



Proposed Amendments to the Sentencing Guidelines

November 27, 2001

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**INDEX TO PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES
PUBLISHED IN THE FEDERAL REGISTER NOVEMBER 27, 2001**

<u>AMDT. NO.</u>	<u>PAGE NO.</u>	<u>ISSUE</u>
1	1	Cultural Heritage. —(A) Proposes a new guideline, §2B1.5, to cover a variety of offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources, including national memorials, archaeological resources, national parks, and national historic landmarks; and (B) provides three issues for comment regarding (i) the proposed definition of, and the extent of the proposed enhancement for, "pattern of similar violations"; (ii) the nature of a structured upward departure for cases involving offense conduct that damages or destroys both cultural heritage resources and non-cultural heritage resources, and whether an upward departure should be provided if the value of the cultural heritage resource underestimates its actual value; and (iii) whether the proposed guideline should include an enhancement for the use of explosives.
2	9	Implementation of the Foreign Corrupt Practices Act. —Proposes to amend Appendix A (Statutory Index) reference for violations of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 through 78dd-3, from §2B4.1(Bribery in Procurement of Bank Loan and Other Commercial Bribery) to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right).
3	11	Career Offenders and Convictions under 18 U.S.C. §§ 924(c) and 929(a). —Proposes special rules in §4B1.1 (Career Offender) for determining and imposing a guideline sentence when the defendant is convicted of an offense under 18 U.S.C. § 924(c) or § 929(a) and, as a result of that conviction, is determined to be a Career Offender under §§4B1.1 and §4B1.2.
4	19	Expansion of Official Victims Enhancement. —(A) Proposes to (i) amend §3A1.2(b) to apply to assaults of any prison employee or other person retained or designated by the prison to perform duties within the prison; and (ii) limit application of the enhancement, in the case of assaults on corrections officers and prison employees, to offenses that occurred while the defendant was in the custody or control of the correctional facility or prison; and (B) provides an issue for comment regarding the appropriate scope of coverage under the enhancement.

5	21	<p>Acceptance of Responsibility.—Proposes to (A) delete §3E1.1(b)(1), which provides an additional one-level reduction if the defendant timely provides complete information to the government concerning his own involvement in the offense; and (B) resolve a circuit conflict regarding whether the court may deny an acceptance of responsibility reduction when the defendant commits a new offense unrelated to the offense of conviction.</p>
6	24	<p>Consent Calendar Amendments.—Proposes to make the following technical and conforming changes: (1) clarifies that §5D1.2(c) is a policy statement; (2) conforms the language in §2B4.1(b)(2) to §2B1.1(b)(12); (3) inserts a missing "or" in §§2C1.7(b)(1)(A) and 2Q1.6(a)(3); (4) (A) updates statutory references in §§2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt and Conspiracy), 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), and 2D1.13 (Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements) and Appendix A (Statutory Index) to correspond to statutory redesignations made by the Hillary J. Farias and Samantha Reid Date Rape Prevention Act; and (B) corrects references to the new chemical quantity tables in §2D1.11; (5) corrects a change to the commentary of §2N2.1(b)(1) that was inadvertently made as part of the conforming package of amendments in the Economic Crime Package; (6) corrects a grammatical error in Note (D) of §2T1.1(c)(1); (7) adds a mandatory condition to §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) in response to the DNA Analysis Backlog Elimination Act of 2000; (8) deletes from Application Note 5 of §5E1.1 (Fines for Individual Defendants) an incorrect statement concerning the Clean Air Act; (9) inserts a missing "Background" title in §5F1.7 (Shock Incarceration); (10) conforms Part A of Chapter Seven and §7B1.3 (Revocation of Supervised Release) to current statutory law and provides an explanatory note concerning the condition of intermittent confinement as a condition of supervised release; (11) updates statutory references in §5F1.5 (Occupational Restrictions); (12) refers 18 U.S.C. § 2245 (sexual abuse resulting in death) to §2A1.1 (First Degree Murder) in Appendix A (Statutory Index); (13) repromulgates amendment 568, effective</p>

November 1, 1997, to correct an inadvertent omission of a conforming amendment to §4B1.4 (Armed Career Criminal) from amendment 568; (14) responds to new legislation as follows: (A) updates, in §2B1.1, a statutory reference in the definition of "means of identification" (B) references in Appendix A two new offenses created by the American Homeownership and Economic Opportunity Act of 2000, and (C) references 16 U.S.C. § 1437(c) to §2A2.4 (Obstructing or Impeding Officers); and (15) proposes several changes to §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) to address more adequately the portion of section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000 (the "Act"), Pub. L. 106-386, pertaining to the new offense at 18 U.S.C. § 1591 (Sex Trafficking of Children by Force, Fraud or Coercion).

2002 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. Proposed Amendment: Cultural Heritage

Synopsis of Proposed Amendment: *This amendment proposes to add to Chapter Two, Part B, a new guideline, §2B1.5, to cover a variety of offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources, including national memorials, archaeological resources, national parks, and national historic landmarks. The proposal was developed in response to concerns raised by the Departments of Justice and the Interior, among others, that the guidelines inadequately address such offenses.*

Cultural heritage resource crimes are fundamentally different than general property crimes because, unlike other property crimes where the primary harm is pecuniary, the effect of cultural heritage resource crimes is in great part non-pecuniary in nature. Punishment of these crimes should reflect these intrinsic differences.

The effect of cultural heritage resource crimes transcends monetary considerations. Individuals, communities, and nations identify themselves through intellectual, emotional, and spiritual connections to places and objects. For much of this cultural heritage in the United States, the federal government has a perpetual duty to act either as a trustee for the public, generally, or as a fiduciary on behalf of American Indians, Alaska Natives and Native Hawaiian Organizations. The current guidelines, however, do not specifically address the importance of cultural identity and fiduciary obligation when crimes are committed against cultural heritage resources. Therefore, a separate guideline amendment is proposed that takes into account the transcendent and irreplaceable, e.g., the non-pecuniary value of cultural heritage resources, and punishes in a proportionate way the particular offense characteristics associated with the range of cultural heritage resource crimes.

First, the amendment proposes a base offense level of level 8, which is two levels higher than the base offense level for general property destruction. The higher base offense level represents the intangible and non-pecuniary harm caused by the theft of, damage to, or destruction of, essentially irreplaceable cultural heritage resources.

Second, the amendment proposes an enhancement, tied to the loss table at §2B1.1, that assesses the monetary value of the damage caused. Use of the standard economic crime concept of “loss” is not used, however, because it implies a fungible and compensatory system of value which is inappropriate for measuring the harm caused by cultural heritage resources offenses. Instead, the calculation is based on either commercial value or archaeological value, as appropriate to the particular resource, which may be necessary to preserve or otherwise care for the resource, together with the cost of restoration and repair of the resource. These values already exist in federal law and are codified in federal regulations.

Third, the amendment proposes a two-level enhancement if the offense involved commercial advantage or private financial gain, in order to distinguish between offenders who are motivated by financial gain or commercial purposes from offenders who merely are motivated by their interest in the past and personal desire to possess cultural heritage resources, and is consistent with similar provisions elsewhere in the guidelines. See, e.g., §§2Q2.1(b)(1) and 2B5.3(b)(3). A two-level enhancement is also proposed if the offense involved a pattern of similar violations, which is defined as “two or more civil or administrative adjudications for misconduct similar to the instant offense, in violation of any Federal, state, or local provision, rule, regulation, ordinance, or permit.”

Fourth, the amendment proposes two-level enhancements that increase the offense level if the offense involves specially protected resources from specially protected places. A two-level enhancement will attach

if the offense involves a resource from one of seven locations particularly designated by Congress as dedicated solely to the preservation of the resource and further education of the public. An additional two-level increase attaches to four specific types of cultural heritage resources that have merited special treatment in federal law.

Fifth, the amendment proposes a two-level enhancement and a minimum offense level of level 14 if a firearm was possessed or a dangerous weapon (including a firearm) was brandished. This enhancement reflects the harm caused by the increased danger of violence and risk to law enforcement officers and innocent passers-by in vast expanses of land, and is consistent with similar provisions elsewhere in the guidelines. *See, e.g.,* §2B1.1(b)(11)(B).

Sixth, an upward departure provision is proposed when the offense level substantially understates the seriousness of the offense. For example, if an upward departure may be warranted in addition to cultural heritage resources, the offense involved theft of, damage to, or destruction of other items such as administrative property. In such a case, the extent of the upward departure should not exceed the number of levels from the table in §2B1.1 corresponding to the dollar amount of the non-cultural heritage resources.

Seventh, the proposed guideline for cultural heritage resources contains three issues for comment. The first issue requests comment on the extent of the proposed enhancement in subsection (b)(4)(B) regarding "pattern of similar violations" and the proposed definition in Application Note 5. The second issue requests comment on proposed Application Note 7 regarding the nature of a structured upward departure for cases involving offense conduct that damages or destroys both cultural heritage resources and non-cultural heritage resources, specifically, is it appropriate to use the applicable numbers of levels from the loss table or the loss commentary in §2B1.1 for the determination of the non-cultural heritage resource harm caused. The second issue also requests comment on whether an upward departure should be provided if the value of the cultural heritage resource, as determined under proposed subsection (b)(1) and Application Note 2, underestimates its actual value. The third issue requests comment regarding whether the proposed guideline should include an enhancement for the use of explosives.

Finally, the Statutory Index (Appendix) is updated to reference a variety of offenses to the new guideline.

Proposed Amendment:

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

(a) Base Offense Level: [8]

(b) Specific Offense Characteristics

(1) If the value of the cultural heritage resources (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) If the offense involved a cultural heritage resource from, or located, prior to the offense, on or in (A) the national park system; (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery; (F) a museum; or (G) the World Heritage List, increase by 2 levels.

- (3) If the offense involved a cultural heritage resource constituting (A) human remains; (B) a funerary object; (C) designated archaeological or ethnological material; or (D) a pre-Columbian monumental or architectural sculpture or mural, increase by **2** levels.
- (4) If the offense (A) was committed for pecuniary gain or otherwise involved a commercial purpose; or (B) involved a pattern of similar violations, increase by **2** levels.
- (5) If (A) a dangerous weapon (including a firearm) was brandished; or (B) a firearm was possessed in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

Commentary

Statutory Provisions: 16 U.S.C. § 470ee; 18 U.S.C. §§ 541-546, 641, 661, 666, 668, 1152-1153, 1163, 1170, 1361, 2314-2315. For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. Meaning of "Cultural Heritage Resource".—For purposes of this guideline, "cultural heritage resource" means any of the following:
 - (A) A historic property, as defined in 16 U.S.C. § 470w(5).
 - (B) A historic resource, as defined in 16 U.S.C. § 470w(5).
 - (C) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 C.F.R. Part 7, 36 C.F.R. Part 296, 32 C.F.R. Part 299, and 18 C.F.R. Part 1312).
 - (D) A cultural item, as defined in section 2(3) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3)(see also 43 C.F.R. 10.2(d)).
 - (E) A commemorative work. "Commemorative work" (A) has the meaning given that term in section 2(c) of Public Law 99-652 (40 U.S.C. § 1002(c)); and (B) includes any national monument or national memorial.
 - (F) An object of cultural heritage, as defined in 18 U.S.C. § 668(a).
2. Value of the Cultural Heritage Resources.—This note applies to the determination of the value of the cultural heritage resources for purposes of subsection (b)(1).
 - (A) In General.—Except as provided in subdivision (B), the value of a cultural heritage resource is its commercial value, and the cost of restoration and repair.
 - (B) Archaeological Resources.—The value of an archaeological resource is (i) the greater of its commercial value or its archaeological value; and (ii) the cost of restoration and repair.
 - (C) Definitions.—For purposes of this application note:
 - (i) "Archaeological value" of an archaeological resource means the cost of the retrieval of the scientific information which would have been obtainable prior to the offense,

including the cost of preparing a research design, conducting field work, conducting laboratory analysis, and preparing reports as would be necessary to realize the information potential. (See 43 C.F.R. § 7.14(a); 36 C.F.R. § 296.14(a); 32 C.F.R. § 229.14(a); 18 C.F.R. § 1312.14(a).)

(ii) "Commercial value" of a cultural heritage resource, including an archaeological resource, means the fair market value of the cultural heritage resource. In the case of a cultural heritage resource that has been damaged as a result of the offense, the fair market value shall be determined using the condition of the cultural heritage resource prior to commission of the offense, if the prior condition can be determined. (See 43 C.F.R. § 7.14(b); 36 C.F.R. § 296.14(b); 32 C.F.R. § 229.14(b); 18 C.F.R. § 1312.14(b).)

(iii) "Cost of restoration and repair" includes all actual and projected costs of curation, disposition, and appropriate reburial of, and consultation with respect to, the cultural heritage resource; and any other actual and projected costs to complete restoration and repair of the cultural heritage resource, including (I) its reconstruction and stabilization; (II) reconstruction and stabilization of ground contour and surface; (III) research necessary to conduct reconstruction and stabilization; (IV) the construction of physical barriers and other protective devices; (V) examination and analysis of the cultural heritage resource as part of efforts to salvage remaining information about the resource; and (VI) preparation of reports. (See 43 C.F.R. § 7.14(c); 36 C.F.R. § 296.14(c); 32 C.F.R. § 229.14(c); 18 C.F.R. § 1312.14(c).)

(D) Determination of Value in Cases Involving A Variety of Cultural Heritage Resources.—In a case involving a variety of cultural heritage resources, the value of the cultural heritage resources is the sum of all calculations made for those resources under this note.

3. Enhancement in Subsection (b)(2).—For purposes of subsection (b)(2):

(A) "Museum" has the meaning given that term in 18 U.S.C. § 668(1).

(B) "National cemetery" has the meaning given that term in Application Note 1 of §2B1.1 (Theft, Property Destruction, and Fraud).

(C) "National Historic Landmark" has the meaning given that term in 16 U.S.C. § 470(a)(1)(B).

(D) "National marine sanctuary" means a national marine sanctuary designated as such by the Secretary of Commerce pursuant to 16 U.S.C. § 1433.

(E) "National monument or national memorial" means any national monument or national memorial established as such by Act of Congress or by proclamation pursuant to the Antiquities Act of 1906 (16 U.S.C. § 431).

(F) "National park system" has the meaning given that term in 16 U.S.C. § 1c(a).

(G) "World Heritage List" means the World Heritage List maintained by the World Heritage Committee of the United Nations Educational, Scientific, and Cultural Organization in accordance with the Convention Concerning the Protection of the World Cultural and Natural Heritage.

4. Enhancement in Subsection (b)(3).—For purposes of subsection (b)(3):
- (A) *"Designated archaeological or ethnological material" has the meaning given that term in 19 U.S.C. § 2601(7).*
 - (B) *"Funerary object" means an object that, as a part of the death rite or ceremony of a culture, was placed intentionally, at the time of death or later, with or near human remains.*
 - (C) *"Human remains" (i) means the physical remains of the body of a human; and (ii) does not include remains that reasonably may be determined to have been freely disposed of or naturally shed by the human from whose body the remains were obtained, such as hair made into ropes or nets.*
 - (D) *"Pre-Columbian monumental or architectural sculpture or mural" has the meaning given that term in 19 U.S.C. § 2095(3).*

5. Enhancements in Subsection (b)(4).—

- (A) Pecuniary Gain.—For purposes of subsection (b)(4)(A), "for pecuniary gain" means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Therefore, offenses committed for pecuniary gain include both monetary and barter transactions, as well as activities designed to increase gross revenue.
- (B) Pattern of Similar Violations.—For purposes of subsection (b)(4)(B), "pattern of similar violations" means two or more civil or administrative adjudications of misconduct similar to the instant offense, in violation of any Federal, state, or local provision, rule, regulation, ordinance, or permit.

6. Dangerous Weapons Enhancement.—For purposes of subsection (b)(5), "brandished", "dangerous weapon", and "firearm" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

7. Upward Departure Provision.—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, in addition to cultural heritage resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources). In such a case, the extent of the upward departure should not exceed the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the dollar amount involved in the theft of, damage to, or destruction of, the items that are not cultural heritage items.

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

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(c) Cross References

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- (4) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).

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Commentary

Application Notes:

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The Commentary to §2B1.1 captioned "Application Notes" is amended by redesignating Notes 12 through 15 as Notes 13 through 16; and by inserting after Note 11 the following:

12. Cross Reference in Subsection (c)(4).—For purposes of subsection (c)(4) "cultural heritage resource" has the meaning given that term in Application Note 1 of §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).

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

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(c) Cross Reference

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- (1) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).

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Commentary

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Application Notes:

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6. For purposes of subsection (c)(1), "cultural heritage resource" has the meaning given that term in Application Note 1 of §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).

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§3D1.2 Groups of Closely Related Counts

(d) * * *

Offenses covered by the following guidelines are to be grouped under this subsection:

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B6.1;

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APPENDIX A - STATUTORY INDEX

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16 U.S.C. § 433	2B1.1, 2B1.3
16 U.S.C. § 470ee	2B1.5

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16 U.S.C. § 668(a)	2B1.5, 2Q2.1	
16 U.S.C. § 707(b)	2B1.5, 2Q2.1	
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18 U.S.C. § 541	2B1.5, 2T3.1	
18 U.S.C. § 542	2B1.5, 2T3.1	
18 U.S.C. § 543	2B1.5, 2T3.1	
18 U.S.C. § 544	2B1.5, 2T3.1	
18 U.S.C. § 545	2B1.5, 2Q2.1, 2T3.1	
18 U.S.C. § 546	2B1.5	
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18 U.S.C. § 641	2B1.1, 2B1.5	
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18 U.S.C. § 661	2B1.1, 2B1.5	
18 U.S.C. § 662	2B1.1, 2B1.5	
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18 U.S.C. § 666(a)(1)(A)	2B1.1, 2B1.5	
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18 U.S.C. § 668	2B1.1 2B1.5	
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18 U.S.C. § 1152	2B1.5	
18 U.S.C. § 1153	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, 2B1.1, 2B1.5, 2B2.1, 2B3.1, 2K1.4	
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18 U.S.C. § 1163	2B1.1, 2B1.5	
18 U.S.C. § 1168	2B1.1	
18 U.S.C. § 1170	2B1.5	
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18 U.S.C. § 1361	2B1.1, 2B1.5	
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18 U.S.C. § 2232	2B1.5, 2J1.2	
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18 U.S.C. § 2314	2B1.1, 2B1.5	
18 U.S.C. § 2315	2B1.1, 2B1.5	

Issues for Comment: (1) *The proposed amendment provides an enhancement in subsection (b)(4)(B) for a "pattern of similar violations", which proposed Application Note 5 defines as "two or more civil or administrative adjudications of misconduct similar to the instant offense, in violation of any Federal, state, or local provision, rule, regulation, ordinance, or permit". The Commission requests comment on the extent of this enhancement. For example, in addition to civil or administrative adjudications, should the enhancement cover prior convictions for similar misconduct as well? Should the enhancement cover similar misconduct for which there has not been a civil or administrative adjudicate?*

(2) *Proposed Application Note 7 provides, as an example of an upward departure that might be warranted, a structured upward departure for cases in which the offense also involved theft of, damage to, or destruction of, items that are not cultural heritage items. Instead of a structured upward departure, should the Commission provide an enhancement if the offense involved theft of, damage to, or destruction of, items that are not cultural heritage items? If so, should the extent of the enhancement correspond to the applicable*

number of levels from the loss table in §2B1.1 (Theft, Property Destruction, and Fraud), and should the loss commentary from §2B1.1 be used to determine the dollar amount of the theft, damage, or destruction? Generally, should proposed Application Note 7 provide an upward departure if the value of a cultural heritage resource, as determined under subsection (b)(1) and Application Note 2, underestimates its actual value?

(3) Should the proposed amendment include an enhancement if the offense involved the use of destructive devices?

2. Proposed Amendment: Implementation of the Foreign Corrupt Practices Act

Synopsis of Proposed Amendment: *This amendment changes the Statutory Index reference for violations of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 through 78dd-3, from §2B4.1(Bribery in Procurement of Bank Loan and Other Commercial Bribery) to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right). This change is proposed because many such violations involve public corruption of foreign officials and therefore are more like public corruption cases than commercial bribery cases. In addition, such a change arguably would better implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which requires the United States, as a signatory, to impose comparable sentences for foreign bribery cases as for domestic bribery cases.*

Although this proposal references all offenses under the Foreign Corrupt Practice Act to §2C1.1, an issue for comment is included regarding whether some of the offenses under that Act should continue to be referenced to §2B4.1. Although offenses under 15 U.S.C. §§ 78dd-1(a)(1), 78dd-2(a)(1), and 78dd-3(a)(1) involve bribery of foreign officials, some of the offenses under that Act involve bribery of foreign candidates for political office (see 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2), and 78dd-3(a)(2)). Other offenses involve bribery of persons who are neither public officials nor candidates for political office, but the defendant knows that some portion of the funds might be used directly or indirectly to influence public officials or political candidates (see 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), and 78dd-3(a)(3)). Similar offenses involving United States Presidential and Vice Presidential candidates currently are referenced to §2B4.1. Section 2B4.1 may continue to be the appropriate guideline for offenses which do not directly involve a foreign governmental official.

Proposed Amendment:

§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

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Commentary

Statutory Provisions: ~~15 U.S.C. §§ 78dd-1, 78dd-2,~~ 18 U.S.C. §§ 215, 224, 225; 26 U.S.C. §§ 9012(e), 9042(d); 41 U.S.C. §§ 53, 54; 42 U.S.C. §§ 1395nn(b)(1), (2), 1396h(b)(1),(2); 49 U.S.C. § 11902. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *This guideline covers commercial bribery offenses and kickbacks that do not involve officials of federal, state, or local government, foreign governments, or public international organizations. See Part C, Offenses Involving Public Officials, if governmental any such officials are involved.*

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Background:

This guideline also applies to violations of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 and 78dd-2, and to violations of 18 U.S.C. § 224, sports bribery, as well as certain violations of the Interstate Commerce Act.

* * *

§2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

Commentary

Statutory Provisions: 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3; 18 U.S.C. §§ 201(b)(1), (2), 872, 1951. For additional statutory provision(s), *see* Appendix A (Statutory Index).

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Appendix A- Statutory Index

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15 U.S.C. § 78dd-1	2B4.1 2C1.1
15 U.S.C. § 78dd-2	2B4.1 2C1.1
15 U.S.C. § 78dd-3	2C1.1
15 U.S.C. § 78ff	2B1.1, 2B4.1 2C1.1

Issue for Comment: *Although this proposed amendment references all offenses under the Foreign Corrupt Practice Act to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), the Commission requests comment regarding whether some of the offenses under that Act should continue to be referenced to §2B4.1. Although offenses under 15 U.S.C. §§ 78dd-1(a)(1), 78dd-2(a)(1), and 78dd-3(a)(1) involve bribery of foreign officials, some of the offenses under that Act involve bribery of foreign candidates for political office (see 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2), and 78dd-3(a)(2)). Other offenses involve bribery of persons who are neither public officials nor candidates for political office, but the defendant knows that some portion of the funds might be used directly or indirectly to influence public officials or political candidates (see 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), and 78dd-3(a)(3)). Similar offenses involving United States Presidential and Vice Presidential candidates under 26 U.S.C. §§ 9012(e) and 9042(d) currently are referenced to §2B4.1. Is §2B4.1 the appropriate guideline for offenses which do not directly involve a foreign governmental official? Alternatively, should offenses under 26 U.S.C. §§ 9012(e) and 9042(d) be referenced to §2C1.1 instead of §2B4.1, inasmuch as those offenses are more akin to public bribery than to commercial bribery?*

3. Proposed Amendment: Career Offenders and Convictions under 18 U.S.C. §§ 924(c) and 929(a)

Synopsis of Proposed Amendment: *This proposed amendment provides special rules in §4B1.1 for determining and imposing a guideline sentence when the defendant is convicted of an offense under 18 U.S.C. § 924(c) or § 929(a) and, as a result of that conviction, is determined to be a Career Offender under §4B1.1 and §4B1.2. The amendment reverses the decision made by the Commission in Amendment 600 (effective November 1, 2000), that such offenses do not qualify as a crime of violence or controlled substance offense for Career Offender purposes, except as a prior conviction. Some have expressed doubt about whether that decision complies with the statutory command in 28 U.S.C. § 994(h), as construed by the United States Supreme Court in United States v. Labonte, 520 U.S. 751 (1997).*

Operationally, this amendment achieves the goals of (1) permitting such offenses, whether as the instant or prior offense of conviction, to qualify for Career Offender purposes, and (2) ensuring that, when such an instant offense establishes the defendant as a Career Offender, the resulting guideline sentence is determined under §4B1.1 using a count of conviction that has a statutory maximum of life imprisonment. The resulting consecutive sentence to be imposed on the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count is at least the minimum required by statute, and may be longer to the extent necessary to achieve the total Career Offender punishment. This amendment does not change the current guideline rules forbidding application of guideline weapon enhancements when the defendant is convicted of a 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) offense. Furthermore, under this amendment, when the defendant is convicted of a 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) offense but that offense, together with any prior convictions, does not establish the defendant as a Career Offender, the current guideline rules for sentencing on that 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count continue to apply. Accordingly, under §2K2.4, the guideline sentence on that count is the statutory minimum, and that sentence is imposed independently and consecutively to the sentence on other counts. No adjustments in Chapters Three or Four apply to adjust the guideline sentence for that 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count.

However, under this amendment, when the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count establishes the defendant as a Career Offender, which the court will determine under §§4B1.1 and 4B1.2, new special rules/instructions will apply. To determine the guideline sentence on the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count, the court moves directly from §2K2.4 to §4B1.1 and applies the new Special Instruction therein, including the instructions regarding multiple counts of conviction.

Proposed Amendment:

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

~~(a) If the defendant, whether or not convicted of another crime, was convicted of violating:~~

~~(1) Section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute.~~

~~(2) Section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute.~~

(a) If the defendant, whether or not convicted of another crime, was convicted of violating section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.

- (b) Except as provided in subsection (c), if the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.
- (c) If the defendant (1) was convicted of violating section 924(c) or section 929(a) of title 18, United States Code; and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). Except for §§3E1.1 (Acceptance of Responsibility), 4B1.1, and 4B1.2 (Definitions of Terms Used in Section 4B1.1), Chapters Three and Four shall not apply to that count of conviction.
- (d) Special Instructions for Fines

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 844(h), 924(c), 929(a).

Application Notes:

1. (A) Application of Subsection (a).—Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Subsection (a) reflects this distinction. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 844(h) is the term required by the statute, and the guideline sentence for a defendant convicted under 18 U.S.C. § 924(c) or § 929(a) is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 844(h), 924(c), and 929(a) Section 844(h) of title 18, United State Code, also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.
- (B) Application of Subsection (b).—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. § 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 924(c) and 929(a) also requires that a term of imprisonment imposed under this section shall run consecutively to any other term of imprisonment.

~~In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant’s criminal history, particularly in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense and has at least two prior felony convictions for a crime of violence or a controlled substance offense that would have resulted in application of §4B1.1 (Career Offender) if that guideline applied to these offenses but is not determined to be a Career Offender under §4B1.1. See Application Note 3.~~

(C) Application of Subsection (c).—In a case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). The amount of the mandatory term of imprisonment that is imposed to run consecutively in such a case also is determined under §4B1.1(c).

2. Weapon Enhancement.— * * *

~~In a few cases, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (i.e., the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).~~

3. Chapters Three and Four.—~~Do~~ Except for those cases covered by subsection (c), do not apply Chapter Three (Adjustments) and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of these chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction). For those cases covered by subsection (c), the adjustment in §3E1.1 (Acceptance of Responsibility) may apply, as provided in §4B1.1(c). No other adjustments in Chapter Three and no provisions of Chapter Four (Criminal History and Criminal Livelihood), other than §§4B1.1 and 4B1.2, shall apply in determining the guideline sentence on a conviction under 18 U.S.C. § 924(c) or § 929(a).

4. Terms of Supervised Release.— * * *

5. Fines.— * * *

§4B1.1. Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) ~~If~~ Except as provided in subsection (c), if the offense level for a career ~~criminal~~ offender from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

<u>Offense Statutory Maximum</u>	<u>Offense Level*</u>
(A) Life	37

(B)	25 years or more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15 years	24
(F)	5 years or more, but less than 10 years	17
(G)	More than 1 year, but less than 5 years	12.

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) If the defendant (1) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under subsection (a):

(A) The offense level shall be—

(i) in the case of a conviction only of an offense under 18 U.S.C. § 924(c) or § 929(a): level **37**, decreased by the number of levels corresponding to any adjustment under §3E1.1 (Acceptance of Responsibility) that applies; or

(ii) in the case of multiple counts of conviction: the greater of (I) the offense level applicable to the counts of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count, or (II) level **37**, decreased by the number of levels corresponding to any adjustment under §3E1.1 that applies.

(B) The criminal history category shall be Category VI.

(C) The amount of the mandatory term of imprisonment that is imposed to run consecutively shall be determined as follows:

(i) A consecutive sentence of imprisonment shall be imposed on any count of conviction under 18 U.S.C. § 924(c) or § 929(a). The length of such consecutive sentence shall be at least the minimum term required by law.

(ii) After taking into account the required statutory minimum consecutive sentence under subdivision (i), the balance of the total punishment shall be allocated and imposed, to the extent possible, on the counts of conviction, other than 18 U.S.C. §§ 924(c) and 929(a), in accordance with the rules in §5G1.2 (Sentencing on Multiple Counts of Conviction), as applicable.

(iii) If the statutory minimum sentence on the count of conviction under 18 U.S.C. § 924(c) or § 929(a) together with the sentence imposed on the remaining counts is less than the total punishment, then the minimum sentence on the count of conviction under 18 U.S.C. § 924(c) or § 929(a) shall be increased to the extent necessary to achieve the total punishment.

* * * *

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

* * * *

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline—

* * * *

~~A prior conviction for violating 18 U.S.C. § 924(c) or § 929(a) is a "prior felony conviction" for purposes of applying §4B1.1 (Career Offender) if the prior offense of conviction established that the underlying offense was a "crime of violence" or "controlled substance offense." (Note that if the defendant also was convicted of the underlying offense, the two convictions will be treated as related cases under §4A1.2 (Definitions and Instruction for Computing Criminal History)).~~

A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the two prior convictions will be treated as related cases under §4A1.2 (Definitions and Instruction for Computing Criminal History)).

* * *

- ~~2. —The guideline sentence for a conviction under 18 U.S.C. § 924(c) or § 929(a) is determined only by the statute and is imposed independently of any other sentence. See §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), 3D1.1 (Procedure for Determining Offense Level on Multiple Counts), and subsection (a) of §5G1.2 (Sentencing on Multiple Counts of Conviction). Accordingly, do not apply this guideline if the only offense of conviction is for violating 18 U.S.C. § 924(c) or § 929(a). For provisions pertaining to an upward departure from the guideline sentence for a conviction under 18 U.S.C. § 924(c) or § 929(a), see Application Note 1 of §2K2.4.~~

2. Application of §4B1.1(c).—

(A) In General.—Section 4B1.1(c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1(a).

(B) Imposition of Consecutive Term of Imprisonment.—The amount of the mandatory term of imprisonment that is imposed to run consecutively in such a case also is determined under §4B1.1(c). The sentence imposed for a conviction under 18 U.S.C. § 924(c) or § 929(a) must, under that statute, consist of a minimum term of imprisonment imposed to run consecutively to the sentence on any other count. In the case of a career offender to whom §4B1.1(c) applies, typically the court will determine the applicable statutory minimum sentence, subtract that minimum from the total punishment determined for all counts

considered together, impose that minimum consecutive sentence on the 18 U.S.C. § 924(c) or § 929(a) count, and then impose the balance of the total punishment on the other counts in accordance with the rules provided in §5G1.2 (Sentencing on Multiple Counts of Convictions). In some cases covered by §4B1.1(c), a consecutive term of imprisonment longer than the minimum required by the 18 U.S.C. § 924(c) or § 929(a) statute will be necessary in order both to achieve the required total punishment determined by the court and also comply with the applicable statutory requirements. Note that a consecutive sentence longer than the statutory minimum under 18 U.S.C. § 924(c) or § 929(a) will be necessary when the total guideline punishment determined by the court exceeds the aggregate statutory maximum term(s) of imprisonment on any counts other than 18 U.S.C. §§ 924(c) and 929(a) by more than the aggregate statutory minimum terms on the 18 U.S.C. §§ 924(c) and 929(a) counts.

(C) Examples.—The following examples illustrate the application of §4B1.1(c) in a variety of multiple count situations in which the 18 U.S.C. § 924(c) count establishes the defendant as Career Offender:

- (i) The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking crime (15 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (assume the statutory maximum of 20 years applies). Applying §4B1.1(c), the court determines a combined offense level of 34 (assuming a 3-level reduction under §3E1.1), and determines that a total punishment of 300 months is appropriate. The court then imposes a minimum sentence of 60 months, as statutorily required under 18 U.S.C. § 924(c), and also as required by 18 U.S.C. § 924(c), imposes that sentence to run consecutively to a sentence of 240 months ($300 - 60 = 240$) imposed on the 21 U.S.C. § 841 count. Alternatively, had the court determined that a sentence of 327 months (top of the guideline range) was appropriate, it necessarily would have increased the consecutive sentence on the 18 U.S.C. § 924(c) count to 87 months.
- (ii) The defendant is convicted of one count of 18 U.S.C. § 924(c) (firearm possession in furtherance of drug trafficking), one count of drug trafficking under 21 U.S.C. § 841(b)(1)(C) (assume the statutory maximum sentence of 30 years applies), and one count of violating 21 U.S.C. § 843(b) (statutory maximum of 4 years). Applying §4B1.1(c), the court determines a combined offense level of 36 and selects a total punishment of 324 months. Sentence is imposed as follows: (I) a minimum sentence of 60 months on the 18 U.S.C. § 924(c) count imposed to run consecutively to all other counts; (II) a sentence of 264 months on the 21 U.S.C. § 841 count ($324 - 60 = 264$ months balance of total punishment to be allocated and imposed on the non-924(c) counts); and (III) a sentence of 48 months on the 21 U.S.C. § 843(b) count, imposed to run concurrently with the 21 U.S.C. § 841 count. Alternatively, if the court had determined that a sentence of 405 months (top of the guideline range) was appropriate, the sentence on the 21 U.S.C. § 841 count would have been increased to 345 months ($405 - 60 = 345$).
- (iii) The defendant is convicted of two counts of 18 U.S.C. § 924(c) (for possessing a firearm in two separate drug trafficking offenses), and one count of conspiracy under 21 U.S.C. § 846 (assume a statutory maximum of life and minimum of ten years is applies). The court determines, under §4B1.1(c), that the combined offense level is 42 and that a total punishment of 480 months is appropriate. As required by statute, a minimum consecutive sentence of 60 months is imposed on the first 18 U.S.C. § 924(c) count, and a minimum consecutive sentence of 300 months is

imposed on the second 18 U.S.C. § 924(c) count. The balance of the total punishment, 120 months (480 - (60 + 300) = 120), is imposed on the 21 U.S.C. § 846 count.

* * * *

§5G1.2. Sentencing on Multiple Counts of Conviction

- (a) The sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently, except as provided in §4B1.1(Career Offender).

* * *

Commentary

Application Notes:

1. In General.—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ("total punishment") is determined by the court after determining the adjusted combined offense level and the Criminal History Category. ~~To the extent possible, Except as otherwise required by law or by §4B1.1(c), the total punishment is to be imposed on each count. Sentences, and the sentences on all counts are imposed to run concurrently, except as required to achieve the total sentence, or as required by law to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.~~

* * *

2. Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by Special Instruction).—Subsection (a) applies if a statute (~~1A~~) specifies a term of imprisonment to be imposed; and (~~2B~~) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment). ~~The~~ Except for certain Career Offender situations in which subsection (c) of §4B1.1 (Career Offender) applies, the term of years to be imposed consecutively is ~~determined~~ the minimum required by the statute of conviction, and is independent of ~~the~~ guideline sentence on any other count. See, e.g., Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e). Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.

4. Proposed Amendment: Expansion of Official Victims Enhancement

Synopsis of Proposed Amendment: *This amendment proposes to expand the persons who may qualify as an official victim for purposes of the enhancement in §3A1.2 (Official Victim). Specifically, this proposed amendment responds to United States v. Walker, 202 F.3d 181 (3d Cir. 1999), which held that the enhancement under §3A1.2(b) was not applicable in the case of a defendant prison inmate who attacked his supervisor, a food service department employee at the prison. Walker held that the work supervisor was not a corrections officer within the meaning of §3A1.2. The proposed amendment amends §3A1.2(b) to apply to assaults of any prison employee or other person retained or designated by the prison to perform duties within the prison. The amendment also limits application of the enhancement, in the case of assaults on corrections officers and prison employees, to offenses that occurred while the defendant was in the custody or control of the correctional facility or prison.*

A general request for comment follows regarding the appropriate scope of coverage under the enhancement (i.e., who should be considered an official victim for purposes of proposed subsection (b)(2)).

Proposed Amendment:

§3A1.2. Official Victim

If --

* * *

(b) during the course of the offense or immediate flight therefrom, the defendant or a person for whose conduct the defendant is otherwise accountable, knowing or having reasonable cause to believe that a person was—

(1) a law enforcement officer, or

(2) a corrections officer or prison employee, in the case of an offense that occurred while the defendant (or a person for whose conduct the defendant is otherwise accountable) was in the custody or control of a prison or other correctional facility,

assaulted such officer or employee in a manner creating a substantial risk of serious bodily injury,

increase by 3 levels.

Commentary

Application Notes:

* * *

5. *Subdivision (b) applies in circumstances tantamount to aggravated assault against a law enforcement officer, or corrections officer, or prison employee, committed in the course of, or in immediate flight following, another offense, such as bank robbery. While this subdivision may apply in connection with a variety of offenses that are not by nature targeted against official victims (such as a bank robbery), its applicability is limited to assaultive conduct against law enforcement officers, or corrections officers, or prison employees that is sufficiently serious to create at least a "substantial*

risk of serious bodily injury" and that is proximate in time to the commission of the offense.

"Prison employee", for purposes of subsection (b)(2), includes any individual retained or designated by a prison or other correctional facility to perform any duty or function within the prison or other correctional facility, regardless of whether the individual is compensated for the performance of the duty or function and whether the individual technically is an employee of the prison or other correctional facility. For example, the term "prison employee" includes an individual employed by the prison as a kitchen supervisor, as well as a nurse who, under contract, provides medical services to prisoners in the prison health facility.

* * *

Issue for Comment: *The Commission requests comment on the appropriate scope of the enhancement provided in §3A1.2(b)(2). Are there particular individuals or groups of individuals against whom assaults by the defendant in a correctional or prison setting should subject the defendant to enhanced punishment? For example, should the enhancement be expanded, further than that proposed in the amendment, to include individuals who assist law enforcement officers in the performance of official duties? Should the enhancement cover individuals who perform functions within a prison (as an employee, under contract, or otherwise) but who do not have regular contact with, or exercise any supervision of, prisoners (e.g., an electrician under contract who repairs wiring in a building typically off-limits to prisoners)? Should the enhancement cover, for example, a minister or attorney who is assaulted while providing volunteer services to inmates?*

5. Proposed Amendment: Acceptance of Responsibility

Synopsis of Proposed Amendment: *This proposal amends §3E1.1 (Acceptance of Responsibility) by (1) deleting subsection (b)(1) which provides an additional one-level reduction if the defendant timely provides complete information to the government concerning his own involvement in the offense; and (2) resolving a circuit conflict regarding whether the court may deny an acceptance of responsibility reduction when the defendant commits a new offense unrelated to the offense of conviction.*

Section 3E1.1(b) provides alternative reductions for either (1) timely providing complete information to the government concerning the defendant's own involvement in the offense; or (2) timely notifying authorities of the defendant's intention to enter a plea of guilty. Subsection (b)(2) specifically addresses the goal of permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently. However, it has been argued that subsection (b)(1) undermines the incentive to plead guilty in subsection (b)(2), because the defendant can receive the reduction even if the defendant has caused the government and the court to devote substantial resources to preparing the case for trial. Under this proposal, a defendant who accepts responsibility for the offense would receive a two-level reduction under subsection (a), and an additional one-level reduction only if the defendant timely notifies authorities of his intent to plead guilty. This proposal is intended to save both judicial and governmental resources by providing defendants a stronger incentive to timely plead guilty.

*This amendment also resolves a circuit conflict regarding whether the court may deny an acceptance of responsibility reduction when the defendant commits a new offense unrelated to the offense of conviction. The majority of circuits have held that the sentencing court may consider new criminal conduct (i.e., conduct occurring after the defendant has been charged for the instant offense), such as subsequent drug use or the commission of the new offense, when determining whether an adjustment for acceptance of responsibility is warranted. The Sixth Circuit, the sole minority circuit, has held that the court may not look at post-indictment conduct unrelated to the offense of conviction when assessing the defendant's acceptance of responsibility for the underlying offense (see *United States v. Morrison*, 983 F.2d 730 (6th Cir. 1993)). This amendment adopts the majority view by making clear that a defendant who commits another offense while pending trial or sentencing on the instant offense ordinarily is not entitled to a reduction under this guideline.*

Proposed Amendment:

§3E1.1. Acceptance of Responsibility

* * *

- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and the defendant ~~has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:~~

(1) ~~timely providing complete information to the government concerning his own involvement in the offense; or~~

(2) ~~timely notifying~~ timely* notified authorities of his intention to enter a plea of

*The Federal Register publication of this proposed amendment indicates that the amendment proposes to strike the word "timely" from the provision. However, it was the Commission's intent to retain the timeliness requirement. The word "timely" was inadvertently struck in the proposal. The Commission's anticipated January

guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,

decrease the offense level by 1 additional level.

Commentary

Application Notes:

* * *

1. Appropriate Considerations in Determining Applicability of Acceptance of Responsibility.—

* * *

2. Convictions by Trial.—

* * *

3. Application of Subsection (a).—

* * *

4. Inapplicability of Adjustment.—~~Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply. A defendant who (A) receives an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice); or (B) commits another offense while pending trial or sentencing on the instant offense, ordinarily is not entitled to a reduction under this guideline. [There may, however, be extraordinary cases in which an adjustment under this guideline is warranted even though the defendant received an enhancement under §3C1.1, or committed another such offense, or both.]~~

5. Deference on Review.—

* * *

6. Application of Subsection (b).—~~Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking one or both of the steps set forth in subsection (b) timely notified authorities of the defendant's intention to enter a guilty plea. The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b)(1) or (2) will occur particularly early in the case. For example, to qualify under subsection (b)(2), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.~~

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by

2002 Federal Register notice will provide notice of a technical amendment to the proposal in order to maintain the "timeliness" requirement.

~~taking, in a timely fashion, one or more of the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.~~

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and ~~has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the steps specified in subsection (b)~~ timely notified authorities of the defendant's intention to enter a guilty plea. Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

6. Proposed Amendment: Consent Calendar Amendments (Part I)

Synopsis of Proposed Amendment: *This proposed amendment makes technical and conforming changes to various guideline provisions. The proposed amendment accomplishes the following:*

- (1) *Clarifies that language in §5D1.2(c) (recommending the maximum term of supervised release for sex offenders) is a policy statement;*
- (2) *Conforms the language in §2B4.1(b)(2) concerning offenses that "affect a financial institution" with subsection (b)(12) of §2B1.1 (Larceny, Embezzlement, and other forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit).*
- (3) *Inserts a missing "or" in §§2C1.7(b)(1)(A) and 2Q1.6(a)(3).*
- (4) *(A) Updates statutory references in §§2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt and Conspiracy), 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), and 2D1.13 (Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements) and Appendix A (Statutory Index) to correspond to statutory redesignations made by the Hillary J. Farias and Samantha Reid Date Rape Prevention Act; and (B) corrects references to the new chemical quantity tables in §2D1.11.*
- (5) *Corrects a change to the commentary of §2N2.1(b)(1) that was inadvertently made as part of the conforming package of amendments in the Economic Crime Package.*
- (6) *Corrects a grammatical error in Note (D) of §2T1.1(c)(1) by replacing "subdivisions (A), (B), or (C)" with "subdivision (A), (B), or (C)".*
- (7) *Adds a mandatory condition to §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) that the defendant provide DNA if the defendant is required to do so by the DNA Analysis Backlog Elimination Act of 2000. Pursuant to section 3 of this Act, a defendant is required to provide a DNA sample if the defendant is convicted of certain offenses (e.g., murder, kidnapping).*
- (8) *Deletes from Application Note 5 of §5E1.2 (Fines for Individual Defendants) an incorrect statement concerning the Clean Air Act.*
- (9) *Inserts a missing "Background" title in §5F1.7 (Shock Incarceration).*
- (10) *Conforms Part A of Chapter Seven and §7B1.3 (Revocation of Supervised Release) to current statutory law and provides an explanatory note concerning the condition of intermittent confinement as a condition of supervised release.*
- (11) *Updates statutory references in §5F1.5 (Occupational Restrictions).*
- (12) *Refers 18 U.S.C. § 2245 (sexual abuse resulting in death) to §2A1.1 (First Degree Murder) in Appendix A (Statutory Index).*
- (13) *Repromulgates amendment 568, effective November 1, 1997, to correct an inadvertent omission of a conforming amendment to §4B1.4 (Armed Career Criminal) from amendment*

568.

(14) *Responds to new legislation as follows:*

- (A) *Updates, in §2B1.1, a statutory reference in the definition of "means of identification" to correspond to a redesignation made by the Internet False Identification Prevention Act of 2000, Pub. L. 106–578, Dec. 28, 2000, 114 Stat. 305.*
- (B) *References in Appendix A two new offenses created by the American Homeownership and Economic Opportunity Act of 2000, Pub. L. 106–569, Dec. 27, 2000, __ Stat. __. Section 5410(b) of title 42, which provides that knowing and willful violations of a state's installation program standards shall be punishable as a Class A misdemeanor, is referenced to §2N2.1. Section 14905 of title 42, which provides a criminal penalty of a \$250,000 fine and five years' imprisonment for equity skimming, is referenced to §2B1.1.*
- (C) *References 16 U.S.C. § 1437(c) to §2A2.4 (Obstructing or Impeding Officers). Section 1437, as amended by the National Marine Sanctuaries Act of 2000, Pub. L. 106–513, Nov. 13, 2000, 114 Stat. 2387, prohibits the interference with the enforcement of conservation activities authorized in title 16, United States Code, including refusing to permit any officer authorized to enforce such title to board a vessel for purposes of conducting a search or inspection in connection with the enforcement of title 16. The Act provides a statutory maximum of six months, or if the offense involved the use of a dangerous weapon or resulted in bodily injury, a statutory maximum of 10 years. Section 1437(c) seems sufficiently similar to other offenses referenced to §2A2.4 to warrant reference to this guideline.*

(15) *Proposes several changes to §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) to address more adequately the portion of section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000 (the "Act"), Pub. L. 106–386, pertaining to the new offense at 18 U.S.C. § 1591 (Sex Trafficking of Children by Force, Fraud or Coercion). Section 1591 prohibits knowingly transporting or harboring any person, or benefitting from such transporting or harboring, knowing either that force, fraud, or coercion will be used to cause that person to engage in a commercial sex act, or that the person is not 18 years old and will be forced to engage in a commercial sex act.*

In response to the Act, the Commission, in March 2001, passed an amendment that (A) referenced 18 U.S.C. § 1591 to §§2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material); and (B) provided an encouraged upward departure in §2G1.1 to address cases in which (i) the defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years; or (ii) the offense involved more than 10 victims. Staff had recommended additional changes to §2G1.1 at that time but because adequate public notice regarding those changes had not been provided, staff recommended that the changes be made during this amendment cycle.

This amendment proposes three substantive changes to §2G1.1. First, this amendment broadens the conduct covered by the guideline to all commercial sex acts. Currently, the conduct covered by the guideline is limited to prostitution. Second, this amendment expands the "force or coercion" prong of §2G1.1(b)(1) to also cover offenses involving fraud. This change addresses the increased punishment provided by section 1591 for offenses

effected by "force, fraud, or coercion". Third, after reviewing again the statute and the encouraged upward departure note that the Commission passed in March, staff recommends deleting the portion of the note pertaining to the age of the victim because it encourages a departure for conduct arguably covered by the guideline in subsection (b)(2).

Proposed Amendment:

(1) Clarifies That §5D1.2(c) Is a Policy Statement

§5D1.2. Term of Supervised Release

* * *

- (c) (Policy Statement) If the instant offense of conviction is a sex offense, the statutory maximum term of supervised release is recommended.

* * *

(2) Conforming Amendment to §2B4.1

§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

* * *

- (b) Specific Offense Characteristics

* * *

~~(2) If the offense --~~

~~(A) substantially jeopardized the safety and soundness of a financial institution; or~~

~~(B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense;~~

~~increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.~~

(2) (Apply the greater) If—

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

(B) the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels.

If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

* * *

Commentary

* * *

Application Notes:

* * *

4. ~~An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations, or was placed in substantial jeopardy of any of the above.~~
5. ~~"The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(2)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).~~

4. Gross Receipts Enhancement under Subsection (b)(2)(A).—

(A) In General.—For purposes of subsection (b)(2)(A), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.

(B) Definition.—"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

5. Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(2)(B).—For purposes of subsection (b)(2)(B), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of any of subdivisions (A) through (D) of this note.

* * *

(3) **Amendment to Insert Missing "Or" in §2C1.7(b)(1)(A) and 2Q1.6(a)(3)**

§2C1.7. Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

* * *

(b) Specific Offense Characteristic

(1) (If more than one applies, use the greater):

(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number

of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount; or

* * *

§2Q1.6. Hazardous or Injurious Devices on Federal Lands

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

* * *

(3) If the offense involved reckless disregard to the risk that another person would be placed in danger of death or serious bodily injury under circumstances manifesting extreme indifference to such risk, the offense level from §2A2.2 (Aggravated Assault); or

* * *

(4) Updates Statutory References in §§2D1.9, 2D1.11, and 2D1.13, Corrects References to Quantity Table in §2D1.11

§2D1.9. Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy

(a) Base Offense Level: **23**

Commentary

Statutory Provision: 21 U.S.C. § 841(e)(1).

* * *

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

(a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e) below, as appropriate.

* * *

(e) CHEMICAL QUANTITY TABLE*
(All Other Precursor Chemicals)

Listed Chemicals and Quantity

Base Offense Level

* * *

***Notes:**

(A) Except as provided in Note (B), to calculate the base offense level in an offense that involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level,

regardless of whether the chemicals are set forth in different tables or in different categories (i.e., list I or list II) under subsection (d) of this guideline or (e) of this guideline, as appropriate.

* * *

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(dc)(1), (2), (gf)(1), 960(d)(1), (2).

* * *

§2D1.13. Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements; Presenting False or Fraudulent Identification to Obtain a Listed Chemical; Attempt or Conspiracy

* * *

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(dc)(3), (gf)(1), 843(a)(4)(B), (a)(8).

* * *

APPENDIX A - STATUTORY INDEX

* * *

21 U.S.C. § 841(dc)(1),(2)	2D1.11
21 U.S.C. § 841(dc)(3)	2D1.13
21 U.S.C. § 841(ed)	2D1.9
21 U.S.C. § 841(gf)(1)	2D1.11, 2D1.13

(5) Conforms Reference to Consolidated Theft and Fraud Guideline

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

* * *

Commentary

* * *

Application Notes:

* * *

2. *The cross reference at subsection (b)(1) addresses cases in which the offense involved ~~theft, property destruction, or fraud~~. The cross reference at subsection (b)(2) addresses cases in which the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline (e.g., bribery).*

* * *

(6) Corrects Grammatical Error in §2T1.1(c)(1)(D)

§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

* * *

(c) Special Instructions

For the purposes of this guideline --

- (1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).

Notes:

* * *

(D) If the offense involved (i) conduct described in subdivisions (A), (B), or (C) of these Notes; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses added together.

* * *

(7) Adds New Mandatory Condition of Probation and Supervised Release to §§5B1.3 and 5D1.3

§5B1.3. Conditions of Probation

(a) Mandatory Conditions—

* * *

- (9) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student;

- (10) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

* * *

§5D1.3. Conditions of Supervised Release

(a) Mandatory Conditions—

* * *

- (7) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student;
- (8) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

* * *

(8) Deletes Incorrect Statement Regarding Fines and the Clean Air Act

§5E1.2. Fines for Individual Defendants

* * *

Commentary

Application Notes:

* * *

- 5. *Subsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases. These statutes include, among others: 21 U.S.C. §§ 841(b) and 960(b), which authorize fines up to \$8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S.C. § 848(a), which authorizes fines up to \$4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S.C. § 1956(a), which authorizes a fine equal to the greater of \$500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; 18 U.S.C. § 1957(b)(2), which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction; 33 U.S.C. § 1319(c), which authorizes a fine of up to \$50,000 per day for violations of the Water Pollution Control Act; 42 U.S.C. § 6928(d), which authorizes a fine of up to \$50,000 per day for violations of the Resource Conservation Act, and 42 U.S.C. § 7413(c), which authorizes a fine of up to \$25,000 per day for violations of the Clean Air Act.*

(9) Inserts Missing "Background" Title

§5F1.7. Shock Incarceration Program (Policy Statement)

The court, pursuant to 18 U.S.C. §§ 3582(a) and 3621(b)(4), may recommend that a defendant who meets the criteria set forth in 18 U.S.C. § 4046 participate in a shock incarceration program.

Commentary

Background:

* * *

(10) **Updates Chapter Seven to Reflect Status of Current Law Regarding Intermittent Confinement and Provides Explanatory Note**

CHAPTER SEVEN - VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

PART A - INTRODUCTION TO CHAPTER SEVEN

* * *

2. Background

* * *

(b) Supervised Release.

Supervised release, a new form of post-imprisonment supervision created by the Sentencing Reform Act, accompanied implementation of the guidelines. A term of supervised release may be imposed by the court as a part of the sentence of imprisonment at the time of initial sentencing. 18 U.S.C. § 3583(a). Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court. Accordingly, supervised release is more analogous to the additional "special parole term" previously authorized for certain drug offenses.

With the exception of ~~intermittent confinement~~ residency in, or participation in the program of, a community corrections facility*, which is available only for a sentence of probation, 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 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 subsection (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 re-designated 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.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act re-designated the remaining paragraphs of section 3563(b), it failed to make the corresponding re-designations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release. While imposition of intermittent confinement as a condition of supervised release does not violate the letter of the law as it is currently written, imposition of the condition arguably may not be consistent with its long-standing intent.

* * *

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

* * *

Commentary

Application Notes:

* * *

- 5. *Intermittent confinement is authorized only as a condition of probation during the first year of the term of probation. 18 U.S.C. § 3563(b)(11)(10). * Intermittent confinement is not authorized as a condition of supervised release. 18 U.S.C. § 3583(d).*

*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 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 subsection (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 re-designated 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.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act re-designated the remaining paragraphs of section 3563(b), it failed to make the corresponding re-designations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release. While imposition of intermittent confinement as a condition of supervised release does not violate the letter of the law as it is currently written, imposition of the condition arguably may not be consistent with its long-standing intent.

* * *

(11) Updates Statutory References in §5F1.5

§5F1.5. Occupational Restrictions

* * *

Commentary

Background: *The Comprehensive Crime Control Act authorizes the imposition of occupational restrictions as a condition of probation, 18 U.S.C. § 3563(b)(6)(b)(5), or supervised release, 18 U.S.C. § 3583(d). Pursuant to § 3563(b)(6)(b)(5), a court may require a defendant to:*

[R]efrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated

circumstances.

* * *

The appellate review provisions permit a defendant to challenge the imposition of a probation condition under 18 U.S.C. § 3563(b)(6)(b)(5) if "the sentence includes . . . a more limiting condition of probation or supervised release ~~under section 3563(b)(6)~~ . . . than the maximum established in the guideline." See 18 U.S.C. § 3742(a)(3)(A). The government may appeal if the sentence includes a "less limiting" condition of probation than the minimum established in the guideline. 18 U.S.C. § 3742(b)(3)(A).

(12) Refers 18 U.S.C. § 2245 to §2A1.1

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 2244	2A3.4
18 U.S.C. § 2245	2A1.1
18 U.S.C. § 2251(a),(b)	2G2.1

(13) Corrects Inadvertent Omission from Earlier Amendment

Amendment 568, effective November 1, 1997, is repromulgated with the following additional change:

§4B1.4. Armed Career Criminal

* * *

(b) The offense level for an armed career criminal is the greatest of:

* * *

(3) (A) **34**, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in ~~§4B1.2(1)~~§4B1.2(a) and (b), respectively, or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or

(14) Responds to New Legislation

(A) Updates Statutory Reference for "Means of Identification"

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft

* * *

Commentary

* * *

Application Instructions:

* * *

7. Application of subsection (b)(9).—

* * *

"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(3)(d)(4), 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).

(B) Appendix A (Statutory Index) References for New Offenses

APPENDIX A - STATUTORY INDEX

16 U.S.C. § 1417(a)(5), (6), (b)(2)	2A2.4	
16 U.S.C. § 1437(c)	2A2.4	
		* * *
42 U.S.C. § 5157(a)	2B1.1	
42 U.S.C. § 5410(b)	2N2.1	
		* * *
42 U.S.C. § 9603(d)	2Q1.2	
42 U.S.C. § 14905	2B1.1	

(15) Changes to Human Trafficking Guideline

Promoting Prostitution~~A~~ Commercial Sex Act or Prohibited Sexual Conduct

2G1.1. Promoting Prostitution~~A~~ Commercial Sex Act or Prohibited Sexual Conduct

* * *

(b) Specific Offense Characteristics

- (1) If the offense involved (A) ~~prostitution~~ a commercial sex act; and (B) the use of physical force, fraud, or coercion by ~~threats or drugs or in any manner~~, increase by **4** levels.
- (2) If the offense involved a victim who had (A) not attained the age of 12 years, increase by **4** levels; or (B) attained the age of 12 years but not attained the age of 16 years, increase by **2** levels.

* * *

(4) If subsection (b)(3) does not apply; and—

- (A) the offense involved the knowing misrepresentation of a participants identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in ~~prostitution~~**a**

commercial sex act; or

(B) a participant otherwise unduly influenced a minor to engage in prostitutiona commercial sex act,

increase by 2 levels.

(5) If a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prostitutiona commercial sex act; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor, increase by 2 levels.

(c) Cross References

* * *

(3) If the offense did not involve promoting prostitutiona commercial sex act, and neither subsection (c)(1) nor (c)(2) is applicable, apply §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate.

(d) Special Instruction

(1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of prostitutiona commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

* * *

Application Notes:

1. For purposes of this guideline—

"Commercial sex act" has the meaning given that term in 18 U.S.C. § 1591(c)(2).

* * *

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

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

2. Subsection (b)(1) provides an enhancement for physical force, fraud, or coercion; that occurs as part of a prostitution commercial sex act offense and anticipates no bodily injury. If bodily injury results,

an upward departure may be warranted. See Chapter Five, Part K (Departures). For purposes of subsection (b)(1)(B), "coercion" includes any form of conduct that negates the voluntariness of the behavior of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of an adult victim, rather than a victim less than 18 years of age, this characteristic generally will not apply if the drug or alcohol was voluntarily taken.

3. For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of ~~prostitution~~ a commercial sex act or prohibited sexual conduct in respect to another victim.
4. For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, ~~prostitution~~ a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of ~~prostitution~~ a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.

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7. The enhancement in subsection (b)(4)(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 ~~prostitution~~ a commercial sex act. Subsection (b)(4)(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)(4)(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)(4)(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 ~~prostitution~~ a commercial sex act. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

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In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption, for purposes of subsection (b)(4)(B), that such participant unduly influenced the minor to engage in ~~prostitution~~ a commercial sex act. 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.

8. Subsection (b)(5) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in ~~prostitution~~ a commercial sex act; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor. Subsection (b)(5)(A) is intended to apply only to the use of a computer or an Internet-access device 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)(5)(A) would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.

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11. *The cross reference in subsection (c)(3) addresses the case in which the offense did not involve promoting prostitution a commercial sex act, neither subsection (c)(1) nor (c)(2) is applicable, and the offense involved prohibited sexual conduct other than the conduct covered by subsection (c)(1) or (c)(2). In such case, the guideline for the underlying prohibited sexual conduct is to be used; i.e., §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact).*

12. *Upward Departure Provisions.—An upward departure may be warranted in either of the following circumstances if the offense involved more than 10 victims.:*

~~(A) The defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years.~~

~~(B) The offense involved more than 10 victims.~~

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