, imprisoned not more than 15 years, or both.”*

Section 103 of the Act also directs the Commission to promulgate or amend the guidelines to provide for increased penalties for persons convicted of offenses under 18 U.S.C. § 2285. In carrying out this directive, the Commission shall—

(1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offense described in section 2285 of title 18, United States Code, and the need for deterrence to prevent such offenses;

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

(A) the use of a submersible vessel or semi-submersible vessel described in section 2285 of title 18, United States Code, to facilitate other felonies;

(B) the repeated use of a submersible vessel or semi-submersible vessel described in section 2285 of title 18, United States Code, to facilitate other felonies, including whether such use is part of an ongoing criminal organization or enterprise;

(C) whether the use of such a vessel involves a pattern of continued and flagrant violations of section 2285 of title 18, United States Code;

(D) whether the persons operating or embarking in a submersible vessel or semi-submersible vessel willfully caused, attempted to cause, or permitted the destruction or damage of such vessel or failed to heave to when directed by law enforcement officers; and

(E) circumstances for which the sentencing guidelines (and policy statements) provide sentencing enhancements;

(3) ensure reasonable consistency with other relevant directives, other sentencing guidelines and policy statements, and statutory provisions;

(4) make any necessary and conforming changes to the sentencing guidelines and

policy statements; and

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

The proposed amendment amends §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit these Offenses); Attempt or Conspiracy) by expanding the scope of the specific offense characteristic at subsection (b)(2) to apply if the defendant used a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285.

The proposed amendment also provides a new guideline at §2X7.2 (Submersible and Semi-Submersible Vessels) for the new offense at 18 U.S.C. § 2285, with a base offense level of [12]-[34]. The proposed amendment also provides upward departure provisions to account for certain aggravating factors listed in the directive.

Finally, the proposed amendment provides a reference in Appendix A (Statutory Index) to index the new offense to the new guideline.

Three issues for comment are also included.

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) **a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used**, or (C) 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.
- (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.
- (7) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.
- (8) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.
- (9) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.
- (10) (Apply the greatest):
 - (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 defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
 - (C) If—
 - (i) the defendant was convicted under 21 U.S.C. § 860a of

manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

- (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

- (D) 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**.

- (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.

* * *

7. OFFENSES INVOLVING BORDER TUNNELS AND SUBMERSIBLE AND SEMI-

SUBMERSIBLE VESSELS

* * *

§2X7.2. Submersible and Semi-Submersible Vessels

(a) Base Offense Level: [12]-[34]

Commentary

Statutory Provision: 18 U.S.C. § 2285.

Application Note:

1. Upward Departure Provisions.—An upward departure may be warranted in any of the following cases:
 - (A) The offense involved a failure to heave to when directed by a law enforcement officer.
 - (B) The offense involved an attempt to sink the vessel or the sinking of the vessel.
 - (C) The defendant engaged in a pattern of activity involving use of a submersible vessel or semi-submersible vessel described in 18 U.S.C. § 2285 to facilitate other felonies.
 - (D) The offense involved use of the vessel as part of an ongoing criminal organization or enterprise.

Background: This guideline implements the directive to the Commission in section 103 of Public Law 110–407.

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APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 2284	2M5.3, 2X2.1, 2X3.1
18 U.S.C. § 2285	2X7.2

* * *

Issues for Comment:

1. The Commission requests comment regarding whether it should reference the new offense at 18 U.S.C. § 2285 (*Operation of Submersible Vessel or Semi-submersible Vessel Without Nationality*) to §2X5.1 (*Other Felony Offenses*), instead of promulgating a new guideline at §2X7.2 (*Submersible and Semi-Submersible Vessels*) for the new offense, as provided for by the proposed amendment. Section 2X5.1 instructs the court to “apply the most analogous offense guideline” when an “offense is a felony for which no guideline expressly has been promulgated.” In a case where “there is not a sufficiently analogous guideline”, §2X5.1

provides that:

the provisions of 18 U.S.C. § 3553 shall control, except that any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable.

If the Commission references section 2285 to §2X5.1, is there further action the Commission should take to clarify how the guidelines apply in such cases? If so, what action?

2. Section 103 of the Drug Trafficking Vessel Interdiction Act of 2008, Pub. L. No. 110–407, directs the Commission to consider aggravating circumstances such as the use of such vessels as part of an ongoing criminal organization or enterprise. Accordingly, the Commission requests comment regarding how the proposed amendment’s new guideline at §2X7.2 (Submersible and Semi-Submersible Vessels), or any other guideline to which offenses under 18 U.S.C. § 2285 (Operation of Submersible Vessel or Semi-submersible Vessel Without Nationality) would be referenced, should account for cases in which the vessel is used as part of an ongoing criminal organization or enterprise. The Commission was informed at its public briefing in November 2008 that the construction of such a vessel costs one million dollars or more and takes one year or more to complete, and that such a vessel is intended to be used for a single trip before being purposely sunk. If so, this may indicate that the use of the submersible or semi-submersible vessel typically is part of an ongoing criminal organization or enterprise. Should the Commission account for this factor in setting the base offense level? If so, should the Commission provide a specific offense characteristic or a downward departure to account for a case in which an ongoing criminal organization or enterprise is not involved? Alternatively, should the Commission provide a specific offense characteristic or an upward departure to account for this factor? Are there any other amendments to the guidelines that should be made to account for cases in which the vessel is used as part of an ongoing criminal organization or enterprise?

3. The Commission requests comment regarding whether, in a case sentenced under the proposed guideline, §2X7.2 (Submersible and Semi-Submersible Vessels), and in which §3B1.2 (Mitigating Role) applies, it should provide an alternative base offense level, downward adjustment, or downward departure to reflect the lesser culpability of the defendant?

EXHIBIT D

ISSUES FOR COMMENT: COURT SECURITY IMPROVEMENT ACT OF 2007

1. *The Court Security Improvement Act of 2007, Public Law 110–177 (the "Act"), creates two new federal offenses, increases the statutory maximum penalty for a number of existing federal offenses, and contains a directive to the Commission relating to threats made in violation of 18 U.S.C. § 115 that occur over the Internet. The Commission responded to the two new offenses created by the Act during the amendment cycle ending May 1, 2008 (see Amendment 718). The Commission requests comment regarding what additional amendments may be appropriate in light of the Act. The increases in the statutory maximum penalties provided by the Act raise issues concerning a number of guidelines in Chapter Two, Part A, generally, and it may be necessary to continue work on any or all of the remaining issues raised by the Act beyond the amendment cycle ending May 1, 2009.*

A. Increases in Statutory Maximum Penalties.

The existing federal offenses with statutory maximum penalties increased by the Act and the guidelines to which those offenses are referenced are as follows:

- (1) *18 U.S.C. § 115 (Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member) makes it unlawful to, among other things, assault an individual who is a current or former federal official, or a family member of such an individual, with intent to impede the individual in, or retaliate against the individual for, the performance of the individual's official duties. Such an assault is punished under 18 U.S.C. § 115(b)(1). The Act modified the penalty structure of these offenses. In doing so, the Act eliminated the reference to 18 U.S.C. § 111 (Assaulting, resisting, or impeding certain officers or employees), and increased the statutory maximum terms of imprisonment for assaults involving physical contact or intent to commit another felony (from 8 years to 10 years), and for assaults resulting in serious bodily injury or assaults involving the use of a dangerous weapon (from 20 years to 30 years). Other statutory maximum terms of imprisonment include 20 years (for assaults resulting in bodily injury) and 1 year (for simple assaults).*

Offenses involving assaults punished under 18 U.S.C. § 115(b)(1) are referenced in Appendix A (Statutory Index) to §§2A2.1 (Assault with Intent to Commit Murder; Attempted Murder); 2A2.2 (Aggravated Assault), and 2A2.3 (Minor Assault).

- (2) *18 U.S.C. § 1112 (manslaughter) makes it unlawful to kill a human being without malice, either upon a sudden quarrel or heat of passion ("voluntary manslaughter") or in the commission of an unlawful act not amounting to a felony or in the commission, in an unlawful manner or without due caution and circumspection, of a lawful act which might produce death ("involuntary manslaughter"). The Act increased the statutory maximum terms of imprisonment for voluntary manslaughter (from 10 years to 15 years) and for involuntary manslaughter (from 6 years to 8 years).*

Offenses under 18 U.S.C. § 1112 are referenced in Appendix A (Statutory Index) to §§2A1.3 (Voluntary Manslaughter) and 2A1.4 (Involuntary Manslaughter).

- (3) *Subsection (a) of 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant), makes it unlawful to kill or attempt to kill another person with intent to interfere in an official proceeding. It also makes it unlawful to use or threaten physical force, or attempt to do so, with intent to interfere with an official proceeding. The Act increased the statutory maximum terms of imprisonment for the killing of another under circumstances constituting manslaughter (by reference to 18 U.S.C. § 1112, from 10 years to 15 years); for attempted murder or attempted use of physical force (from 20 years to 30 years); and for threat of use of physical force to prevent the attendance or testimony in an official proceeding (from 10 years to 20 years). Offenses under section 1512(a) are referenced in Appendix A (Statutory Index) to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), and 2J1.2 (Obstruction of Justice).*

- (4) *Section 1512(b) makes it unlawful to intimidate, threaten, or corruptly persuade another person, or to engage in misleading conduct toward another person, with intent to interfere with an official proceeding. The Act increased the statutory maximum term of imprisonment for these offenses from 10 years to 20 years.*

Offenses under section 1512(b) are referenced in Appendix A (Statutory Index) to §2J1.2 (Obstruction of Justice).

- (5) *Section 1512(d) makes it unlawful to harass another person and thereby hinder, delay, prevent, or dissuade an arrest or prosecution, or the participation of a person in an official proceeding. The Act increased the statutory maximum term of imprisonment for these offenses from 1 year to 3 years.*

Offenses under section 1512(d) are referenced in Appendix A (Statutory Index) to §2J1.2 (Obstruction of Justice).

- (6) *Subsection (a) of 18 U.S.C. § 1513 (Retaliating against a witness, victim, or an informant) makes it unlawful to kill or attempt to kill another person with intent to retaliate against a person for attending or testifying at an official proceeding or for providing information to a law enforcement officer. The Act increased the statutory maximum terms of imprisonment for the killing of another under circumstances constituting manslaughter (by reference to 18 U.S.C. § 1112, from 10 years to 15 years) and for an attempt (from 20 years to 30 years). Other statutory maximum terms of imprisonment include death, or imprisonment for life, if the offense involved the killing of another under circumstances constituting murder.*

Offenses under section 1513(a) are referenced in Appendix A (Statutory Index) to §2J1.2 (Obstruction of Justice).

- (7) *Section 1513(b) makes it unlawful to cause bodily injury to another person or damage the tangible property of another person (or threaten to do so) with intent to retaliate against a person for attending or testifying at an official proceeding or for providing information to a law enforcement officer. The Act increased the statutory maximum terms of imprisonment for such offenses from 10 years to 20 years.*

Offenses under section 1513(b) are referenced in Appendix A (Statutory Index) to §2J1.2 (Obstruction of Justice).

- (8) *Other offenses under section 1513 include subsection (e) (which makes it unlawful to knowingly, with intent to retaliate, take any action harmful to any person for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense) and subsection (f) (which makes it unlawful to conspire to commit any offense under section 1513).*

These other offenses under section 1513 are also referenced in Appendix A (Statutory Index) to §2J1.2 (Obstruction of Justice).

Are the guidelines adequate as they apply to such offenses? If not, what amendments to the guidelines should be made to address the increases in statutory maximum penalties?

As described in paragraph (7), above, Appendix A (Statutory Index) currently refers all offenses under section 1513 to §2J1.2 (Obstruction of Justice) only. An offense under section 1513 can involve conduct such as killing, causing bodily injury, or threatening. Should the Commission amend Appendix A (Statutory Index) to refer offenses under section 1513 to other guidelines, either in addition to or in lieu of referencing them to §2J1.2? If so, to which other guidelines? Alternatively, should the Commission provide cross references in §2J1.2 that allow for an offense under section 1513 to be sentenced under a guideline other than §2J1.2?

B. Official Victims.

The Commission requests comment regarding cases in which an official is the victim of an offense described above. The circumstance of an official victim is addressed in the guidelines as follows:

- (1) *Section 3A1.2 contains an adjustment if the victim was an individual who is a current or former government officer or employee (or a member of the immediate family of such an individual), and the offense was motivated by such status. If the applicable guideline is from Chapter Two, Part A (as is the case with §§2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3), the adjustment is 6 levels; otherwise (as with §2J1.2), the adjustment is 3 levels.*
- (2) *Section 3A1.2, Application Note 5, invites an upward departure if the official victim is an exceptionally high-level official.*

Do these provisions adequately address the circumstance of an official victim? If not, what amendments to the guidelines should be made? Should the Commission increase the amount, or the scope, of these provisions? Should the upward departure provision be incorporated as an

enhancement in one or more of the applicable guidelines (e.g., §§2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2J1.2)?

The Commission also requests comment on cases in which a non-official is the victim of an offense described above. Are the guidelines adequate as they apply to such offenses? If not, what amendments to the guidelines should be made?

C. Directive to the Commission.

Section 209 of the Act directs the Commission to review the guidelines as they apply to threats made in violation of 18 U.S.C. § 115 (Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member). Section 115 makes it unlawful to assault, kidnap, or murder an individual who is a current or former federal official, or a family member of such an individual, with intent to impede the individual in, or retaliate against the individual for, the performance of the individual's official duties; section 115 also makes it unlawful to threaten such an assault, kidnapping, or murder. Such a threat is punished under 18 U.S.C. § 115(b)(4), which provides that a violator is subject to a fine under title 18, United States Code, and imprisonment of up to 6 years (if an assault was threatened) or up to 10 years (if a kidnapping or murder was threatened). Offenses involving threats made in violation of 18 U.S.C. § 115 are referenced in Appendix A of the Guidelines Manual (Statutory Index) to §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens).

Section 209 specified that the Commission should review those threats made in violation of section 115 "that occur over the Internet," and "determine whether and by how much that circumstance should aggravate the punishment pursuant to section 994 of title 28, United States Code." Section 209 further directed the Commission to "take into consideration the number of such threats made, the intended number of recipients of such threats, and whether the initial senders of such threats were acting in an individual capacity or as part of a larger group."

With regard to threats made in violation of section 115 that occur over the Internet, the guidelines do not currently provide for the use of the Internet to be an aggravating circumstance. Should that circumstance aggravate the punishment and, if so, by how much?

Other factors specified in the directive (i.e., (i) the number of threats made in violation of section 115, (ii) the intended number of recipients of such threats, and (iii) whether the initial senders of such threats were acting in an individual capacity or as part of a larger group), are currently addressed in the guidelines as follows:

- (1) Section 2A6.1(b)(2)(A) contains a 2-level enhancement if the offense involved more than two threats. Section 2A6.1, Application Note 1, provides that, in determining whether this enhancement applies, conduct that occurred prior to the offense must be "substantially and directly connected to the offense, under the facts of the case taken as a whole".
- (2) Section 2A6.1, Application Note 4, invites an upward departure if the offense involved substantially more than two threatening communications to the same victim, or if the offense involved multiple victims.

Are the factors in the directive relating to number of threats made and intended number of recipients adequately addressed through these upward departures? If not, what amendments to the guidelines should be made? Should these upward departure provisions be incorporated as enhancements in §2A6.1?

In considering whether to amend the guidelines as they apply to offenses involving threats made in violation of section 115, should the Commission focus on whether to amend the guidelines with regard to offenses that occur over the Internet (i.e., the category of offenses covered by the directive), or should the Commission also consider whether to amend the guidelines with regard to offenses that do not occur over the Internet? If the latter, what amendments to the guidelines should be made?

EXHIBIT E

ISSUES FOR COMMENT: WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008

1. *The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110–457 (the "Act"), was signed into law on December 23, 2008. The Act creates two new federal offenses, amends a number of federal statutes, and contains a directive to the Commission relating to certain alien harboring offenses. The Commission requests comment regarding what amendments to the guidelines may be appropriate in light of the Act. Given the recency of enactment of the Act, it may be necessary to continue work on any or all of the issues raised by the Act beyond the amendment cycle ending May 1, 2009.*

A. *Directive to the Commission.*

Section 222(g) of the Act directs the Commission to—

review and, if appropriate, amend the sentencing guidelines and policy statements applicable to persons convicted of alien harboring to ensure conformity with the sentencing guidelines applicable to persons convicted of promoting a commercial sex act if--

- (1) the harboring was committed in furtherance of prostitution; and*
- (2) the defendant to be sentenced is an organizer, leader, manager, or supervisor of the criminal activity.*

*Alien harboring is an offense under 8 U.S.C. § 1324(a) (bringing in and harboring certain aliens), which makes it unlawful to (among other things) harbor an illegal alien. Offenses under section 1324(a) are referenced to §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). In some circumstances, a person who harbors an alien could also commit an offense under 8 U.S.C. § 1328 (importation of alien for immoral purpose), which makes it unlawful to (among other things) harbor an illegal alien for purposes of prostitution or any other immoral purpose. Offenses under section 1328, however, are referenced not to §2L1.1 but to the guidelines applicable to promoting a commercial sex act, §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; 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). It is to those guidelines, §§2G1.1 and 2G1.3, that sex trafficking offenses, such as 18 U.S.C. § 1591 and the offenses under chapter 117 of title 18, United States Code (18 U.S.C. § 2421 *et seq.*) are referenced.*

The Commission requests comment regarding whether (and, if so, how) the guidelines should be amended to ensure conformity between the guidelines applicable to persons convicted of alien harboring (i.e., §2L1.1) and the guidelines applicable to persons convicted of promoting a commercial sex act (i.e., §§2G1.1 and 2G1.3) if the alien harboring offense involves the circumstances specified in the directive (i.e., the harboring was committed in furtherance of

prostitution and the defendant is an organizer, leader, manager, or supervisor of the criminal activity).

In a case in which no aggravating or mitigating factors otherwise apply, a person convicted of alien harboring under 8 U.S.C. § 1324(a)(1)(A)(iii) under the circumstances specified in the directive receives a base offense level of 12 under §2L1.1(a)(3) and an upward adjustment of two, three, or four levels under §3B1.1 (Aggravating Role) for being an organizer, leader, manager, or supervisor of the criminal activity, for a resulting offense level of 14 to 16. (Section 2L1.1 does not provide an enhancement for committing the harboring in furtherance of prostitution.) In comparison, a person convicted of promoting a commercial sex act receives a base offense level of 14 under §2G1.1(a)(2) (if the offense did not involve a minor) or a base offense level of 24 under §2G1.3(a)(4) (if the offense did involve a minor). In cases in which aggravating or mitigating circumstances are present, the guideline applicable to alien harboring, §2L1.1, may conform with the guidelines applicable to promoting a commercial sex act, §§2G1.1 and 2G1.3, to a greater or lesser degree.

Are amendments needed to §2L1.1, as it applies to a person convicted of alien harboring under the circumstances specified in the directive, to ensure conformity with §§2G1.1 and 2G1.3? For example, should the Commission provide a cross reference in §2L1.1 to §§2G1.1 and 2G1.3 when the offense involves the circumstances specified in the directive? Alternatively, should the Commission provide one or more specific offense characteristics in §2L1.1 to account for the circumstances specified in the directive, such as a specific offense characteristic for harboring committed in furtherance of prostitution? Should the Commission provide a specific offense characteristic in §2L1.1 to account for an offense involving a minor? Should the Commission provide a specific offense characteristic in §2L1.1 that incorporates the adjustment in §3B1.1 (Aggravating Role)? If the Commission were to provide one or more such specific offense characteristics, what should the offense levels be? Are there any other amendments that should be made to the guidelines as they apply to a person convicted of alien harboring under the circumstances specified in the directive?

B. New Offenses.

The Act created two new offenses. The first new offense, 18 U.S.C. § 1593A (benefitting financially from peonage, slavery, and trafficking in persons), makes it unlawful to knowingly benefit, financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of section 1581(a), 1592, or 1595(a) of title 18, United States Code, knowing or in reckless disregard of the fact that the venture has engaged in such violation. A violator is subject to a fine under title 18, United States Code, and imprisonment in the same manner as a completed violation of such section.

The second new offense, 18 U.S.C. § 1351 (fraud in foreign labor contracting), makes it unlawful to knowingly and with intent to defraud recruit, solicit or hire a person outside the United States for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment. A violator is subject to a fine under title 18, United States Code, and imprisonment of up to 5 years.

Should the Commission amend Appendix A (Statutory Index) to refer these new offenses to one or more guidelines and, if so, which ones? Should offenses under section 1593A be referred to

§2H4.1 (Peonage, Involuntary Servitude, and Slave Trade)? Should offenses under section 1351 be referred to §2B1.1 (Theft, Property Destruction, and Fraud), or to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade)? Are there aggravating or mitigating circumstances existing in cases involving those offenses that might justify additional amendments to the guidelines? If so, what amendments to the guidelines should be made to address those circumstances?

C. Other Modifications to Chapter 77.

Subtitle C of title II of the Act amended various provisions in Chapter 77 (Peonage, Slavery, and Trafficking in Persons) of title 18, United States Code, in particular to the following offenses:

- (A) 18 U.S.C. § 1583 (enticement into slavery), which is referenced in Appendix A (Statutory Index) to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade).*
- (B) 18 U.S.C. § 1584 (sale into involuntary servitude), which is referenced in Appendix A (Statutory Index) to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade).*
- (C) 18 U.S.C. § 1589 (forced labor), which is referenced in Appendix A (Statutory Index) to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade).*
- (D) 18 U.S.C. § 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), which is referenced in Appendix A (Statutory Index) to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade).*
- (E) 18 U.S.C. § 1591 (sex trafficking of children or by force, fraud, or coercion), which is referenced in Appendix A (Statutory Index) to §§2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), 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), 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; 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).*
- (F) 18 U.S.C. § 1592 (unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor), which is referenced in Appendix A (Statutory Index) to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade).*

Are the guidelines adequate as they apply to such offenses? Are there aggravating or mitigating circumstances existing in cases involving such offenses that might justify additional amendments to the guidelines? If so, what amendments to the guidelines should be made to address those circumstances?

Among other things, the Act amended these offenses by extending to these offenses the obstruction provision of 18 U.S.C. § 1581 (peonage; obstructing enforcement), under which a person who obstructs, interferes with, or prevents the enforcement of the section is subject to the same punishment as a person who commits the substantive offense. Are the guidelines adequate as they apply to these offenses in a case involving obstruction?

The Act also amended 18 U.S.C. §§ 1589 and 1591 to provide that a person who benefits financially from participating in a venture involving trafficked labor is subject to the same punishment as a person who commits the substantive offense. Are the guidelines adequate as they apply to these offenses in a case involving these circumstances?

The Act also amended 18 U.S.C. § 1594 (general provisions) to provide for conspiracy liability under these offenses. Are the guidelines adequate as they apply to these offenses in a case involving conspiracy?

Are there any other amendments to the guidelines that should be made to address the amendments made by the Act?

EXHIBIT F

PROPOSED AMENDMENT:

MISCELLANEOUS AMENDMENTS

Synopsis of Proposed Amendment: *This proposed amendment is a multi-part amendment responding to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues.*

*Part A of the proposed amendment amends Appendix A (Statutory Index) to include offenses created or amended by the Housing and Economic Recovery Act of 2008 (Public Law 110–289). The new offense at 12 U.S.C. § 4636b is referenced to §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); as a conforming change, the similar existing offense at 12 U.S.C. § 1818(j) is also referenced to §2B1.1. The new offense at 12 U.S.C. § 4641 is referenced to §2J1.1 (Contempt) and §2J1.5 (Failure to Appear by Material Witness); as conforming changes, similar existing offenses (*see* 2 U.S.C. §§ 192, 390; 7 U.S.C. § 87f(e); 12 U.S.C. §§ 1818(j), 1844(f), 2273, 3108(b)(6); 15 U.S.C. §§ 78u(c), 80a-41(c), 80b-9(c), 717m(d); 16 U.S.C. § 825f(e); 26 U.S.C. § 7210; 33 U.S.C. §§ 506, 1227(b); 42 U.S.C. § 3611; 47 U.S.C. § 409(m); 49 U.S.C. §§ 14909, 16104) are also referenced to §2J1.1 and §2J1.5.*

*Part B of the proposed amendment amends Appendix A (Statutory Index) to include offenses created or amended by the Consumer Product Safety Improvement Act of 2008 (Public Law 110–314). These offenses (*see* 15 U.S.C. §§ 1192, 1197(b), 1202(c), 1263, 2068) are referenced to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product). Technical and conforming changes are also made.*

Part C of the proposed amendment amends Appendix A (Statutory Index) to include an offense created by the Veterans' Benefits Improvement Act of 2008 (Public Law 110–389). The new offense at 50 U.S.C. App. § 527(e) is referenced to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Guideline)); as a conforming change, the similar existing offense at 10 U.S.C. § 987(f) is also referenced to §2X5.2.

Part D of the proposed amendment amends Appendix A (Statutory Index) to include an offense created by the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109–162). The new offense at 18 U.S.C. § 117 is referenced to §2A6.2 (Stalking or Domestic Violence).

Part E of the proposed amendment amends Appendix A (Statutory Index) to include an offense created by the Child Soldiers Accountability Act of 2008 (Public Law 110–340). The new offense at 18 U.S.C. § 2442 is referenced to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade). Technical and conforming changes are also made. An issue for comment also is provided.

Part F of the proposed amendment makes changes throughout the Guidelines Manual so that it accurately reflects the amendments made by the Judicial Administration and Technical Amendments Act of 2008 (Public Law 110–406) to the probation and supervised release statutes (18 U.S.C. §§ 3563, 3583). The changes include the addition of a new guideline for intermittent confinement that parallels the statutory language, as well as technical and conforming changes.

Part G of the proposed amendment amends the enhancement relating to property from a national cemetery or veterans' memorial in subsection (b)(6) of §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) so that it also covers trafficking in such property, and makes a conforming change to the commentary. This part responds to the directive to the Commission in the Let Our Veterans Rest in Peace Act of 2008 (Public Law 110–384).

*Part H of the proposed amendment makes changes in the child pornography guidelines, §2G2.1 and §2G2.2, so that they accurately reflect the amendments made to the child pornography statutes (18 U.S.C. §§ 2251 *et seq.*) by the Effective Child Pornography Prosecution Act of 2007 (Public Law 110–358) and the PROTECT Our Children Act of 2008 (Public Law 110–401). The changes relate primarily to cases where child pornography is transmitted over the Internet. Under the proposed amendment, where the guidelines refer to the purpose of producing a visual depiction, they will also refer to the purpose of transmitting a live visual depiction; where the guidelines refer to possessing material, they will also refer to accessing with intent to view the material. As a conforming change, this part also amends the child pornography guidelines so that the term "distribution" includes "transmission", and the term "material" includes any visual depiction, as now defined by 18 U.S.C. § 2256 (i.e., to include data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format).*

Part I of the proposed amendment makes a technical change to the terms "another felony offense" and "another offense", as defined in Application Note 14(C) of the firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). Those definitions were slightly revised when they were placed into Application Note 14(C) by Amendment 691 (effective November 1, 2006), and some confusion has arisen regarding whether the revisions were intended to have a substantive effect. The technical change amends the terms to clarify that Amendment 691 was not intended to have a substantive effect on those terms.

Part J of the proposed amendment revises Appendix A (Statutory Index) so that the threat guideline, §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), is included on the list of guidelines to which 18 U.S.C. § 2280 and § 2332a are referenced. The proposed amendment ensures that in a case in which an offense under one of those statutes is committed by threat, the court has the option of determining that §2A6.1 is the most analogous offense guideline.

Part K of the proposed amendment amends the enhancement relating to serious bodily injury in subsection (b)(5) of §2B5.3 (Criminal Infringement of Copyright or Trademark) so that it parallels the corresponding enhancement for serious bodily injury in §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). This part responds to statutory amendments made by the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (Public Law 110–403).

An issue for comment is also included regarding whether the guidelines are adequate as they apply to subsection (a)(7) of 18 U.S.C. § 2252A, a new offense created by the PROTECT Our Children Act of 2008 (Public Law 110–401).

Proposed Amendment:

Part A (Housing and Economic Recovery Act of 2008)

APPENDIX A - STATUTORY INDEX

2 U.S.C. § 192	2J1.1, 2J1.5
2 U.S.C. § 390	2J1.1, 2J1.5

2 U.S.C. § 437g(d)	2C1.8	* * *
7 U.S.C. § 87b	2N2.1	
7 U.S.C. § 87f(e)	2J1.1, 2J1.5	* * *
12 U.S.C. § 631	2B1.1	
12 U.S.C. § 1818(j)	2B1.1	
12 U.S.C. § 1844(f)	2J1.1, 2J1.5	
12 U.S.C. § 2273	2J1.1, 2J1.5	
12 U.S.C. § 3108(b)(6)	2J1.1, 2J1.5	
12 U.S.C. § 4636b	2B1.1	
12 U.S.C. § 4641	2J1.1, 2J1.5	* * *
15 U.S.C. § 78ff	2B1.1, 2C1.1	
15 U.S.C. § 78u(c)	2J1.1, 2J1.5	
15 U.S.C. § 80a-41(c)	2J1.1, 2J1.5	
15 U.S.C. § 80b-6	2B1.1	
15 U.S.C. § 80b-9(c)	2J1.1, 2J1.5	* * *
15 U.S.C. § 714m(c)	2B1.1	
15 U.S.C. § 717m(d)	2J1.1, 2J1.5	* * *
16 U.S.C. § 773g	2A2.4	
16 U.S.C. § 825f(c)	2J1.1, 2J1.5	* * *
26 U.S.C. § 7210	2J1.1, 2J1.5	* * *
33 U.S.C. § 506	2J1.1, 2J1.5	
33 U.S.C. § 1227(b)	2J1.1, 2J1.5	* * *
42 U.S.C. § 3611(f)	2J1.1, 2J1.5	* * *
47 U.S.C. § 223(b)(1)(A)	2G3.2	
47 U.S.C. § 409(m)	2J1.1, 2J1.5	* * *
49 U.S.C. § 14909	2J1.1, 2J1.5	* * *
49 U.S.C. § 16104	2J1.1, 2J1.5	* * *

Part B (Consumer Product Safety Improvement Act of 2008)

**PART N - OFFENSES INVOLVING FOOD, DRUGS,
AGRICULTURAL PRODUCTS, CONSUMER PRODUCTS, AND ODOMETER LAWS**

* * *

2. FOOD, DRUGS, AND AGRICULTURAL PRODUCTS, AND CONSUMER PRODUCTS

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

* * *

APPENDIX A - STATUTORY INDEX

15 U.S.C. § 1176	2E3.1
15 U.S.C. § 1192	2N2.1
15 U.S.C. § 1197(b)	2N2.1
15 U.S.C. § 1202(c)	2N2.1
15 U.S.C. § 1263	2N2.1

* * *

15 U.S.C. § 1990(c)	2N3.1 (for offenses committed prior to July 5, 1994)
15 U.S.C. § 2068	2N2.1

* * *

Part C (Veterans' Benefits Improvement Act of 2008)

APPENDIX A - STATUTORY INDEX

8 U.S.C. § 1375a(d)(3)(C), (d)(5)(B)	2H3.1	* * *
10 U.S.C. § 987(f)	2X5.2	
50 U.S.C. § 783(c)	2M3.3	* * *
50 U.S.C. App. § 527(e)	2X5.2	

* * *

Part D (Violence Against Women and Department of Justice Reauthorization Act of 2005)

APPENDIX A - STATUTORY INDEX

18 U.S.C. § 115(b)(3)	2A1.1, 2A1.2, 2A2.1, 2X1.1	* * *
18 U.S.C. § 117	2A6.2	

* * *

Part E (Child Soldiers Accountability Act of 2008)

4. PEONAGE, INVOLUNTARY SERVITUDE, ~~AND~~ SLAVE TRADE, AND CHILD SOLDIERS

§2H4.1. Peonage, Involuntary Servitude, and Slave Trade, and Child Soldiers

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 1581-1590, 1592, 2442.

Application Notes:

1. For purposes of this guideline—

* * *

Definitions of "firearm," "dangerous weapon," "otherwise used," "serious bodily injury," and "permanent or life-threatening bodily injury" are found in the Commentary to §1B1.1 (Application Instructions).

"Involuntary servitude" includes forced labor, slavery, and service as a child soldier.

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 2425 2G1.3
18 U.S.C. § 2442 2H4.1

* * *

Issue for Comment

1. *The Commission requests comment regarding whether it should amend Appendix A (Statutory Index) to reference the new offense at 18 U.S.C. § 2242 to §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) or to one or more other guidelines. Does §2H4.1, or one or more other guidelines, adequately address offenses under 18 U.S.C. § 2242 and, if not, what aggravating or mitigating circumstances existing in those cases might justify additional amendments to the guidelines? Alternatively, should the Commission defer action in response to the new offense at 18 U.S.C. § 2242 this amendment cycle, undertake a broader review of the guidelines pertaining to human rights offenses generally, and include responding to the new offense as part of that broader review?*

Part F (Judicial Administration and Technical Amendments Act of 2008)

§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, or (B) work in community service, unless the court has imposed a fine, or 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)).~~

* * *

(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. [See §5F1.1 \(Community Confinement\)](#).

* * *

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation. [See §5F1.8 \(Intermittent Confinement\)](#).

§5C1.1. Imposition of a Term of Imprisonment

* * *

(c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by --

* * *

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement* or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or

* * *

- (d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by --

* * *

- (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement* or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

* * *

Commentary

Application Notes:

* * *

3. *Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months), the court has three options:*

* * *

- (C) *Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement* or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4-10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.*

* * *

4. *Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is eight, nine, or ten months), the court has two options:*

* * *

- (B) *Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement* or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 8-14 months, a sentence of four months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention would satisfy the minimum term of imprisonment required by the*

guideline range.

* * *

6. *There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement* than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases where the defendant's criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.*

* * *

~~*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.

§5D1.3. Conditions of Supervised Release

* * *

(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.~~

* * *

(5) Curfew

* * *

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release. See §5F1.8 (Intermittent Confinement).

* * *

§5F1.1. Community Confinement

Community confinement may be imposed as a condition of probation or supervised release.*

~~*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.~~

* * *

§5F1.8. Intermittent Confinement

Intermittent confinement may be imposed as a condition of probation or supervised release.

Commentary

Application Notes:

1. *"Intermittent confinement" means remaining in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release. See 18 U.S.C. § 3563(b)(10).*
2. *Intermittent confinement shall be imposed as a condition of supervised release only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See 18 U.S.C. § 3583(d).*

* * *

CHAPTER SEVEN - VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

PART A - INTRODUCTION TO CHAPTER SEVEN

* * *

2. Background

(b) Supervised Release.

* * *

~~With the exception of residency in, or participation in the program of, a community corrections facility,* which is available only for a sentence of probation, the~~ **The** conditions of supervised release authorized by statute are the same as those for a sentence of probation. When the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release, with or without extending the term or modifying the conditions, or revoke supervised release and impose a term of imprisonment. The periods of imprisonment authorized by statute for a violation of the conditions of supervised release generally are more limited, however, than those available for a violation of the conditions of probation. 18 U.S.C. § 3583(e)(3).

~~*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.~~

~~* * *~~

§7B1.3. Revocation of Probation or Supervised Release (Policy Statement)

~~* * *~~

Commentary

Application Notes:

~~* * *~~

- ~~5. Intermittent confinement is authorized *only* as a condition of probation *only* during the first year of the term of probation, *see* 18 U.S.C. § 3563(b)(10), and as a condition of supervised release *only* during the first year of supervised release, *see* 18 U.S.C. § 3583(d). *See* §5F1.8 (Intermittent 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.~~

~~* * *~~

§8D1.3. Conditions of Probation - Organizations

~~* * *~~

- (b) Pursuant to 18 U.S.C. § 3563(a)(2), if a sentence of probation is imposed for a felony, the court shall impose as a condition of probation at least one of the following: (1) restitution, ~~(2) notice to victims of the offense pursuant to 18 U.S.C. § 3555, or (3) an order requiring the organization to reside, or refrain from residing, in a specified place or area,~~ or (2) community service, unless the court has imposed a fine, or unless the court finds on the record that extraordinary circumstances exist that would make such condition plainly unreasonable, in which event the court shall impose one or more other conditions set forth in 18 U.S.C. § 3563(b).

~~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)).~~

* * *

Part G (Let Our Veterans Rest in Peace Act of 2008)

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

- (b) Specific Offense Characteristics

* * *

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

* * *

Commentary

* * *

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).

* * *

Subsection (b)(6) implements the instruction to the Commission in section 2 of Public Law 105–101 and the directive to the Commission in section 3 of Public Law 110–384.

* * *

Part H (PROTECT Our Children Act of 2008 and Effective Child Pornography Prosecution Act of 2007)

§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

- (a) Base Offense Level: **32**
- (b) Specific Offense Characteristics
 - (1) If the offense involved a minor who had (A) not attained the age of twelve years, increase by **4** levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by **2** levels.
 - (2) (Apply the greater) If the offense involved—
 - (A) the commission of a sexual act or sexual contact, increase by **2** levels; or
 - (B) (i) the commission of a sexual act; and (ii) conduct described in 18 U.S.C. § 2241(a) or (b), increase by **4** levels.
 - (3) If the offense involved distribution, 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.
 - (5) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.
 - (6) If, for the purpose of producing sexually explicit material **or for the purpose of transmitting such material live**, the offense involved (A) the knowing misrepresentation of a participant’s identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage sexually explicit conduct; or (B) the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by **2** levels.
- (c) Cross Reference

- (1) If the victim was killed in 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.
- (d) Special Instruction
 - (1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1591, 2251, 2260(b).

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, transmission, advertisement, and transportation, 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)).

"Material" includes a visual depiction, as defined in 18 U.S.C. § 2256.

"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.

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

2. Application of Subsection (b)(2).—For purposes of subsection (b)(2):

"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.

"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).

3. Application of Subsection (b)(5).—

(A) In General.—Subsection (b)(5) is intended to have broad application and includes offenses involving a minor 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 adjustment, 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)(5) 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 persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material *or for the purpose of transmitting such material live*. 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 persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material *or for the purpose of transmitting such material live*. 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 an Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if the offense involved the use of a computer or an interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material *or for the purpose of transmitting such material live*, or otherwise to solicit participation by a minor in such conduct for such purposes. 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 (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2

(Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.

6. Upward Departure Provision.—An upward departure may be warranted if the offense involved more than 10 minors.

§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

- (a) Base Offense Level:
- (1) **18**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), or § 2252A(a)(5).
 - (2) **22**, otherwise.
- (b) Specific Offense Characteristics
- (1) If (A) subsection (a)(2) applies; (B) the defendant’s conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.
 - (2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.
 - (3) (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.
- (4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.
- (5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.
- (6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, **or for accessing with intent to view the material**, increase by **2** levels.
- (7) If the offense involved—
 - (A) at least 10 images, but fewer than 150, increase by **2** levels;
 - (B) at least 150 images, but fewer than 300, increase by **3** levels;
 - (C) at least 300 images, but fewer than 600, increase by **4** levels; and
 - (D) 600 or more images, increase by **5** levels.
- (c) Cross Reference
 - (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 **or for the purpose of transmitting a live 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.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A, 2260(b).

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, **transmission**, advertisement, and transportation, 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.*

"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. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

"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" includes a visual depiction, as defined in 18 U.S.C. § 2256.

"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.

"Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

"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 abuse or exploitation" means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251, § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). "Sexual abuse or exploitation" does not include possession, **accessing with intent to view**, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.*

2. *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, **access with intent to view**, receive, or distribute such materials.*
3. *Application of Subsection (b)(5).—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*
4. *Application of Subsection (b)(7).—*
 - (A) *Definition of "Images".—"Images" means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8).*

(B) Determining the Number of Images.—For purposes of determining the number of images under subsection (b)(7):

(i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.

(ii) Each video, video-clip, movie, or similar ~~recording~~ visual depiction shall be considered to have 75 images. If the length of the ~~recording~~ visual depiction is substantially more than 5 minutes, an upward departure may be warranted.

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 *or for the purpose of transmitting live any visual depiction of such conduct.*

(B) Definition.—“Sexually explicit conduct” has the meaning given that term in 18 U.S.C. § 2256(2).

6. Upward Departure Provision.—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (7), effective April 30, 2003.

* * *

Part I (Clarification of §2K2.1, Application Note 14(C))

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

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

(1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

- (3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;
- (4) **20**, if --
 - (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or
 - (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; or (II) is convicted under 18 U.S.C. § 922(d);
- (5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);
- (6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; or (B) is convicted under 18 U.S.C. § 922(d);
- (7) **12**, except as provided below; or
- (8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1).

(b) Specific Offense Characteristics

- (1) If the offense involved three or more firearms, increase as follows:

	<u>Number of Firearms</u>	<u>Increase in Level</u>
(A)	3-7	add 2
(B)	8-24	add 4
(C)	25-99	add 6
(D)	100-199	add 8
(E)	200 or more	add 10 .

- (2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.
- (3) If the offense involved—
 - (A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or

- (B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.
- (4) If any firearm (A) was stolen, increase by **2** levels; or (B) had an altered or obliterated serial number, increase by **4** levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

- (5) If the defendant engaged in the trafficking of firearms, increase by **4** levels.
- (6) If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.
- (7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

- (1) If the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense, apply --
 - (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or
 - (B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

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

Application Notes:

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

"Ammunition" has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

"Controlled substance offense" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"Crime of violence" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

"Destructive device" has the meaning given that term in 26 U.S.C. § 5845(f).

"Felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

"Firearm" has the meaning given that term in 18 U.S.C. § 921(a)(3).

2. *Semiautomatic Firearm Capable of Accepting a Large Capacity Magazine.—For purposes of subsections (a)(1), (a)(3), and (a)(4), a "semiautomatic firearm capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.*
3. *Definition of "Prohibited Person".—For purposes of subsections (a)(4)(B) and (a)(6), "prohibited person" means any person described in 18 U.S.C. § 922(g) or § 922(n).*
4. *Application of Subsection (a)(7).— Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.*
5. *Application of Subsection (b)(1).—For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.*
6. *Application of Subsection (b)(2).—Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1) - (a)(5), subsection (b)(2) is not applicable.*

7. Destructive Devices.—A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. See also §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).

8. Application of Subsection (b)(4).—

(A) Interaction with Subsection (a)(7).—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, if the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).

(B) Knowledge or Reason to Believe.—Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

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

10. Prior Felony Convictions.—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). See §4A1.2(a)(2); §4A1.2, comment. (n.3).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal

history points pursuant to Chapter Four, Part A (Criminal History).

11. Upward Departure Provisions.—An upward departure may be warranted in any of the following circumstances: (1) the number of firearms substantially exceeded 200; (2) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (3) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (4) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 7).
12. Armed Career Criminal.—A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. See §4B1.4.
13. Application of Subsection (b)(5).—
 - (A) In General.—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—
 - (i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and
 - (ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—
 - (I) whose possession or receipt of the firearm would be unlawful; or
 - (II) who intended to use or dispose of the firearm unlawfully.
 - (B) Definitions.—For purposes of this subsection:

"Individual whose possession or receipt of the firearm would be unlawful" means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. "Crime of violence" and "controlled substance offense" have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). "Misdemeanor crime of domestic violence" has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term "defendant", consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.
 - (C) Upward Departure Provision.—If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.
 - (D) Interaction with Other Subsections.—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6) also would apply.

14. "In Connection With".—

(A) In General.—Subsections (b)(6) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.

(B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(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~~**an** 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~~**an** 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.

* * *

Part J (Treatment of 18 U.S.C. §§ 2280, 2332a in statutory index)

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 2280 2A1.1, 2A1.2, 2A1.3,
 2A1.4, 2A2.1, 2A2.2,
 2A2.3, 2A4.1, **2A6.1**, 2B1.1,
 2B3.1, 2B3.2, 2K1.4,
 2X1.1

* * *

18 U.S.C. § 2332a **2A6.1**, 2K1.4, 2M6.1

* * *

Part K (Prioritizing Resources and Organization for Intellectual Property Act of 2008)

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

* * *

(b) Specific Offense Characteristics

* * *

- (5) 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 ~~13~~14, increase to level ~~13~~14.

* * *

Issue for Comment

1. *The Commission requests comment regarding whether the guidelines are adequate as they apply to subsection (a)(7) of 18 U.S.C. § 2252A, a new offense created by the PROTECT Our Children Act of 2008 (Public Law 110–401). The new offense at subsection (a)(7) makes it unlawful to knowingly produce with intent to distribute, or to knowingly distribute, "child pornography that is an adapted or modified depiction of an identifiable minor." A violator is subject to a fine under title 18, United States Code, and imprisonment up to 15 years.*

Under Appendix A (Statutory Index), all offenses under 18 U.S.C. § 2252A are referenced to the child pornography trafficking, receipt, and possession guideline, §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor).

Is §2G2.2 the guideline to which offenses under subsection (a)(7) should be referenced? Alternatively, should the Commission amend Appendix A (Statutory Index) to refer offenses under subsection (a)(7) to a guideline or guidelines other than §2G2.2 and, if so, which ones? Should the Commission amend the guidelines (such as by amending Appendix A or by providing cross references) so that an offense under subsection (a)(7) that involves distribution is referred to one guideline (e.g., §2G2.2), and an offense under subsection (a)(7) that involves production is referred to another guideline (e.g., the child pornography production guideline, §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))? Whether offenses under subsection (a)(7) are referenced to §2G2.2 or to one or more other guidelines, are there aggravating or mitigating circumstances existing in cases involving those offenses that might justify additional amendments to the guidelines? If so, how should the guidelines be amended to address those circumstances? For example, if an offense under subsection (a)(7) that involves production is referred to §2G2.1, should the Commission provide a downward adjustment in §2G2.1 to reflect the less serious nature of an offense involving the production of child pornography that is an adapted or modified depiction of an identifiable minor compared to other offenses involving the production of child pornography covered by that guideline? Alternatively, should the Commission create a new guideline for offenses under subsection (a)(7)?

EXHIBIT G

PROPOSED AMENDMENT: INFLUENCING A MINOR

Synopsis of Proposed Amendment: *This proposed amendment addresses a circuit conflict regarding the undue influence enhancement at §2A3.2(b)(2)(B)(ii) (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Year (Statutory Rape) or Attempt to Commit Such Acts) and at §2G1.3(b)(2)(B) (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). The undue influence enhancement provides for an increase in the defendant's offense level (four levels in §2A3.2 and two levels in §2G1.3) if "a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct." In both guidelines, commentary states that in determining whether the undue influence enhancement 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." The commentary also provides for a rebuttable presumption of undue influence "[i]n a case in which a participant is at least 10 years older than the minor."*

In both guideline provisions, the term "minor" includes "an individual, whether fictitious or not, who a law enforcement officer represented to a participant . . . could be provided for the purposes of engaging in sexually explicit conduct" or "an undercover law enforcement officer who represented to a participant that the officer had not attained" the age of majority.

Three circuits have three different approaches regarding the application of the undue influence enhancement in cases in which the "minor" is actually an undercover law enforcement officer. The Eleventh Circuit, in United States v. Root, 296 F.3d 1222 (11th Cir. 2002), held that, according to the terms of §2A3.2, the undue influence enhancement can apply even when the victim is an undercover law enforcement officer. In such a case, the Eleventh Circuit held, the focus is on the defendant's conduct, not on the fact that the victim's will was not actually overborne. The Eleventh Circuit is also the only circuit that has addressed this issue in the context of §2G1.3. See United States v. Vance, 494 F.3d 985 (11th Cir. 2007) (holding that §2G1.3(b)(2)(B) applies where the minor is fictitious, and stating that "the focus is on the defendant's intent, not whether the victim is real or fictitious").

The Seventh Circuit reached a different result in United States v. Mitchell, 353 F.3d 552 (7th Cir. 2003), holding that "the plain language of [§2A3.2] cannot apply in the case of an attempt where the victim is an undercover police officer." The Seventh Circuit also stated that its reading of the guideline concluded that "the enhancement cannot apply [in any case] where the offender and victim have not engaged in illicit sexual conduct." Id. at 559.

The Sixth Circuit, in United States v. Chriswell, 401 F.3d 459 (6th Cir. 2005), took a third approach. The Sixth Circuit agreed in part with the Seventh Circuit, holding that "§2A3.2(b)(2)(B) is not applicable in cases where the victim is an undercover agent representing himself to be a child under the age of sixteen." Id. at 469. Unlike the Seventh Circuit, however, the Sixth Circuit concluded that the enhancement can apply in other instances of attempted sexual conduct.

The three proposed options reflect the three different interpretations of the enhancement by the Eleventh, Sixth, and Seventh Circuits. Option One reflects the Eleventh Circuit's approach by amending the commentary regarding the undue influence enhancement in §§2A3.2 and 2G1.3 to provide that the enhancement can apply in a case of attempted sexual conduct. Option One further amends the commentary to provide that the undue influence enhancement can apply in a case involving only an undercover law enforcement officer.

Option Two reflects the Sixth Circuit's approach. It amends the commentary regarding the undue influence enhancement in §§2A3.2 and 2G1.3 to provide that the enhancement can apply in a case of attempted sexual conduct. Option Two further amends the commentary to provide that the undue influence enhancement does not apply in a case involving only an undercover law enforcement officer.

Option Three reflects the Seventh Circuit's approach. Contrary to Options One and Two, Option Three amends the commentary regarding the undue influence enhancement in §§2A3.2 and 2G1.3 to provide that the enhancement does not apply in a case of attempted sexual conduct. Like Option Two, Option Three amends the commentary regarding the undue influence enhancement in §§2A3.2 and 2G1.3 to provide that the enhancement does not apply in a case involving only an undercover law enforcement officer.

All three options include a technical amendment to the background of §2A3.2.

One issue for comment is also included.

Proposed Amendment:

§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

- (a) Base Offense Level: **18**
- (b) Specific Offense Characteristics
 - (1) If the minor was in the custody, care, or supervisory control of the defendant, increase by **4** levels.
 - (2) If (A) subsection (b)(1) does not apply; and (B)(i) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct; or (ii) a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct, increase by **4** levels.
 - (3) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct, increase by **2** levels.
- (c) Cross Reference
 - (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). If the victim had not attained the age of 12 years, §2A3.1 shall apply, regardless of the "consent" of the victim.

Commentary

Statutory Provision: 18 U.S.C. § 2243(a). 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 16 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 16 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 16 years.

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

"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).

2. Custody, Care, or Supervisory Control Enhancement.—

(A) In General.—Subsection (b)(1) is intended to have broad application and is to be applied whenever the minor 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 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)(1) applies, do not apply subsection (b)(2) or §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. Application of Subsection (b)(2).—

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

[Option 1:

(B) Undue Influence.—In determining whether subsection (b)(2)(B)(ii) 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. *Subsection (b)(2)(B)(ii) does not require that the participant engage in prohibited sexual conduct with the minor.*

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption ~~that~~, for purposes of subsection (b)(2)(B)(ii), ~~that such participant unduly influenced the minor to engage in prohibited sexual conduct~~ applies. 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.

Subsection (b)(2)(B)(ii) can apply in a case in which the only "minor" (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.]

[Option 2:

(B) Undue Influence.—In determining whether subsection (b)(2)(B)(ii) 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. *Subsection (b)(2)(B)(ii) does not require that the participant engage in prohibited sexual conduct with the minor.*

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption ~~that~~, for purposes of subsection (b)(2)(B)(ii), ~~that such participant unduly influenced the minor to engage in prohibited sexual conduct~~ applies. 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.

Subsection (b)(2)(B)(ii) does not apply in a case in which the only "minor" (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.]

[Option 3:

(B) Undue Influence.—In determining whether subsection (b)(2)(B)(ii) 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. *Subsection (b)(2)(B)(ii) requires that the participant engage in prohibited sexual conduct with the minor.*

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption ~~that~~, for purposes of subsection (b)(2)(B)(ii), ~~that such participant unduly influenced the minor to engage in prohibited sexual conduct~~ applies. 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.

Subsection (b)(2)(B)(ii) does not apply in a case in which the only "minor" (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.]

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

person who exercises custody, care, or supervisory control of the minor.

5. Cross Reference.— Subsection (c)(1) provides a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. § 2241 or § 2242. For example, the cross reference to §2A3.1 shall apply if (A) the victim had not attained the age of 12 years (see 18 U.S.C. § 2241(c)); (B) the victim had attained the age of 12 years but not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnaping (see 18 U.S.C. § 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnaping (see 18 U.S.C. § 2242(1)).
6. Upward Departure Consideration.—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. For example, an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.

Background: This section applies to offenses involving the criminal sexual abuse of an individual who had not attained the age of 16 years. While this section applies to consensual sexual acts prosecuted under 18 U.S.C. § 2243(a) that would be lawful but for the age of the minor, it also applies to cases, prosecuted under 18 U.S.C. § 2243(a), in which a participant took active measure(s) to unduly influence the minor to engage in prohibited sexual conduct and, thus, the voluntariness of the minor's behavior was compromised. A ~~two-level~~ **four-level** enhancement is provided in subsection (b)(2) for such cases. It is assumed that at least a four-year age difference exists between the minor and the defendant, as specified in 18 U.S.C. § 2243(a). A ~~two-level~~ **four-level** enhancement is provided in subsection (b)(1) for a defendant who victimizes a minor under his supervision or care. However, if the minor had not attained the age of 12 years, §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) will apply, regardless of the "consent" of the 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:
 - (1) **34**, if the defendant was convicted under 18 U.S.C. § 1591(b)(1);
 - (2) **30**, if the defendant was convicted under 18 U.S.C. § 1591(b)(2);
 - (3) **28**, 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 (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by **2** levels.
- (5) If (A) subsection (a)(3) or (a)(4) applies; and (B) the offense involved a minor who had not attained the age of 12 years, increase by **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), 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.

[Option 1:

- (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. **Subsection (b)(2)(B) does not require that the participant engage in prohibited sexual conduct with the minor.**

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption ~~that, for purposes of subsection (b)(2)(B), that such participant unduly influenced the minor to engage in prohibited sexual conduct~~ **applies**. 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.

Subsection (b)(2)(B) can apply in a case in which the only "minor" (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.]

[Option 2:

- (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. **Subsection (b)(2)(B) does not require that the participant engage in prohibited sexual conduct with the minor.**

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption ~~that, for purposes of subsection (b)(2)(B), that such participant unduly influenced the minor to engage in prohibited sexual conduct~~ **applies**. 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.

Subsection (b)(2)(B) does not apply in a case in which the only "minor" (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.]

[Option 3:

- (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. **Subsection (b)(2)(B)**

requires that the participant engage in prohibited sexual conduct with the minor.

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption ~~that, for purposes of subsection (b)(2)(B), that such participant unduly influenced the minor to engage in prohibited sexual conduct~~ applies. 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.

Subsection (b)(2)(B) does not apply in a case in which the only "minor" (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.]

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. *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.

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

* * *

Issue for Comment:

1. *The Commission seeks comment regarding the current application of the undue influence enhancements in both §2A3.2 and §2G1.3. In 2004, the Commission created §2G1.3 specifically to address offenses under chapter 117 of title 18, United States Code, that involve minors. See USSG App. C, Amendment 664 (Nov. 2004). Prior to the creation of §2G1.3, chapter 117 offenses, primarily 18 U.S.C. §§ 2422 (Coercion and Enticement) and 2423 (Transportation of Minors), were sentenced under §2A3.2 either by direct reference from Appendix A, or through a cross reference from §2G1.1. The creation of a new guideline for chapter 117 cases was "intended to address more appropriately the issues specific to these offenses. In addition, the removal of these cases from §2A3.2 permit[ted] the Commission to more appropriately tailor [§2A3.2] to actual statutory rape cases." USSG App. C, Amendment 664 (Nov. 2004).*

The Commission requests comment regarding the application of the undue influence enhancements in the two guidelines at issue. Should the Commission amend the enhancement in either guideline in any way? If so, what changes should the Commission make? Should, for example, the Commission more narrowly tailor the enhancement in §2A3.2 to reflect the offense conduct typical in cases now being sentenced under §2A3.2? If so, how?

EXHIBIT H

PROPOSED AMENDMENT: §3C1.3 (COMMISSION OF OFFENSE WHILE ON RELEASE)

Synopsis of Proposed Amendment: *This proposed amendment clarifies Application Note 1 in §3C1.3 (Commission of Offense While on Release). Section 3C1.3 (formerly §2J1.7, (see Appendix C to the Guidelines Manual, Amendment 684) provides for a three-level adjustment if the defendant is subject to the statutory enhancement found at 18 U.S.C. § 3147—that is, if the defendant has committed the underlying offense while on release. Application Note 1 to §3C1.3 states that, in order to comply with the statute’s requirement that a consecutive sentence be imposed, the sentencing court must “divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement.”*

The Second and Seventh Circuits have held that, according to the terms of Application Note 2 to §2J1.7 (now Application Note 1 to §3C1.3), a sentencing court cannot apportion to the underlying offense more than the maximum of the guideline range absent the three-level enhancement. See United States v. Confredo, 528 F.3d 143 (2d Cir. 2008); United States v. Stevens, 66 F.3d 431 (2d Cir. 1995); United States v. Wilson, 966 F.2d 243 (7th Cir. 1992). The Second Circuit has stated that the example the Commission provides in the Application Note does not abide by their interpretation of the rule: “The commentary example begins with a total range of 30-37 months. In all criminal history categories, if the §2J1.7 three-level enhancement is deleted from the guideline level at which a 30-37 month sentence is imposed, the permissible range provided for the reduced sentence would be 21-27 months.” Stevens, at 435-36. The example states that a properly “apportioned” sentence for the underlying offense would be 30 months. This is outside the guideline range for that offense.

Under ordinary guideline application principles, however, only one guideline range applies to a defendant who committed an offense while on release and is subject to the enhancement at 18 U.S.C. § 3147. See §1B1.1 (instructing the sentencing court to, in this order: (1) determine the offense guideline applicable to the offense of conviction (the underlying offense); (2) determine the base offense level, specific offense characteristics, and follow other instructions in Chapter Two; (3) apply adjustments from Chapter Three; and, ultimately, (4) “[d]etermine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above”).

The proposed amendment clarifies that the court determines the applicable guideline range as in any other case. At that point, the court determines an appropriate “total punishment” from within that applicable guideline range, and then divides the total sentence between the underlying offense and the § 3147 enhancement as the court considers appropriate.

Proposed Amendment:

§3C1.3. Commission of Offense While on Release

If a statutory sentencing enhancement under 18 U.S.C. § 3147 applies, increase the offense level by 3 levels.

Commentary

Application Note:

1. Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence

for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the "total punishment" (i.e., the sentence for the offense committed while on release plus the statutory sentencing enhancement under 18 U.S.C. § 3147) is in accord with the guideline range for the offense committed while on release, *including, as in any other case in which a Chapter Three adjustment applies (see §1B1.1 (Application Instructions)), the adjustment provided by ~~as adjusted by~~ the enhancement in this section.* For example, if the applicable adjusted guideline range is 30-37 months and the court determines a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement. *Similarly, if the applicable adjusted guideline range is 30-37 months and the court determines a "total punishment" of 30 months is appropriate, a sentence of 24 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.*

Background: An enhancement under 18 U.S.C. § 3147 applies, after appropriate sentencing notice, when a defendant is sentenced for an offense committed while released in connection with another federal offense.

This guideline enables the court to determine and implement a combined "total punishment" consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement.

EXHIBIT I

PROPOSED AMENDMENT: COUNTERFEITING AND "BLEACHED NOTES"

Synopsis of Proposed Amendment: *The proposed amendment clarifies guideline application issues regarding the sentencing of counterfeiting offenses involving "bleached notes." Bleached notes are genuine United States currency stripped of its original image through the use of solvents or other chemicals and then reprinted to appear to be notes of higher denomination than intended by the Treasury. Circuit courts have resolved differently the question of whether offenses involving bleached notes should be sentenced under §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) or §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). Compare, United States v. Schreckengost, 384 F.3d 922 (7th Cir. 2004) (holding that bleached notes should be sentenced under §2B1.1); United States v. Inclema, 363 F.3d 1177 (11th Cir. 2004) (same); with United States v. Dison, 2008 WL 351935 (W.D. La. Feb 8, 2008) (applying §2B5.1 in a case involving bleached notes); United States v. Vice, 2008 WL 113970 (W. D. La. Jan. 3, 2008) (same). The proposed amendment resolves this circuit conflict and responds to concerns expressed by federal judges and members of Congress concerning the guidelines pertaining to offenses involving bleached notes.*

The definition of the term "counterfeit" in Application Note 3 of §2B5.1 has been cited by courts as the basis for declining to apply §2B5.1 to offenses involving bleached notes. "Counterfeit" is defined to mean "an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety." Application Note 3 further provides that "[o]ffenses involving genuine instruments that have been altered are covered under §2B1.1 (Theft, Property Destruction, and Fraud)." Under this definition, courts have had to consider whether a bleached note should be considered falsely made or manufactured in its entirety (and therefore sentenced under §2B5.1) or an altered note (and therefore sentenced under §2B1.1).

The proposed amendment resolves this issue to provide that offenses involving bleached notes are to be sentenced under §2B5.1. Specifically, the proposed amendment deletes Application Note 3 and revises the definition of "counterfeit" to more closely parallel relevant counterfeiting statutes, for example 18 U.S.C. §§ 471 (Obligations or securities of the United States) and 472 (Uttering counterfeit obligations or securities). As a clerical change, the definition is moved from Application Note 3 to Application Note 1.

The proposed amendment also amends the enhancement at subsection (b)(2)(B) to cover a case in which the defendant controlled or possessed genuine United States currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed.

In addition, the proposed amendment amends Appendix A (Statutory Index) by striking the alternative reference to §2B1.1 for two offenses that do not involve elements of fraud. Specifically, the amendment deletes alternative reference to §2B1.1 for offenses under 18 U.S.C. §§ 474A (Deterrents to counterfeiting of obligations and securities) and 476 (Taking impressions of tools used for obligations or securities). As a result, these offenses would be referenced solely to §2B5.1. A conforming change is made to delete these offenses from the list of statutory provisions in §2B1.1.

Proposed Amendment:

§2B5.1. Offenses Involving Counterfeit Bearer Obligations of the United States

- (a) Base Offense Level: 9

(b) Specific Offense Characteristics

- (1) If the face value of the counterfeit items (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 defendant (A) manufactured or produced any counterfeit obligation or security of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting; or (B) controlled or possessed (i) counterfeiting paper similar to a distinctive paper; (ii) **genuine United States currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed**; or (iii) a feature or device essentially identical to a distinctive counterfeit deterrent, increase by **2** levels.
- (3) If subsection (b)(2)(A) applies, and the offense level determined under that subsection is less than level **15**, increase to level **15**.
- (4) If a dangerous weapon (including a firearm) was possessed in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **13**, increase to level **13**.
- (5) If any part of the offense was committed outside the United States, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 470-474A, 476, 477, 500, 501, 1003. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Counterfeit" refers to an instrument that has been falsely made, manufactured, or altered. For example, an instrument that has been falsely made or manufactured in its entirety is "counterfeit", as is a genuine instrument that has been falsely altered (such as a genuine \$5 bill that has been altered to appear to be a genuine \$100 bill).

"Distinctive counterfeit deterrent" and "distinctive paper" have the meaning given those terms in 18 U.S.C. § 474A(c)(2) and (1), respectively.

"United States" means each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

2. Applicability to Counterfeit Bearer Obligations of the United States.— *This guideline applies to counterfeiting of United States currency and coins, food stamps, postage stamps, treasury bills, bearer bonds and other items that generally could be described as bearer obligations of the United States, i.e., that are not made out to a specific payee.*

~~3. *Inapplicability to Genuine but Fraudulently Altered Instruments.*—"Counterfeit," as used in this section, means an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety. Offenses involving genuine instruments that have been altered are covered under §2B1.1 (Theft, Property Destruction, and Fraud).~~

~~34. *Inapplicability to Certain Obviously Counterfeit Items.*—Subsection (b)(2)(A) does not apply to persons who produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny.~~

Background: Possession of counterfeiting devices to copy obligations (including securities) of the United States is treated as an aggravated form of counterfeiting because of the sophistication and planning involved in manufacturing counterfeit obligations and the public policy interest in protecting the integrity of government obligations. Similarly, an enhancement is provided for a defendant who produces, rather than merely passes, the counterfeit items.

Subsection (b)(4) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.

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18 U.S.C. § 474A	2B1.1, 2B5.1
18 U.S.C. § 476	2B1.1, 2B5.1

EXHIBIT J

PROPOSED AMENDMENT: TECHNICAL AMENDMENTS

Synopsis of Proposed Amendment: *This proposed amendment is a multi-part amendment that makes various technical and conforming changes to the guidelines.*

Part A of the proposed amendment addresses several cases in which the guidelines refer to another guideline, or to a statute or rule, but the reference has become incorrect or obsolete. First, the proposed amendment makes technical changes in §1B1.8 (Use of Certain Information) to address the fact that provisions that had been contained in subsection (e)(6) of Rule 11 of the Federal Rules of Criminal Procedure are now contained in subsection (f) of that rule. Second, it makes a technical change in §2J1.1 (Contempt), Application Note 3, to address the fact that the provision that had been contained in subsection (b)(7)(C) of §2B1.1 (Theft, Property Destruction, and Fraud) is now contained in subsection (b)(8)(C) of that guideline. Third, it makes a technical change in §4B1.2 (Definitions of Terms used in Section 4B1.1), Application Note 1, fourth paragraph, to address the fact that the offense that had been contained in subsection (d)(1) of 21 U.S.C. § 841 is now contained in subsection (c)(1) of that section. Fourth, it makes technical changes in §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), Application Note 8, to address the fact that subsections (c)(1) and (c)(3) of Rule 32 of the Federal Rules of Criminal Procedure are now contained in subsections (f) and (i) of that rule. Fifth, it makes a technical change in §5D1.2 (Term of Supervised Release), Commentary, to address the fact that the provision that had been contained in subsection (b) of §5D1.2 is now contained in subsection (c) of that guideline. Sixth, it makes a technical change in Appendix A (Statutory Index) to address the fact that the offense that had been contained at subsection (f) of 42 U.S.C. § 3611 is now contained in subsection (c) of that section.

Part B of the proposed amendment resolves certain technical issues that have arisen in the Guidelines Manual with respect to child pornography offenses. First, the proposed amendment makes technical changes in §2G2.1, Statutory Provisions, to address the fact that only some, not all, offenses under 18 U.S.C. § 2251 are referenced to §2G2.1. Second, it makes technical changes in §2G2.2, Statutory Provisions, to address the fact that offenses under section 2252A(g) are now covered by §2G2.6, while offenses under section 2252A(a) and (b) continue to be covered by §2G2.2. Third, it makes similar technical changes in §2G2.2, Application Note 1, to address this fact. Fourth, it makes a technical change in §2G2.3, Commentary, to address the fact that the statutory minimum sentence for a defendant convicted under 18 U.S.C. § 2251A is now 30 years imprisonment. Fifth, it makes technical changes in §2G3.1, subsection (c)(1), to address the fact that §2G2.4 no longer exists, having been consolidated into §2G2.2 effective November 1, 2004. Sixth, it makes a technical change in Appendix A (Statutory Index) to address the fact that the offenses that had been contained in subsections (c)(1)(A) and (c)(1)(B) of 18 U.S.C. § 2251 are now contained in subsections (d)(1)(A) and (d)(1)(B) of that section. As a conforming change, it also provides the appropriate reference for the offense that is now contained in subsection (c) of that section. Seventh, it makes a technical change in Appendix A (Statutory Index) to address the fact that offenses under section 2252A(g) are now covered by §2G2.6, while offenses under section 2252A(a) and (b) continue to be covered by §2G2.2.

Proposed Amendment:

Part A (Technical Issues With Respect to References to Guidelines, Statutes, and Rules)

§1B1.8. Use of Certain Information

* * *

Commentary

Application Notes:

* * *

3. *On occasion the defendant will provide incriminating information to the government during plea negotiation sessions before a cooperation agreement has been reached. In the event no agreement is reached, use of such information in a sentencing proceeding is restricted by Rule 11(e)(6) (Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements) of the Federal Rules of Criminal Procedure and Rule 410 (Inadmissibility of Plea, Plea Discussions, and Related Statements) of the Rules of Evidence.*

* * *

§2J1.1. Contempt

* * *

Commentary

* * *

Application Notes:

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3. *Violation of Judicial Order Enjoining Fraudulent Behavior.—In a case involving a violation of a judicial order enjoining fraudulent behavior, the most analogous guideline is §2B1.1. In such a case, §2B1.1(b)(7)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply.*

* * *

§4B1.2. Definitions of Terms Used in Section 4B1.1

* * *

Commentary

Application Notes:

1. *For purposes of this guideline—*

* * *

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(d)(1)) is a "controlled substance offense."

* * *

§5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

* * *

Commentary

Application Notes:

* * *

8. Under 18 U.S.C. § 3553(f), prior to its determination, the court shall afford the government an opportunity to make a recommendation. See also Fed. R. Crim. P. 32~~(c)(1), (3)~~(f), (i).

* * *

§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

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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.

* * *

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42 U.S.C. § 3611(fc) 2J1.1

* * *

Part B (Technical Issues With Respect to Child Pornography Offenses)

§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

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1591, 2251(a)-(c), 2251(d)(1)(B), 2260(b).

* * *

§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A(a)-(b), 2260(b).

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"Sexual abuse or exploitation" means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)-(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). "Sexual abuse or exploitation" does not include possession, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

* * *

§2G2.3. Selling or Buying of Children for Use in the Production of Pornography

- (a) Base Offense Level: **38**

Commentary

Statutory Provision: 18 U.S.C. § 2251A.

Background: The statutory minimum sentence for a defendant convicted under 18 U.S.C. § 2251A is *twenty years imprisonment.*

* * *

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

* * *

- (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, **Soliciting**, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; **Possessing Material Involving the Sexual Exploitation of a Minor**) or §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), as appropriate.

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18 U.S.C. § 2251(a),(b)	2G2.1
18 U.S.C. § 2251(c)	2G2.2
18 U.S.C. § 2251(ed)(1)(A)	2G2.2
18 U.S.C. § 2251(ed)(1)(B)	2G2.1
18 U.S.C. § 2251A	2G2.3
18 U.S.C. § 2252	2G2.2
18 U.S.C. § 2252A(a),(b)	2G2.2
18 U.S.C. § 2252A(g)	2G2.6

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