UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of: (A) promulgation of temporary, emergency amendments, effective May 1, 2001, for (1) offenses involving the manufacture, importation, exportation, or trafficking of ''Ecstasy''; (2) offenses involving the manufacture, importation, or trafficking of amphetamine; (3) offenses involving the trafficking of certain List I chemicals that are used in the manufacture of methamphetamine; and (4) offenses involving peonage and human trafficking; and (B) submission to Congress of additional non-emergency amendments to the sentencing guidelines, effective November 1, 2001.

SUMMARY: The United States Sentencing Commission hereby gives notice of the following actions:

(A) Emergency Amendments.—

(1) ''Ecstasy'' Offenses.—Pursuant to section 3664 of the Ecstasy Anti-Proliferation Act of 2000, Pub. L. 106—310, the Commission has promulgated a temporary, emergency amendment to § 2D1.1.

(2) Amphetamine Offenses.—Pursuant to section 3611 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106—310, the Commission has promulgated a temporary, emergency amendment to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses) Attempt and Conspiracy).

(3) List I Chemical Offenses.—Pursuant to section 3651 of the Methamphetamine Anti-Proliferation Act of 2000, the Commission has promulgated a temporary, emergency amendment to §§ 2D1.1 and 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy).

(4) Human Trafficking Offenses.—Pursuant to section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106—386, the Commission has promulgated a temporary, emergency amendment to §§ 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct), 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), and 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade), and has promulgated a new guideline at § 2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act).

(B) Non-Emergency Amendments—Pursuant to its authority under 28 U.S.C. 994(a) and (p) and several congressional directives more fully described herein, the Commission has promulgated additional, non-emergency amendments to the sentencing guidelines, policy statements, commentary, and statutory index.

This notice sets forth the amendments and the season for each amendment.

DATES: The Commission has specified an effective date of May 1, 2001, for the emergency amendments set forth in Part (A) of this notice and an effective date of November 1, 2001, for the non-emergency amendments set forth in Part (B) of this notice.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, 202–502–4590. The amendments set forth in this notice also may be accessed through the Commission's website at *www.ussc.gov.*

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guidelines amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

(A) Emergency Amendments.—In January 2001, the Commission published options for promulgating the emergency amendments set forth herein (*see* 66 FR 7962, January 26, 2001). The Commission held a public hearing on the proposed amendments in Washington, DC, on March 19, 2001. After a review of hearing testimony and additional public comment, the Commission promulgated the emergency amendments set forth herein. The Commission specified an effective date of May 1, 2001, for these amendments.

(1) ''Ecstasy''.—The Ecstasy Anti-Proliferation Act of 2000 instructed the Commission to provide increased penalties for the manufacture, importation, exportation, or trafficking of ''Ecstasy''. The directive specifically required the Commission to increase the base offense level for 3,4-Methylenedioxymethamphetamine (MDMA), 3,4-Methylenedioxyamphetamine (MDA), 3,4-Methylenedioxy-N-ethylamphetamine (MDEA), and Paramethoxymethamphetamine (PMA). The amendment amends the Drug Equivalency Tables in 1A2D1.1 to increase substantially the marihuana equivalencies for the specified controlled substances, which has the effect of substantially increasing the penalties for offenses involving ''Ecstasy''.

(2) Amphetamine.—Section 3611 of the Methamphetamine Anti-Proliferation Act of 2000 directed the Commission to provide increased guideline penalties for amphetamine offenses such that those penalities are comparable to the base offense level for methamphetamine offenses. This amendment revises § 2D1.1 to include amphetamine in the Drug Quantity Table in subsection (c) of that guideline. This amendment also treats amphetamine and methamphetamine identically, at a 1:1 ratio, because of the similarities of the two substances.

(3) List I Chemicals.—Section 3651 of the Methamphetamine Anti-Proliferation Act of 2000 directed the Commission to ''provide increased penalties for offenses involving ephedrine, phenylpropanolamine (PPA), or pseudoephedrine (including their salts, optical isomers, and salts of optical isomers) to correspond to the quality of controlled substance that reasonably could have been manufactured using the quality of ephedrine, PPA, and pseudoephedrine possessed or distributed.'' This amendment provides a new chemical quantity table in § 2D1.11 specifically for ephedrine, pseudoephedrine, and phenylpropanolamine (PPA). The table, which has a maximum based offense level of level 38, ties the base offense levels for these chemicals to the base offense levels for methamphetamine (actual) set forth in § 2D1.1. The amendment also makes conforming changes to the commentary in §§ 2D1.11 and 2D1.1.

(4) Human Trafficking.—This amendment implements the congressional directive in section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106–386. The directive requires the Commission to amend, if appropriate, the guidelines applicable to human trafficking (*i.e.,* peonage, involuntary servitude, and forced labor) offenses. It also requires the Commission to ensure that the guidelines ''are sufficiently stringent to deter and adequately reflect the heinous nature of these offenses.'' This amendment (i) creates a new

guideline, § 2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act); (ii) refers violations of four new statutes, 18 U.S.C. 1589 (Forced Labor), 1590 (Trafficking with Respect to Peonage, Involuntary Servitude or Forced Labor), 1591 (Sex Trafficking of Children by Force, Fraud or Coercion) and 1952 (Unlawful Conduct with Respect to Documents in Furtherance of Peonage, Involuntary Servitude, or Forced Labor) to the appropriate guidelines; and (iii) makes changes, consistent with the directive, which both enhance sentences and reflect changes to three existing statutes: 18 U.S.C. 1581(a) (Peonage), 1583 (Enticement into Slavery) and 1584 (Sale into Involuntary Servitude).

(B) Non-Emergency Amendments.—Section 994 of title 28, United States Code, authorizes the Commission to promulgate sentencing guidelines and policy statements for federal courts. *See* 28 U.S.C. 994(a). Additionally, 28 U.S.C. 994 directs the Commission periodically to review and revise guidelines previously promulgated (*see* 28 U.S.C. 994(o)) and authorizes its to submit guidelines amendments to the Congress at or after the beginning of a regular session of Congress but not later than May 1 (*see* 18 U.S.C. 994(p)). Absent action of Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

Notice of proposed amendments was published in the **Federal Register** on November 7, 2000 (*see* 65 FR 66792), and January 26, 2001 (*see* 66 FR 7962). The Commission held a public hearing on the proposed amendments in Washington, DC on March 19, 2001. After a review of hearing testimony and additional public comment, the Commission promulgated the amendments set forth herein (including amendments to make permanent the temporary, emergency amendments set forth in Part (A) of this notice). On May 1, 2001, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2001.

Authority: 28 U.S.C. 994(a), (o), and (p); USSC Rule of Practice and Procedure 4.1.

Diana E. Murphy,

Chair.

(A) Emergency Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary, Effective May 1, 2001.

1. *Amendment:* The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)* '' in the line referenced to ''MDA'' by striking ''50 gm'' and inserting ''500 gm''; in the line referenced to ''MDMA'' by striking ''35 gm'' and inserting ''500 gm''; in the line referenced ''MDEA'' by striking ''30 gm'' and inserting ''500 gm''; and by inserting ''1 gm of Paramethoxymethamphetamine/PMA = 500 gm of marihuana'' after the line referenced to ''MDEA''.

Reason for Amendment: This amendment addresses the directive in the Ecstasy Anti-Proliferation Act of 2000 (the ''Act''), section 3664 of Pub. L. 106–310, which instructs the Commission to provide, under emergency amendment authority, increased penalties for the manufacture, importation, exportation, or trafficking of Ecstasy. The directive specifically requires the Commission to increase the base offense level for 3,4-Methylenedioxymethetamine (MDMA), 3,4-Methylenedioxyamphetamine (MDA), 3,4-Methylenedioxy-N-ethylamphetamine (MDEA), Paramethoxymethamphetamine (PMA), and any other controlled substance that is marketed as Ecstasy and that has either a chemical structure similar to MDMA or an effect on the central nervous system substantially similar to or greater than MDMA.

The amendment addresses the directive by amending the Drug Equivalency Table in § 2D1.1, Application Note 10, to increase substantially the marihuana equivalencies for the specified controlled substances, which has the effect of substantially increasing the penalties for offenses involving Ecstasy. The new penalties for Ecstasy trafficking provide penalties which, gram for gram, are more severe than those for powder cocaine. Currently under the Drug Equivalency Table, one gram of powder cocaine has a marihuana equivalency of 200 grams. This amendment sets the marihuana equivalency for one gram of Ecstasy at 500 grams.

There are a combination of reasons why the Commission has substantially increased the penalties in response to the congressional directive. Much evidence received by the Commission indicated that Ecstasy: (1) has powerful pharmacological effects; (2) has the capacity to cause lasting physical harms, including brain damage; and (3) is being abused by rapidly increasing numbers of teenagers and young adults. Indeed, the market for Ecstasy is overwhelmingly comprised of people under the age of 25 years.

Before voting to promulgate this amendment, the Commission considered whether the penalty levels for Ecstasy should be set at the same levels as for heroin (*i.e.*, one gram of heroin has a marihuana equivalency of 1000 grams) and decided that somewhat lesser penalties were appropriate for Ecstasy for a number of reasons: (1) The potential for addiction is greater with heroin; (2) heroin distribution often involves violence while, at this time, violence is not reported in Ecstasy markets; (3) because it is a narcotic and is often injected, the risk of death from overdose is much greater from heroin; and (4) because heroin is often injected, there are more secondary health consequences, such as infections and the transmission of the human immunodeficiency virus (HIV) and hepatitis.

Finally, based on information regarding Ecstasy trafficking patterns, the penalty levels chosen are appropriate and sufficient to target serious and high-level traffickers and to provide appropriate punishment, deterrence, and incentives for cooperation. The penalty levels chosen for Ecstasy offenses provide five year sentences for serious traffickers (those whose relevant conduct involved at least 800 pills) and ten year sentences for high-level traffickers (those whose relevant conduct involved at least 8,000 pills).

2. *Amendment:* Section 2D1.1(c)(1) is amended by inserting after the fifth entry the following:

''15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual);''.

Section 2D1.1(c)(2) is amended by inserting after the fifth entry the following:

''At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);''.

Section 2D1.1(c)(3) is amended by inserting after the fifth entry the following:

''At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);''.

Section 2D1.1(c)(4) is amended by inserting after the fifth entry the following:

''At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);''.

Section 2D1.1(c)(5) is amended by inserting after the fifth entry the following:

''At least 350 G but less than 500 G of Amphetamine, or at least 35 G but

less than 50 G of Amphetamine (actual);''.

Section 2D1.1(c)(6) is amended by inserting after the fifth entry the following:

''At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);''.

Section 2D1.1(c)(7) is amended by inserting after the fifth entry the following:

''At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);''.

Section 2D1.1(c)(8) is amended by inserting after the fifth entry the following:

''At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);''.

Section 2D1.1(c)(9) is amended by inserting after the fifth entry the following:

''At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);''.

Section 2D1.1(c)(10) is amended by inserting after the fifth entry the following:

''At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);''.

Section 2D1.1(c)(11) is amended by inserting after the fifth entry the following:

''At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);''.

Section 2D1.1(c)(12) is amended by inserting after the fifth entry the following:

''At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);''.

Section 2D1.1(c)(13) is amended by inserting after the fifth entry the following:

''At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);''.

Section 2D1.1(c)(14) is amended by inserting after the fifth entry the following:

''Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);''.

Section 2D1.1(c) is amended in Note (B) of the ''Notes to Drug Quantity Table'' by inserting '', 'Amphetamine (actual)','' after ''terms 'PCP (actual)' ''; by inserting '', amphetamine,'' after ''substance containing PCP''; and by inserting '', amphetamine (actual),'' after ''weight of the PCP (actual)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 9 by inserting '', amphetamine,'' after ''PCP''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*'' by striking ''200 gm'' after ''1 gm of Amphetamine='' and inserting ''2 kg''; and by inserting ''1 gm of Amphetamine (Actual) = 20 kg of marihuana'' after the line referenced to ''Amphetamine''.

Reason for Amendment: This emergency amendment implements the directive in the Methamphetamine Anti-Proliferation Act of 2000, section 3611 of Pub. L. 106–310 (the ''Act''), which directs the Commission to provide, under emergency amendment authority, increased guideline penalties for amphetamine such that those penalties are comparable to the base offense level for methamphetamine.

This amendment revised § 2D1.1 to include amphetamine in the Drug Quantity Table. This amendment also treats amphetamine and methamphetamine identically, at a 1:1 ratio (*i.e.*, the same quantities of amphetamine and methamphetamine would result in the same base offense level) because of the similarities of the two substances. Specifically, amphetamine and methamphetamine (1) chemically are similar; (2) are produced by a similar method and are trafficked in a similar manner; (3) share similar methods of use; (4) affect the same parts of the brain; and (5) have similar intoxicating effects. The amendment also distinguishes between pure amphetamine (*i.e.*, amphetamine (actual)) and amphetamine mixture in the same manner, and at the same quantities, as pure methamphetamine (*i.e.*, methamphetamine (actual)) and methamphetamine mixture, respectively. The amendment reflects the view that the 1:1 ratio is appropriate given the seriousness of these two controlled substances.

3. *Amendment:* Section 2D1.11 is amended by striking subsection (d), captioned ''Chemical Quantity Table*''; and by striking the Notes that follow subsection (d), captioned ''*Notes'', and inserting the following:

''(d)(1) EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE QUANTITY TABLE*

[Methamphetamine and Amphetamine Precursor Chemicals]

Quantity	Base offense level
(1) 3 KG or more of Ephedrine; 3 KG or more of Phenylpropanolamine; 3 KG or More of Pseudoephedrine.	Level 38
(2) At least 1 KG but less than 3 KG of Ephedrine; At least 1 KG but less than 3 KG of Phenylpropanolamine; At least 1 KG but less than 3 KG of Pseudoephedrine.	Level 36
(3) At least 300 G but less than 1 KG of Ephedrine; At least 300 G but less than 1 KG of Phenylpropanolamine; At least 300 G but less than 1 KG of Pseudoephedrine.	Level 34
(4) At least 100 G but less than 300 G of Ephedrine; At least 100 G but less than 300 G of Phenylpropanolamine; At least 100 G but less than 300 G of Pseudoephedrine.	Level 32
(5) At least 70 G but less than 100 G of Ephedrine; At least 70 G but less than 100 G of Phenylpropanolamine; At least 70 G but less than 100 G of Pseudoephedrine.	Level 30
(6) At least 40 G but less than 70 G of Ephedrine; At least 40 G but less than 70 G of Phenylpropanolamine; At least 40 G but less than 70 G of Pseudoephedrine.	Level 28
(7) At least 10 G but less than 40 G of Ephedrine; At least 10 G but less than 40 G of Phenylpropanolamine; At least 10 G but less than 40 G of Pseudoephedrine.	Level 26

''(d)(1) EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE QUANTITY TABLE*—Continued

[Methamphetamine and Amphetamine Precursor Chemicals]

Quantity	Base offense level
(8) At least 8 G but less than 10 G of Ephedrine;	Level 24
At least 8 G but less than 10 G of Phenylpropanolamine;	
At least 8 G but less than 10 G of Pseudoephedrine.	
(9) At least 6 G but less than 8 G of Ephedrine;	Level 22
At least 6 G but less than 8 G of Phenylpropanolamine;	
At least 6 G but less than 8 G of Pseudoephedrine.	
(10) At least 4 G but less than 6 G of Ephedrine;	Level 20
At least 4 G but less than 6 G of Phenylpropanolamine;	
At least 4 G but less than 6 G of Pseudoephedrine.	
(11) At least 2 G but less than 4 G of Ephedrine;	Level 18
At least 2 G but less than 4 G of Phenylpropanolamine;	
At least 2 G but less than 4 G of Pseudoephedrine.	
(12) At least 1 G but less than 2 G of Ephedrine;	Level 16
At least 1 G but less than 2 G of Phenylpropanolamine;	
At least 1 G but less than 2 G of Pseudoephedrine.	
(13) At least 500 MG but less than 1 G of Ephedrine;	Level 14
At least 500 MG but less than 1 G of Phenylpropanolamine;	
At least 500 MG but less than 1 G of Pseudoephedrine.	
(14) Less than 500 MG of Ephedrine;	Level 12
Less than 500 MG of Phenylpropanolamine;	
Less than 500 MG of Pseudoephedrine.	

*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.

(B) To calculate the base offense level in an offense that involves two or more chemicals each of which is set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) aggregate the quantities of all such chemicals, and (ii) determine the base offense level corresponding to the aggregate quantity.

(C) In a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.''.

(d)(2) CHEMICAL QUANTITY TABLE*

[All other precursor chemicals]

Listed chemicals and quantity	Base offense level
(1) List I Chemicals	Level 30
890 G or more of Benzaldehyde;	
20 KG or more of Benzyl Cyanide;	
200 G or more of Ergonovine;	
400 G or more of Ergotamine;	
20 KG or more of Ethylamine;	
2.2 KG or more of Hydriodic Acid;	
320 KG or more of Isosafrole;	
200 G or more of Methylamine;	
500 KG or more of N-Methylephedrine;	
500 KG or more of N-Methylpseudoephedrine;	
625 G or more of Nitroethane;	
10 KG or more of Norpseudoephedrine;	
20 KG or more of Phenylacetic Acid;	
10 KG or more of Piperidine;	
320 KG or more of Piperonal;	
1.6 KG or more of Propionic Anhydride;	
320 KG or more of Safrole;	
400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone.	
(2) List I Chemicals	Level 28
At least 267 G but less than 890 G of Benzaldehyde;	
At least 6 KG but less than 20 KG of Benzyl Cyanide;	
At least 60 G but less than 200 G of Ergonovine;	
At least 120 G but less than 400 G of Ergotamine;	
At least 6 KG but less than 20 KG of Ethylamine;	
At least 660 G but less than 2.2 KG of Hydriodic Acid;	
At least 96 KG but less than 320 KG of Isosafrole;	
At least 60 G but less than 200 G of Methylamine;	

(d)(2) CHEMICAL QUANTITY TABLE*—Continued

[All other precursor chemicals]

Listed chemicals and quantity	Base offense level
At least 150 KG but less than 500 KG of N-Methylephedrine; At least 150 KG but less than 500 KG of N-Methylpseudoephedrine; At least 187.5 G but less than 625 G of Nitroethane; At least 3 KG but less than 10 KG of Norpseudoephedrine; At least 6 KG but less than 20 KG of Phenylacetic Acid; At least 3 KG but less than 10 KG of Piperidine; At least 96 KG but less than 320 KG of Piperonal; At least 480 G but less than 1.6 KG of Propionic Anhydride; At least 96 KG but less than 320 KG of Safrole; At least 120 KG but less than 400 KG of 3,4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals	
11 KG or more of Acetic Anhydride; 1175 KG or more of Acetone; 20 KG or more of Benzyl Chloride; 1075 KG or more of Ethyl Ether; 1200 KG or more of Methyl Ethyl Ketone; 10 KG or more of Potassium Permanganate; 1300 KG or more of Toluene.	Level 26
(3) List I Chemicals	
At least 89 G but less than 267 G of Benzaldehyde; At least 2 KG but less than 6 KG of Benzyl Cyanide; At least 20 G but less than 60 G of Ergonovine; At least 40 G but less than 120 G of Ergotamine; At least 2 KG but less than 6 KG of Ethylamine; At least 220 G but less than 660 G of Hydriodic Acid; At least 32 KG but less than 96 KG of Isosafrole; At least 20 G but less than 60 G of Methylamine; At least 50 KG but less than 150 KG of N-Methylephedrine; At least 50 KG but less than 150 KG of N-Methylpseudoephedrine; At least 62.5 G but less than 187.5 G of Nitroethane; At least 1 KG but less than 3 KG of Norpseudoephedrine; At least 2 KG but less than 6 KG of Phenylacetic Acid; At least 1 KG but less than 3 KG of Piperidine; At least 32 KG but less than 96 KG of Piperonal; At least 160 G but less than 480 G of Propionic Anhydride; At least 32 KG but less than 96 KG of Safrole; At least 40 KG but less than 120 KG of 3,4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals	
At least 3.3 KG but less than 11 KG of Acetic Anhydride; At least 352.5 KG but less than 1175 KG of Acetone; At least 6 KG but less than 20 KG of Benzyl Chloride; At least 332.5 KG but less than 1075 KG of Ethyl Ether; At least 360 KG but less than 1200 KG of Methyl Ethyl Ketone; At least 3 KG but less than 10 KG of Potassium Permanganate; At least 390 KG but less than 1300 KG of Toluene.	
(4) List I Chemicals	Level 24
At least 62.3 G but less than 89 G of Benzaldehyde; At least 1.4 KG but less than 2 KG of Benzyl Cyanide; At least 14 G but less than 20 G of Ergonovine; At least 28 G but less than 40 G of Ergotamine; At least 1.4 KG but less than 2 KG of Ethylamine; At least 154 G but less than 220 G of Hydriodic Acid; At least 22.4 KG but less than 32 KG of Isosafrole; At least 14 G but less than 20 G of Methylamine; At least 35 KG but less than 50 KG of N-Methylephedrine;	
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine; At least 43.8 G but less than 62.5 of Nitroethane; At least 700 G but less than 1 KG of Norpseudoephedrine; At least 1.4 KG but less than 2 KG of Phenylacetic Acid; At least 700 G but less than 1 KG of Piperidine; At least 22.4 KG but less than 32 KG of Piperonal; At least 112 G but less than 160 G of Propionic Anhydride;	

(d)(2) CHEMICAL QUANTITY TABLE*—Continued
(All Other Precursor Chemicals)

Listed chemicals and quantity	Base offense level
At least 22.4 KG but less than 32 KG of Safrole; At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone; List II Chemicals At least 1.1 KG but less than 3.3 KG of Acetic Anhydride; At least 117.5 KG but less than 352.5 KG of Acetone; At least 2 KG but less than 6 KG of Benzyl Chloride; At least 107.5 but less than 322.5 KG of Ethyl Ether; At least 120 KG but less than 360 KG of Methyl Ethyl Ketone; At least 1 KG but less than 3 KG of Potassium Permanganate; At least 130 KG but less than 390 KG of Toluene.	
(5) List I Chemicals	Level 22
At least 35.6 G but less than 62.3 of Benzaldehyde; At least 800 G but less than 1.4 KG of Benzyl Cyanide; At least 8 G but less than 14 G of Ergonovine; At least 16 G but less than 28 G of Ergotamine; At least 800 G but less than 1.4 KG of Ethylamine; At least 88 G but less than 154 G of Hydriodic Acid; At least 12.8 KG but less than 22.4 KG of Isosafrole; At least 8 G but less than 14 G of Methylamine; At least 20 KG but less than 35 KG of N-Methylephedrine; At least 20 KG but less than 35 KG of N-Methylpseudoephedrine; At least 25 G but less than 43.8 G of Nitroethane; At least 400 G but less than 700 G of Norpseudoephedrine; At least 800 G but less than 1.4 KG of Phenylacetic Acid; At least 400 G but less than 700 G of Piperidine; At least 12.8 KG but less than 22.4 KG of Piperonal; At least 64 G but less than 112 G of Propionic Anhydride; At least 12.8 KG but less than 22.4 KG of Safrole; At least 16 KG but less than 28KG of 3,4-Methylenedioxyphenyl-2-propanone; List II Chemicals At least 726 G but less than 1.1 KG of Acetic Anhydride; At least 82.25 KG but less than 117.5 KG of Acetone; At least 1.4 KG but less than 2 KG of Benzyl Chloride; At least 75.25 KG but less than 107.5 KG of Ethyl Ether; At least 84 KG but less than 120 KG of Methyl Ethyl Ketone; At least 700 G but less than 1 KG of Potassium Permanganate; At least 91 KG but less than 130 KG of Toluene.	
(6) List I Chemicals	Level 20
At least 8.9 G but less than 35.6 G of Benzaldehyde; At least 200 G but less than 800 G of Benzyl Cyanide; At least 2 G but less than 8 G of Ergonovine; At least 4 G but less than 16 G of Ergotamine; At least 200 G but less than 800 G of Ethylamine; At least 22 G but less than 88 G of Hydriodic Acid; At least 3.2 KG but less than 12.8 KG of Isosafrole; At least 2 G but less than 8 G of Methylamine; At least 5 KG but less than 20 KG of N-Methylephedrine; At least 5 KG but less than 20 KG of N-Methylpseudoephedrine; At least 6.3 G but less than 25 G of Nitroethane; At least 100 G but less than 400 of Norpseudoephedrine; At least 200 G but less than 800 G of Phenylacetic Acid; At least 100 G but less than 400 G of Piperidine; At least 3.2 KG but less than 12.8 KG of Piperonal; At least 16 G but less than 64 G of Propionic Anhydride; At least 3.2 KG but less than 12.8 KG of Safrole; At least 4 KG but less than 16 KG of 3,4-Methylenedioxyphenyl-2-propanone; List II Chemicals At least 440 G but less than 726 G of Acetic Anhydride; At least 47 KG but less than 82.25 KG of Acetone;	

(d)(2) CHEMICAL QUANTITY TABLE*—Continued

[All Other Precursor Chemicals]

Listed chemicals and quantity	Base offense level
At least 800 G but less than 1.4 KG of Benzyl Chloride; At least 43 KG but less than 75.25 KG of Ethyl Ether; At least 48 KG but less than 84 KG of Methyl Ethyl Ketone; At least 400 G but less than 700 g of Potassium Permanganate;	
(7) List I Chemicals	Level 18
At least 7.1 G but less than 8.9 G of Benzaldehyde; At least 160 G but less than 200 G of Benzyl Cyanide; At least 1.6 G but less than 2 G of Ergonovine; At least 3.2 G but less than 4 G of Ergotamine; At least 160 G but less than 200 G of Ethylamine; At least 17.6 G but less than 22 G of Hydriodic Acid; At least 2.56 KG but less than 3.2 KG of Isosafrole; At least 1.6 G but less than 2 G of Methylamine; At least 4 KG but less than 5 KG of N-Methylephedrine; At least 4 KG but less than 5 KG of N-Methylpseudoephedrine; At least 5 G but less than 6.3 G of Nitroethane; At least 80 G but less than 100 G of Norpseudoephedrine; At least 160 G but less than 200 G of Phenylacetic Acid; At least 80 G but less than 100 G of Piperidine; At least 2.56 KG but less than 3.2 KG of Piperonal; At least 12.8 G but less than 16G of Propionic Anhydride; At least 2.56 KG but less than 3.2 KG of Safrole; At least 3.2 KG but less than 4 KG of 3,4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals	
At least 110 G but less than 440 G of Acetic Anhydride; At least 11.75 KG but less than 47 KG of Acetone; At least 200 G but less than 800 G of Benzyl Chloride; At least 10.75 KG but less than 43 KG of Ethyl Ether; At least 12 KG but less than 48 KG of Methyl Ethyl Ketone; At least 100 G but less than 400 G of Potassium Permanganate; At least 13 KG but less than 52 KG of Toluene.	
(8) List I Chemicals	Level 16
3.6 KG or more of Anthranilic Acid; At least 5.3 G but less than 7.1 G of Benzaldehyde; At least 120 G but less than 160 G of Benzyl Cyanide; At least 1.2 G but less than 1.6 G of Ergonovine; At least 2.4 G but less than 3.2 G of Ergotamine; At least 120 G but less than 160 G of Ethylamine; At least 13.2 G but less than 17.6 G of Hydriodic Acid; At least 1.92 KG but less than 2.56 KG of Isosafrole; At least 1.2 G but less than 1.6 G of Methylamine; 4.8 KG or more of N-Acetylanthranilic Acid; At least 3 KG but less than 4 KG of N-Methylephedrine; At least 3 KG but less than 4 KG of N-Methylpseudoephedrine; At least 3.8 G but less than 5 G of Nitroethane; At least 60 G but less than 80 G of Norpseudoephedrine; At least 120 G but less than 160 G of Phenylacetic Acid; At least 60 G but less than 80 G of Piperidine; At least 1.92 KG but less than 2.56 KG of Piperonal; At least 9.6 G but less than 12.8 G of Propionic Anhydride; At least 1.92 KG but less than 2.56 KG of Safrole; At least 2.4 KG but less than 3.2 KG of 3, 4-MethylenedioxyphenyL-2-propanone;	
List II Chemicals	
At least 88 G but less than 110 G of Acetic Anhydride; At least 9.4 KG but less than 11.75 KG of Acetone; At least 160 G but less than 200 G of Benzyl Chloride; At least 8.6 KG but less than 10.75 KG of Ethyl Ether; At least 9.6 KG but less than 12 KG of Methyl Ethyl Ketone; At least 80 G but less than 100 G of Potassium Permanganate; At least 10.4 KG but less than 13 KG of Toluene.	

(d)(2) CHEMICAL QUANTITY TABLE*—Continued

[All Other Precursor Chemicals]

Listed chemicals and quantity	Base offense level
(9) List I Chemicals	Level 14
At least 2.7 KG but less than 3.6 KG of Anthranilic Acid; At least 3.6 G but less than 5.3 G of Benzaldehyde; At least 80 G but less than 120 G of Benzyl Cyanide; At least 800 MG but less than 1.2 G of Ergonovine; At least 1.6 G but less than 2.4 G of Ergotamine; At least 80 G but less than 120 G of Ethylamine; At least 8.8 G but less than 13.2 G of Hydriodic Acid; At least 1.44 KG but less than 1.92 KG of Isosafrole; At least 800 MG but less than 1.2 G of Methylamine; At least 3.6 KG but less than 4.8 KG of N-Acetylanthraniclic Acid; At least 2.25 KG but less than 3 KG of N-Methylephedrine; At least 2.25 KG but less than 3 KG of N-Methylpseudoephedrine; At least 2.5 G but less than 3.8 G of Nitroethane; At least 40 G but less than 60 G of Norpseudoephedrine; At least 80 G but less than 120 G of Phenylacetic Acid; At least 40 G but less than 60 G of Piperidine; At least 1.44 KG but less than 1.92 KG of Piperonal; At least 7.2 G but less than 9.6 G of Propionic Anhydride; At least 1.44 KG but less than 1.92 KG of Safrole; At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals	
At least 66 G but less than 88 G of Acetic Anhydride; At least 7.05 KG but less than 9.4 KG of Acetone; At least 120 G but less than 160 G of Benzyl Chloride; At least 6.45 KG but less than 8.6 KG of Ethyl Ether; At least 7.2 KG but less than 9.6 KG of Methyl Ethyl Ketone; At least 60 G but less than 80 G of Potassium Permanganate; At least 7.8 KG but less than 10.4 KG of Toluene.	
(10) List I Chemicals	Level 12
Less than 2.7 KG of Anthranilic Acid; Less than 3.6 G of Benzaldehyde; Less than 80 G of Benzyl Cyanide; Less than 800 MG of Ergonovine; Less than 1.6 G of Ergotamine; Less than 80 G of Ethylamine; Less than 8.8 G of Hydriodic Acid; Less than 1.44 KG of Isosafrole; Less than 800 MG of Methylamine; Less than 3.6 KG of N-Acetylanthranilic Acid; Less than 2.25 KG of N-Methylephedrine; Less than 2.25 KG of N-Methylpseudoephedrine; Less than 2.5 G of Nitroethane; Less than 40 G of Norpseudoephedrine; Less than 80 G of Phenylacetic Acid; Less than 40 G of Piperidine; Less than 1.44 KG of Piperonal; Less than 7.2 G of Propionic Anhydride; Less than 1.44 KG of Safrole; Less than 1.8 KG of 3,4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals	
Less than 66 G of Acetic Anhydride; Less than 7.05 KG of Acetone; Less than 120 G of Benzyl Chloride; Less than 6.45 KG of Ethyl Ether; Less than 7.2 KG of Methyl Ethyl Ketone; Less than 60 G of Potassium Permanganate; Less than 7.8 KG of Toluene.	

* **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.

(B) To calculate the base offense level in an offense that involves two or more chemicals each of which is set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) aggregate the quantities of all such chemicals, and (ii) determine the base offense level corresponding to the aggregate quantity.

(C) In a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.''.

The commentary to § 2D1.11 captioned ''Application Notes'' is amended by striking Note 4 in its entirety and inserting the following:

''4. Cases Involving Multiple Chemicals.—

(A) Determining the Base Offense Level for Two or More Chemicals.—Except as provided in subdivision (B), if the offense 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.

Example: The defendant was in possession of five kilograms of ephedrine and 300 grams of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. The base offense level for each chemical is calculated separately and the chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of level 38; 300 grams of hydriodic acid result in a base offense level of level 26. In this case, the base offense level would be level 38.

(B) Determining the Base Offense Level for Offenses involving Ephedrine, Pseudoephedrine, or Phenylpropanolamine.—If the offense involves two or more chemicals each of which is set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) aggregate the quantities of all such chemicals, and (ii) determine the base offense level corresponding to the aggregate quantity.

Example: The defendant was in possession of 80 grams of ephedrine and 50 grams of phenylpropanolamine, an aggregate quantity of 130 grams of such chemicals. The base offense level corresponding to that aggregate quantity is level 32.

(C) Upward Departure.—In a case involving two or more chemicals used to manufacture different controlled substances, or to manufacture one controlled substance by different manufacturing processes, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense.''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended by striking Notes 5 and 6 in their entirety; and by redesignating Notes 7 and 8 as Notes 5 and 6, respectively.

The Commentary to § 2D1.11 captioned ''Background'' is amended in the first sentence by inserting ''(including ephedrine, pseudoephedrine, and phenylpropanolamine)'' after ''list I chemicals''.

The Commentary to 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the ''Drug Equivalency Tables'' by inserting after the subdivision captioned ''Schedule V Substances * * *'' the following new subdivision:

''List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)* * *

1 gm of Ephedrine = 10 kg of marihuana
1 gm of Phenylpropanolamine = 10 kg of marihuana
1 gm of Pseudoephedrine = 10 kg of marihuana

* * * Provided, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.''.

Reason for Amendment: This amendment is in response to the three-part directive in section 3651 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310 (the ''Act''), regarding enhanced punishment for trafficking in List I chemicals. That section requires the Commission to promulgate an amendment implementing the directive under emergency amendment authority.

First, this amendment provides a new chemical quantity table specifically for ephedrine, pseudoephedrine, and phenylpropanolamine (PPA). The table ties the base offense levels for these chemicals to the base offense levels for methamphetamine (actual) set forth in § 2D1.1, assuming a 50 percent actual yield of the controlled substance from the chemicals. (Methamphetamine (actual) is used rather than methamphetamine mixture because ephedrine, pseudoephedrine, and PPA produce methamphetamine (actual)). This yield is based on information provided by the Drug Enforcement Administration (DEA) that the typical yield of these substances for clandestine laboratories is 50 to 75 percent.

This new chemical quantity table has a maximum base offense level of level 38 (as opposed to a maximum base offense level of level 30 for all other precursor chemicals). Providing a maximum base offense level of the level 38 complies with the directive to establish penalties for these precursors that ''correspond to the quantity of controlled substance that could have reasonably been manufactured using the quantity of ephedrine, phenylpropanolamine, or pseudoephedrine possessed or distributed.'' Additionally, this adjustment will have an impact on the relationship between §§ 2D1.1 and 2D1.11 by eliminating the six-level distinction that currently exists between offenses that involve intent to manufacture methamphetamine and offenses that involve an attempt to manufacture methamphetamine, at least for offenses involving ephedrine, pseudoephedrine, and PPA.

This amendment eliminates the Ephedrine Equivalency Table in § 2D1.11 and, in its place, provides an instruction for the court to determine the base offense level in cases involving multiple precursors (other than ephedrine, pseudoephedrine, or PPA) by using the quantity of the single chemical resulting in the greatest offense level. An upward departure is provided for cases in which the offense level does not adequately address the seriousness of the offense.

However, this amendment provides an exception to the rule for offenses that involve a combination of ephedrine, pseudoephedrine, or PPA because these chemicals often are used in the same manufacturing process. In a case that involves two or more of these chemicals, the base offense level will be determined using the total quantity of these chemicals involved. The purpose of this exception is twofold: (1) Any of the three primary precursors in the same table can be combined without difficulty; and (2) studies conducted by the DEA indicate that because the manufacturing process for amphetamine and methamphetamine is identical, there are cases in which the different precursors are included in the same batch of drugs. If the chemical is PPA, amphetamine results; and if the chemical is ephedrine, methamphetamine results.

Second, the amendment adds to the Drug Equivalency Tables in § 2D1.1 a conversion table for these precursor chemicals, providing for a 50 percent

conversion ratio. This is based on data from the DEA that the actual yield from ephedrine, pseudoephedrine, or PPA typically is in the range of 50 to 75 percent. The purpose of this part of the amendment is to achieve the same punishment level (as is achieved by the first part of this amendment) for an offense involving any of these precursor chemicals when such offense involved the manufacturer of methamphetamine and, as a result, is sentenced under § 2D1.1 pursuant to the cross reference in § a2D1.11.

Third, this amendment increases the base offense level for Benzaldehyde, Hydriodic Acid, Methylamine, Nitroethane, and Norpseudoesphedrine by re-calibrating these levels to the appropriate quantity of methamphetamine (actual) that could be produced assuming a 50 percent yield of chemical to drug and retaining a cap at level 30. Previously, these chemicals had been linked to methamphetamine (mixture) penalty levels. Based on a study conducted by the DEA, ephedrine and pseudoephedrine are the primary precursors used to make methamphetamine in the United States. Phenylproponolamine is the primary precursor used to make amphetamine. Unlike the five additional List I chemicals, the chemical structures of ephedrine, pseudoephedrine, and PPA are so similar to the resulting drug (*i.e.,* methamphetamine or amphetamine) that the manufacture of methamphetamine or amphetamine from ephedrine, pseudoephedrine, or PPA is a very simple one-step synthesis which anyone can perform using a variety of chemical reagents. The manufacture of methamphetamine or amphetamine from the five additional List I chemicals is a more complex process which requires a heightened level of expertise.

4. *Amendment:* The Commentary to § 2G1.1 captioned ''Statutory Provisions'' is amended by inserting ''1591,'' before ''2421''.

The Commentary to § 2G1.1 captioned ''Application Notes'' is amended in Note 2 in the forth sentence by adding ''(B)'' after ''purposes of subsection (b)(1)''.

The Commentary to § 2G1.1 captioned ''Application Notes'' is amended by adding at the end the following:

''12. Upward Departure Provisions.—An upward departure may be warranted in either of the following circumstances:

(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.''.

The Commentary to § 2G1.1 captioned ''Background'' is amended by adding at the end the following paragraph:

''This guideline also covers offenses under section 1591 of title 18, United States Code. These offenses involve recruiting or transporting a person in interstate commerce knowing either that (1) force, fraud, or coercion will be used to cause the person to engage in a commercial sex act; or (2) the person (A) had not attained the age of 18 years; and (B) will be caused to engage in a commercial sex act.''.

The Commentary to § 2G2.1 captioned ''Statutory Provisions'' is amended by inserting ''1591,'' before ''2251(a)''.

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended by adding at the end the following:

''6. Upward Departure Provisions.—An upward departure may be warranted in either of the following circumstances:

(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.''.

Section 2H4.1 is amended by striking subsection (a) in its entirety and inserting the following:

''(a) Base Offense Level (Apply the greater):

(1) 22; or

(2) 18, if the defendant was convicted of an offense under 18 U.S.C. 1592.''.

Section 2H4.1(b) is amended by striking subdivision (2) in its entirety and inserting the following:

''(2) If (A) a dangerous weapon was used, increase by 4 levels; or (B) a dangerous weapon was brandished, or the use of a dangerous weapon was threatened, increase by 2 levels.''.

The Commentary to § 2H4.1 captioned ''Statutory Provisions'' is amended by striking ''1588'' and inserting ''1590, 1592''.

The Commentary to § 2H4.1 captioned ''Application Notes'' is amended in Note 1 in the second paragraph by inserting ''other'' after ''that a firearm or''; and by adding after ''otherwise used.'' the following:

'' 'The use of a dangerous weapon was threatened' means that the use of a dangerous weapon was threatened regardless of whether a dangerous weapon was present.''.

Chapter Two, Part H, is amended in Subpart 4 by adding at the end the following:

''§ 2H4.2. Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense involved (i) serious bodily injury, increase by 4 levels; or (ii) bodily injury, increase by 2 levels.

(2) If the defendant committed any part of the instant offense subsequent to sustaining a civil or administrative adjudication for similar misconduct, increase by 2 levels.

Commentary

Statutory Provision: 29 U.S.C. 1851.

Application Notes

1. Definitions.—For purposes of subsection (b)(1), 'bodily injury' and 'serious bodily injury' have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

2. Application of Subsection (b)(2).—Section 1851 of title 29, United States Code, covers a wide range of conduct. Accordingly, the enhancement in subsection (b)(2) applies only if the instant offense is similar to previous misconduct that resulted in a civil or administrative adjudication under the provisions of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. § 1801 et. seq.).''.

Section 5E1.1(a)(1) is amended by inserting ''§ 1593,'' after ''18 U.S.C.''.

The Commentary to § 5E1.1 captioned ''Background'' is amended in the first paragraph by inserting ''§ 1593,'' after ''18 U.S.C.§§''.

Appendix A (Statutory Index) is amended in the line referenced to ''18 U.S.C. § 241'' by inserting '', 2H4.1'' after ''2H2.1''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''18 U.S.C. 1588'' the following new lines:

18 U.S.C. 1590 2H4.1
18 U.S.C. 1591 2G1.1, 2G2.1
18 U.S.C. 1592 2H4.1''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''29 U.S.C. 1141'' the following:

''29 U.S.C. 1851 2H4.2''.

Reason for Amendment: In promulgating this amendment, the Commission is cognizant of the extraordinarily serious nature of offenses that involve trafficking in human lives. This amendment is in response to the directive found at section 112(b) of the Victims of trafficking and Violence Protection Act of 2000 (the ''Act''). Pub. L. 106–386. The Commission expects to consider further revisions and additions to the specific offense characteristics and punishment levels for these offenses, such as the possibility of providing an alternative base offense level in § 2G1.1

(Promoting Prostitution or Prohibited Sexual Conduct) for convictions under 18 U.S.C. 1591 involving victims under the age of 14 years.

The directive confers emergency authority on the Commission to amend the federal sentencing guidelines to reflect changes to 18 U.S.C. 1581(a) (Peonage), 1583 (Enticement into Slavery), and 1584 (Sale into Involuntary Servitude). The Commission also is directed to consider how to address four new statutes: 18 U.S.C. 1589 (Forced Labor); 1590 (Trafficking with Respect to Peonage, Involuntary Servitude or Forced Labor); 1591 (Sex Trafficking of Children by Force, Fraud or Coercion); and 1592 (Unlawful Conduct with Respect to Documents in Furtherance of Peonage, Involuntary Servitude or Forced Labor).

Specifically, the Commission is directed to ''review and, if appropriate, amend the sentencing guidelines applicable to * * * the trafficking of persons including * * * peonage, involuntary servitude, slave trade offenses, and possession, transfer or sale of false immigration documents in furtherance of trafficking, and the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act.''

The Commission further is directed to ''take all appropriate measures to ensure that these sentencing guidelines . . . are sufficiently stringent to deter and adequately reflect the heinous nature of these offenses.'' The Commission also is directed to ''consider providing sentencing enhancements'' in cases which involve: (1) A large number of victims; (2) a pattern of continued and flagrant violations; (3) the use or threatened use of a dangerous weapon; or (4) the death or bodily injury of any person.

To address this multi-faceted directive, this amendment makes changes to several existing guidelines and creates a new guideline for criminal violations of the Migrant and Seasonal Agricultural Worker Protection Act. Although the directive instructs the Commission to amend the guidelines applicable to the Fair Labor Standards Act (29 U.S.C. 201 et. seq.), a criminal violation of the Fair Labor Standards Act is only a Class B misdemeanor. *See* 29 U.S.C. 216. Thus, the guidelines are not applicable to those offenses.

The amendment references the new offense at 18 U.S.C. 1591 to § 2G1.1. Section 1591 punishes a defendant who participates in the transporting or harboring of a person, or who benefits from participating in such a venture, with the knowledge that force, fraud, or coercion will be used to cause that person to engage in a commercial sex act or with knowledge that the person is not 18 years old and will be forced to engage in a commercial sex act. Despite the statute's inclusion in a chapter of title 18 devoted mainly to peonage offenses, section 1591 offenses are more analogous to the offenses referenced to the prostitution guideline.

Section 1591 cases alternatively have been referred in Appendix A to § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production). This has been done in anticipation that some portion of section 1591 cases will involve children being forced or coerced to engage in commercial sex acts for the purpose of producing pornography. Such offenses, as recognized by the higher base offense level at § 2G2.1, are more serious because they both involve specific harm to an individual victim and further an additional criminal purpose, namely, commercial pornography.

The amendment maintains the view that § 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) continues to be an appropriate tool for determining sentences for violations of 18 U.S.C. 1581, 1583, and 1584. Section 2H4.1 also is designed to cover offenses under three new statutes, 18 U.S.C. 1589, 1590, and 1592. Section 1589 punishes defendants who provide or obtain the labor or services of another by the use of threats of serious harm or physical restraint against a person, or by a scheme or plan intended to make the person believe that if he or she did not perform the labor or services, he or she would suffer physical restraint or serious harm. This statute also applies to defendants who provide or obtain labor or services of another by abusing or threatening abuse of the law or the legal process. *See* 18 U.S.C. 1589.

Section 1590 punishes defendants who harbor, transport, or are otherwise involved in obtaining, a person for labor or services. Section 1592 punishes a defendant who knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person in the course of a violation of § 1581 (peonage), § 1583 (enticement into slavery), § 1584 (sale into involuntary servitude), § 1589 (forced labor), § 1590 (trafficking with respect to these offenses), § 1591 (sex trafficking of children by force, fraud or coercion), § 1594(a) (attempts to violate these offenses). Section 1592 also punishes a defendant who, with intent to violate § 1581, § 1583, § 1584, § 1589, § 1590, or § 1591, knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person. These statutes prohibit the types of behaviors that have been traditionally sentenced under § 2H4.1.

The amendment provides an alternative, less punitive base offense level of level 18 for those who violate 18 U.S.C. 1592, an offense which limits participation in peonage cases to the destruction or wrongful confiscation of a passport or other immigration document. This alternative, lower base level reflects the lower statutory maximum sentence for § 1592 offenses, (*i.e.,* 5 years).

Section 2H4.1(b)(2) has been expanded to provide a 4-level increase if a dangerous weapon was used and a 2-level increase if a dangerous weapon was brandished or its use was threatened. Currently, only actual use of a dangerous weapon is covered. This change reflects the directive to consider an enhancement for the ''use or threatened use of a dangerous weapon.'' The commentary to § 2H4.1 is amended to clarify that the threatened use of a dangerous weapon applies regardless of whether a dangerous weapon was actually present.

The amendment also creates a new guideline, § 2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act), in response to the directive to amend the guidelines applicable to such offenses. These offenses, which have a statutory maximum sentence of one year imprisonment for first offenses and three years' imprisonment for subsequent offenses, currently are not referred to any specific guidelines. The amendment provides a base offense level of level 6 in recognition of the low statutory maximum sentences set for these cases by Congress. Further, these offenses typically involve violations of regulatory provisions. Setting the base offense level at level 6 provides consistency with guidelines for other regulatory offenses. *See, e.g.,* §§ 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) and 2N3.1 (Odometer Laws and Regulations). Subsections (b)(1), an enhancement for bodily injury, and (b)(2), an enhancement applicable to defendants who commit the instant offense after previously sustaining a civil penalty for similar misconduct, have been established to respond to the directive that the Commission consider sentencing enhancement for these

offense characteristics. This section addresses the Department of Justice's and the Department of Labor's concern regarding prior administrative and civil adjudications.

This amendment also addresses that portion of section 112 of the Act that amends chapter 77 of title 18, United States Code, to provide mandatory restitution for peonage and involuntary servitude offenses. The amendment amends § 5E1.1 (Restitution) to include a reference to 18 U.S.C. 1593 in the guideline provision regarding mandatory restitution.

By enactment of various sentencing enhancements and encouraged upward departures for areas of concern identified by Congress, the Commission has provided for more severe sentences for perpetrators of human trafficking offenses in keeping with the conclusion that the offenses covered by this amendment are both heinous in nature and being committed with rapidly increasing frequency.

(B) Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary, Effective November 1, 2001.

1. *Amendment:* The Commentary to § 1B1.2 captioned ''Application Notes'' is amended in Note 1 in the third sentence of the first paragraph by inserting ''(written or made orally on the record)'' after ''agreement''.

The Commentary to § 1B1.2 captioned ''Application Notes'' is amended in Note 1 by striking the first two sentences of the third paragraph and inserting:

''As set forth in the first paragraph of this note, an exception to this general rule is that if a plea agreement (written or made orally on the record) contains a stipulation that establishes a more serious offense than the offense of conviction, the guideline section applicable to the stipulated offense is to be used. A factual statement or a stipulation contained in a plea agreement (written or made orally on the record) is a stipulation for purposes of subsection (a) only if both the defendant and the government explicitly agree that the factual statement or stipulation is a stipulation for such purposes. However, a factual statement or stipulation made after the plea agreement has been entered, or after any modification to the plea agreement has been made, is not a stipulation for purposes of subsection (a).''.

The Commentary to § 1B1.2 captioned ''Application Notes'' is amended in Note 1 in the third paragraph by striking ''may be imposed'' and inserting ''shall be imposed''.

The Commentary to § 1B1.2 captioned ''Application Notes'' is amended in Note 1 in the second sentence of the fourth paragraph by striking ''cases where'' and inserting ''a case in which''.

Reason for Amendment: This amendment addresses the circuit conflict regarding whether admissions made by a defendant during a guilty plea hearing, without more, can be considered stipulations for purposes of subsection (a) of § 1B1.2 (Application Instructions). *Compare, e.g., United States* v. *Nathan*, 188 F.3d 190, 201 (3d Cir. 1999) (statement made by defendants during the factual-basis hearing for a plea agreement do not constitute stipulations for the purpose of this enhancement; a statement is a stipulation only if it is part of a defendant's written plea agreement or if both the government and the defendant explicitly agree at a factual-basis hearing that the facts being placed on the record are stipulations that might subject the defendant to § 1B1.2(a)); *United States* v. *Saaverda*, 148 F.3d 1311 (11th Cir. 1998) (same); *United States* v. *McCall*, 915 F.2d 811 (2d Cir. 1990) (same); *United States* v. *Gardner*, 940 F.2d (10th Cir. 1991) (requiring a ''knowing agreement by the defendant, as part of a plea bargain, that facts supporting a more serious offense occurred and could be presented to the court''), and *United States* v. *Rutter*, 897 F.2d 1558, 1561 (10th Cir. 1990) (once the government agrees to a plea bargain without extracting an admission, facts admitted by the defendant can be considered only as relevant conduct in determining appropriate guideline range, not as stipulations under § 1B1.2(a)), *with United States* v. *Loos*, 165 F.3d 504, 508 (7th Cir. 1998) (the objective behind § 1B1.2(a) is best answered by interpreting ''stipulations'' to mean any acknowledgment by the defendant that the defendant committed the acts that justify use of the more serious guideline, not in the formal agreement); and *United States* v. *Domino*, 62 F.3d 716 (5th Cir. 1995) (same).

This amendment represents a narrow approach to the majority view that a factual statement made by the defendant during the plea colloquy must be made as part of the plea agreement in order to be considered a stipulation for purposes of § 1B1.2(a). This approach lessens the possibility that the plea agreement will be modified during the course of the plea proceeding without providing the parties, especially the defendant, with notice of the defendant's potential sentencing range.

2. *Amendment*: The Commentary to § 2A2.2 captioned ''Application Notes'' is amended by striking Notes 1 through 3 and inserting the following:

''1. Definitions.—For purposes of guideline:

'Aggravated assault' means a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon; (B) serious bodily injury; or (C) an intent to commit another felony.

'Brandished,' 'bodily injury,' 'firearm;' 'otherwise used,' 'permanent or life threatening bodily injury,' and 'serious bodily injury,' have the meaning given those terms in § 1B1.1 (Application Instructions), Application Note 1.

'Dangerous weapon' has the meaning given that term in § 1B.1, Application Note 1, and includes any instrument that is not ordinarily used as a weapon (e.g., a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury.

Application of Subsection (b)(2).—In a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).

3. More than Minimal Planning.—For purposes of subsection (b)(1), 'more than minimal planning' means more planning than is typical for commission of the offense in a simple form. 'More than minimal planning' also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which § 3C1.1 (Obstructing or Impeding the Administration of Justice) applies. For example, waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. By contrast, luring the victim to a specific location or wearing a ski mask to prevent identification would constitute more than minimal planning.''.

The Commentary to § 2A2.2 captioned ''Background'' is amended by striking the text of the background and inserting the following:

''This guideline covers felonious assaults that are more serious than minor assaults because of the presence of an aggravating factor, i.e., serious bodily injury, the involvement of a dangerous weapon with intent to cause bodily injury, or the intent to commit another felony. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows § 2A2.1 (Assault with Intent to Commit Murder, Attempted Murder). This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by § 2A2.1. Assault with intent to commit rape is covered by § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse.)

An assault that involves the presence of a dangerous weapon is aggravated in form when the presence of the dangerous weapon is coupled with the intent to cause bodily injury. In such a case, the base offense level and the weapon enhancement in subsection (b)(2) take into account different aspects of the offense, even if application of the base offense level and the weapon enhancement is based on the same conduct.''.

Reason for Amendment: This amendment responds to a circuit conflict regarding whether the four-level enhancement in subsection (b)(2)(B) of § 2A2.2 (Aggravated Assault) for use of a dangerous weapon during an aggravated assault is impermissible double counting. *Compare United States* v. *Williams,* 954 F.2d 204, 205–08 (4th circ. 1992) (applying the dangerous weapon enhancement under § 2A2.2(b)(2)(B) for defendant's use of his chair as a dangerous weapon did not constitute impermissible double counting even though that conduct increased the defendant's offense level twice: first, by triggering the application of the aggravated assault guideline, and second, as the basis for the four-level enhancement for use for a dangerous weapon), *with United States* v. *Hudson*, 972 F.2d 504, 506–07 (2d Cir. 1992) (in a case in which the use of an automobile caused the crime to be classified as an aggravated assault, the court may not enhance the base offense level under § 2A2.2(b) for use of the same, non-inherently dangerous weapon).

This amendment addresses the circuit conflict by providing in the aggravated assault guideline that (1) Both the base offense level of level 15 and the weapon use enhancement in subsection (b)(2) shall apply to aggravated assaults that involve a dangerous weapon with intent to cause bodily harm; and (2) an instrument, such as a car or chair, that ordinarily is not used as a weapon may qualify as a dangerous weapon for purposes of the use of the aggravated assault guideline and the application of subsection (b)(2) when the defendant involves it in the offense with the intent to cause bodily harm.

3. *Amendment:* The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by striking Note 5 and Note 7; and by redesignating Note 6 as Note 5.

Section 2A3.2(a) is amended by striking subdivisions (1) and (2) and inserting the following:

''(1) 24, if the offense involved (A) a violation of chapter 117 of title 18, United States Code; and (B)(i) the commission of a sexual act; or (ii) sexual contact;

(2) 21, if the offense (A) involved a violation of chapter 117 of title 18, United States Code; but (B) did not involve (i) the commission of a sexual act; or (ii) sexual contact; or

(3) 18, otherwise.''.

Section 2A3.2(b) is amended by striking subdivision (4) and inserting the following:

''(4) If (A) subsection (a)(1) applies; and (B) none of subsections (b)(1) through (b)(3) applies, decrease by 6 levels.''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 1 by striking ''For purposes of this guideline—'' and inserting the following: ''Definitions.—For purposes of this guideline:''; and by inserting before '' 'Victim' means'' the following new paragraphs:

'' 'Sexual act' has the meaning given that term in 18 U.S.C. 2246(2).

'Sexual contact' has the meaning given that term in 18 U.S.C. 2246(3).''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by striking Note 2 and Note 8; by redesignating Notes 3 through 7 as Notes 2 through 6, respectively; and by inserting after Note 6, as redesignated by this amendment, the following:

''7. Upward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 2, as redesignated by this amendment, by inserting ''Custody, Care, and Supervisory Control Enhancement.—'' before ''Subsection''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 3, as redesignated by this amendment, by inserting ''Abuse of Position of Trust.—'' before ''If the''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 4, as redesignated by this amendment, by inserting ''Misrepresentation of Identity.—'' before ''The enhancement''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 5, as redesignated by this amendment, by inserting ''Use of Computer or Internet-Access Device.—'' before ''Subsection (b)(3) provides''.

The Commentary to § 2A3.2 captioned ''Applications Notes'' is amended in Note 6, as redesignated by this amendment, by inserting ''Cross Reference.—'' before ''Subsection (c)(1)''.

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended by striking Note 4.

Section 2A3.4(b) is amended by adding at the end the following:

''(6) If the offense involved a violation of chapter 117 of title 18, United States Code, increase by 3 levels.''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended by striking Note 8.

Section 3D1.2(d) is amended in the second paragraph by inserting after ''§§ 2E4.1, 2E5.1;'' the following new line: ''§§ 2G2.2, 2G2.4;''.

Chapter Four, Part B is amended by adding at the end the following:

''§ 4B1.5. Repeat and Dangerous Sex Offender Against Minors

(a) In any case in which the defendant's instant offense of conviction is a covered sex crime, § 4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction:

(1) The offense level shall be the greater of:

(A) the offense level determined under Chapters Two and Three; or

(B) the offense level from the table below decreased by the number of levels corresponding to any applicable adjustment from § 3E1.1 (Acceptance of Responsibility):

Offense statutory maximum	Offense level
(i) Life	37
(ii) 25 years or more	34
(iii) 20 years or more, but less than 25 years	32
(iv) 15 years or more, but less than 20 years	29
(v) 10 years or more, but less than 15 years	24
(vi) 5 years or more, but less than 10 years	17
(vii) More than 1 year, but less than 5 years	12

(2) The criminal history category shall be the greater of: (A) the criminal history category determined under Chapter Four, Part A (Criminal History); or (B) criminal history Category V.

(b) In any case in which the defendant's instant offense of conviction is a covered sex crime, neither § 4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a patter of activity involving prohibited sexual conduct:

(1) The offense level shall be 5 plus the offense level determined under

Chapters Two and Three. However, if the resulting offense level is less than level 22, the offense level shall be level 22, decreased by the number of levels corresponding to any applicable adjustment from § 3E1.1.

(2) The criminal history category shall be the criminal history category determined under Chapter Four, Part A.

Commentary

Application Notes

1. Definitions.—For purposes of this guideline:

'Minor' means an individual who had not attained the age of 18 years.

'Minor victim' includes (A) an undercover law enforcement officer who represented to the defendant that the officer was a minor; or (B) any minor the officer represented to the defendant would be involved in the prohibited sexual conduct.

2. Covered Sex Crime as Instant Offense of Conviction.—For purposes of this guideline, the instant offense of conviction must be a covered sex crime, i.e.: (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iii) of this note.

3. Application of Subsection (a).—

(A) Definitions.—For purposes of subsection (a):

(i) 'Offense statutory maximum' means the maximum term of imprisonment authorized for the instant offense of conviction that is a covered sex crime, including any increase in that maximum term under a sentencing enhancement provision (such as a sentencing enhancement provision contained in 18 U.S.C. 2247(a) or 2426(a)) that applies to that covered sex crime because of the defendant's prior criminal record.

(ii) 'Sex offense conviction' (I) means any offense described in 18 U.S.C. 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor; and (II) does not include trafficking in, receipt of, or possession of, child pornography. 'Child pornography' has the meaning given that term in 18 U.S.C. 2256(8).

(B) Determination of Offense Statutory Maximum in the Case of Multiple Counts of Conviction.—In a case in which more than one count of the instant offense of conviction is a felony that is a covered sex crime, the court shall use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (a).

4. Application of Subsection (b).—

(A) Definition.—For purposes of subsection (b), 'prohibited sexual conduct' (i) means any offense described in 18 U.S.C. 2426(b)(1)(A) or (B); (ii) includes the production of child pornography; (iii) includes trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography; and (iv) does not include receipt or possession of child pornography. 'Child pornography' has the meaning given that term in 18 U.S.C. 2256(8).

(B) Determination of Pattern of Activity.—

(i) In General.—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if—

(I) on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor; and

(II) there were at least two minor victims of the prohibited sexual conduct.

For example, the defendant engaged in a pattern of activity involving prohibited sexual conduct if there were two separate occasions of prohibited sexual conduct and each such occasion involved a different minor, or if there were two separate occasions of prohibited sexual conduct involving the same two minors.

(ii) Occasion of Prohibited Sexual Conduct.—An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion.

5. Treatment and Monitoring.—

(A) Recommended Maximum Term of Supervised Release.—The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.

(B) Recommended Conditions of Probation and Supervised Release.—Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.

Background: The guideline is intended to provide lengthy incarceration for offenders who commit sex offenses against minors and who present a continuing danger to the public. It applies to offenders whose instant offense of conviction is a sex offense committed against a minor victim. The relevant criminal provisions provide for increased statutory maximum penalties for repeat sex offenders and make those increased statutory maximum penalties available if the defendant previously was convicted of any of several federal and state sex offenses (see 18 U.S.C. 2247, 2426). In addition, section 632 of Pub. L. 102–141 and section 505 of Pub. L. 105–314 directed the Commission to ensure lengthy incarceration for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.''.

Section 5B1.3(d) is amended by adding at the end the following:

''(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in § 5D1.2 (Term of Supervised Release)—a condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.''.

Section 5D1.2 is amended by adding after subsection (b) the following:

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

The Commentary to § 5D1.2 captioned ''Application Notes'' is amended by redesignating Notes 1 and 2 as Notes 2 and 3, respectively; by inserting before Note 2, as redesignated by this amendment, the following:

''1. Definition.—For purposes of this guideline, 'sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; or (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iii) of this note.''; and in Note 2, as redesignated by this amendment, by inserting ''Safety Valve Cases.—'' before ''A defendant''; and in Note 3, as redesignated by this amendment, by inserting ''Substantial Assistance Cases.—'' before ''Upon motion''.

Section 5D1.3(d) is amended by inserting at the end the following:

''(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in § 5D1.2

(Term of Supervised Release)—a condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.''.

Reason for Amendment: This is a three-part amendment promulgated primarily in response to the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314 (the ''Act''), which contains several directives to the Commission. In furtherance of the directives, the Commission initiated a comprehensive examination of the guidelines under which most sex crimes are sentenced. Amendment 592, effective November 1, 2000, addressed a number of these directives. (See USSC Guidelines Manual 2000 Supplement to Appendix C, Amendment 592.)

The first part of the amendment addresses the Act's directive to increase penalties in any case in which the defendant engaged in a pattern of activity of sexual abuse or sexual exploitation of a minor. In response to this directive, the amendment provides a new Chapter Four (Criminal History and Criminal Livelihood) guideline, § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), that focuses on repeat child sex offenders. This new guideline works in a coordinated manner with § 4B1.1 (Career Offender) and creates a tiered approach to punishing repeat child sex offenders.

The first tier, in § 4B1.5(a), aims to incapacitate repeat child sex offenders who have an instant offense of conviction of sexual abuse of a minor and a prior felony conviction for sexual abuse of a minor (but to whom § 4B1.1 does not apply). This provision subjects a defendant to the greater of the offense level determined under Chapters Two and Three or the offense level obtained from a table that, like the table in § 4B1.1, bases the applicable offense level on the statutory maximum for the offense. In addition, the defendant is subject to an enhanced criminal history category of not less than Category V, similar to § 4B1.1 (which provides for Category VI). By statute, defendants convicted of a federal sex offense are subject to twice the statutory maximum penalty for a subsequent sex offense conviction. This guideline provision effectuates the Commission's and Congress's intent to punish repeat child sex offenders severely.

The second tier, in § 4B1.5(b), provides a five-level increase in the offense level and a minimum offense level of level 22 for defendants who are not subject to either § 4B1.1 or to § 4B1.5(a) and who have engaged in a pattern of activity involving prohibited sexual conduct with minors. This part of the guideline does not rely on prior convictions to increase the penalty for those who have a pattern of activity of sexual abuse or exploitation of a minor. The pattern of activity enhancement requires that the defendant engaged in prohibited sexual conduct on at least two separate occasions and that at least two minors were victims of the sexual conduct. This provision is similar to the existing five-level pattern of activity enhancement in subsection (b)(4) of § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) and effectuates the Commission's and Congress's intent to punish severely offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.

Conforming amendments are made to the criminal sexual abuse guidelines in Chapter Two, Part A, Subpart 3 to delete the upward departure provisions for prior sentences for similar conduct; that factor is now taken into account in the new guideline.

In addition to creating a new guideline, this part of the amendment also modifies § 5D1.2 (Term of Supervised Release) to provide that the recommended term of supervised release for a defendant convicted of a sex crime is the maximum term authorized by statute. Amendments to § § 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) effectuate the Commission's intent that offenders who commit sex crimes receive appropriate treatment and monitoring.

The second part of the amendment addresses a circuit conflict regarding whether multiple counts of possession, receipt, or transportation of images containing child pornography should be grouped together pursuant to subsection (a) or (b) of § 3D1.2 (Groups of Closely Related Counts). Resolution of the conflict depends, in part, on determining who is the victim of the offense: the child depicted in the pornography images or society as a whole. Six circuits have held that the child depicted is the victim, and, therefore, that the counts are not grouped. *See United States* v. *Norris*, 159 F.3d 926 (5th Cir. 1998); *United States* v. *Hibbler*, 159 F.3d 233 (6th Cir. 1998); *United States* v. *Ketcham*, 80 F.3d 789 (3d Cir. 1996); *United States* v. *Rugh*, 968 F.2d 750 (8th Cir. 1992); *United States* v. *Boos*, 127 F.3d 1207 (9th Cir. 1997), *cert. denied*, 522 U.S. 1066 (1998); and *United States* v. *Tillmon*, 195 F.3d 640 (11th Cir. 1999). In contrast, one circuit has held that society as a whole is the victim of these types of offenses, and, therefore, that one count of interstate transportation of child pornography does not group with a count of interstate transportation of a minor with intent to engage in illegal sexual activity in a case in which the child portrayed in the pornography was the same child transported. *See United States* v. *Toler*, 901 F.2d 399 (4th Cir. 1990).

In addressing the circuit conflict, the Commission adopted a position that provides for grouping of multiple counts of child pornography distribution, receipt, and possession pursuant to § 3D1.2(d). Grouping multiple counts of these offenses pursuant to § 3D1.2(d) is appropriate because these offenses typically are continuous and ongoing enterprises. This grouping provision does not require the determination of whether counts involve the same victim in order to calculate a combined adjusted offense level for multiple counts of conviction which, particularly in these kinds of cases, could be complex and time consuming. Consistent with the provisions of subsection (a)(2) of § 1B1.3 (Relevant Conduct), this approach provides that additional images of child pornography (often involved in the case, but outside of the offense of conviction) shall be considered by the court in determining the appropriate sentence for the defendant if the conduct related to those images is part of the same course of conduct or common scheme or plan.

The third part of the amendment makes several modifications to § 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts). The amendment responds to the directive in the Act to provide an enhancement for offenses under chapter 117 of title 18, United States Code, involving the transportation of minors for prostitution or prohibited sexual conduct. The amendment increases the offense levels in § 2A3.2 and in § 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact). The Act focuses on those individuals who travel to meet or transport minors for illegal sexual activity by providing increased statutory maximum penalties for those individuals. In response, the increase in penalties in these guidelines were geared toward those individuals. Specifically, the amendment distinguishes between chapter 117 offenses that involve the commission of a sexual act or sexual contact and those offenses (e.g., sting cases) that do not, by

providing an alternative base offense level in § 2A3.2 for chapter 117 offenses that also involve the commission of a sexual act or sexual contact that is three levels greater (i.e., level 24) than the base offense level applicable to chapter 117 offenses that do not involve a sexual act or sexual contact.

The amendment provides a three-level increase in the base offense level for offenses sentenced under § 2A3.2, such that the base offense level (1) for statutory rape unaccompanied by aggravating conduct is increased from level 15 to level 18; (2) for a chapter 117 offense (unaccompanied by a sexual act or sexual contact) is increased from level 18 to level 21; and (3) for a chapter 117 offense (accompanied by a sexual act or sexual contact) results in a base offense level of level 24. The amendment reflects the seriousness accorded criminal sexual abuse offenses by Congress, which provided for statutory maximum penalties of 15 years' imprisonment (or 30 years' imprisonment with a prior conviction for a sex crime). A defendant who transmits child pornography to a minor as a means of enticing the minor to engage in illegal sexual activity will receive a sentence increase when that defendant subsequently travels across state lines to engage in illegal sexual activity with that minor. Therefore, this increase also maintains the proportionality between §§ 2A3.2 and 2G2.2.

The third part of the amendment also makes conforming changes to § 2A3.2 to ensure that some chapter 117 offenses that do not include aggravating conduct receive the offense level applicable to statutory rape in its basic form. Technical changes made by the amendment (such as the addition of headings and the reordering of applications notes) are not intended to have substantive effect.

4. *Amendment:* Section 2A6.2(a) is amended by striking ''14'' and inserting ''18''.

Section 2A6.2(c) is amended by striking subdivision (1) and inserting the following:

''(1) If the offense involved the commission of another criminal offense, apply the offense guideline from Chapter Two, Part A (Offenses Against the Person) most applicable to that other criminal offense, if the resulting offense level is greater than that determined above.''.

The Commentary to § 2A6.2 captioned ''Application Notes'' is amended in Note 1 by striking the 1-em dash and inserting a colon; and by striking the last paragraph and inserting the following:

'' 'Stalking means (A) traveling with the intent to kill, injure, harass, or intimidate another person and, in the course of, or as a result of, such travel, placing the person in reasonable fear of death or serious bodily injury to that person or an immediate family member of that person; or (B) using the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, that person or an immediate family member of that person. See 18 U.S.C. § 2261A. 'Immediate family member' (A) has the meaning given that term in 18 U.S.C. § 115(c)(2); and (B) includes a spouse or intimate partner. 'Course of conduct' and 'spouse or intimate partner' have the meaning given those terms in 18 U.S.C. § 2266(2) and (7), respectively.''.

The Commentary to § 1B1.5 captioned ''Application Notes'' is amended in Note 3 by inserting after the first sentence the following:

''Consistent with the provisions of § 1B1.3 (Relevant Conduct), such other offense includes conduct that may be a state or local offense and conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States.''.

Reason for Amendment: This amendment addresses section 1107 of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106–386 (the ''Act''). That section amends 18 U.S.C. 2261, 2261A, and 2262 to broaden the reach of those statutes to include international travel to stalk, commit domestic violence, or violate a protective order. Section 2261A also is amended to broaden the category of persons protected by this statute to include intimate partners of the person stalked. The Act also creates a new offense at section 2261A(2) that prohibits the use of the mail or any facility of interstate or foreign commerce to commit a stalking offense. Several technical changes were also made to these statutes.

The Act includes a directive to the Commission to amend the federal sentencing guidelines to reflect the changes made to 18 U.S.C. 2261, with specific consideration to be given to the following factors: (1) whether the guidelines relating to stalking offenses should be modified in light of the amendment made by this subsection; and (2) whether any changes the Commission may make to the guidelines pursuant to clause (1) should also be made with respect to offenses under chapter 110A of title 18, United States Code (staling and domestic violence offenses).

For several reasons, the amendment refers the new stalking by mail offense, like other stalking offenses, to § 2A6.2 (Stalking or Domestic Violence). First, the statutory penalties for stalking by mail are the same as the statutory penalties for other stalking offenses. Second, although there was some consideration to refer this new offense to § 2A6.1 (Threatening or Harassing Communications), stalking by mail offenses differ significantly from threatening communications in that the former require the defendant's intent to kill, or injure a person, or place a person in reasonable fear of death or serious bodily injury. Third, referencing stalking by mail offenses to § 2A6.1 could result in these offenses receiving higher penalties than other stalking offenses. For example, a defendant who writes a threatening letter, violates a protective order, and engages in some conduct evidencing an intent to carry out such threat, would receive an offense level of level 20 under § 2A6.1. A defendant who engages in stalking by mail, violates a protective order, and actually commits bodily injury on the person who is the subject of the protection order would have received, prior to this amendment, an offense level of level 18 under § 2A6.2. This amendment reflects the policy judgment that the second defendant should receive punishment equal to, or perhaps greater than, that received by the first defendant. Accordingly, because of concern for proportionality in sentencing stalking and domestic violence offenses relative to other crimes, such as threatening or harassing communications, this amendment increases the base offense level in § 2A6.2 from level 14 to level 18. Setting the base offense level at level 18 for stalking and domestic violence crimes ensures that these offenses are sentenced at or above the offense levels for offenses involving threatening and harassing communications.

The amendment also conforms the definition of ''stalking'' in Application Note 1 of § 2A6.2 to the statutory changes made by the Act. Additionally, the amendment modifies the language of subsection (c) in § 2A6.2 to clarify application of the cross reference. This change is consistent with the amendment to Application Note 3 of § 1B1.5 (Interpretation of References to Other Offense Guidelines), which also clarifies the operation of cross references generally.

These revisions are designed to clarify that, unless otherwise specified, cross references in Chapter Two (Offense

Conduct) are to be determined consistently with the provisions of § 1B1.3 (Relevant Conduct). Therefore, in a case in which the guideline includes a reference to use another guideline if the conduct involved another offense, the other offense includes conduct that may be a state or local offense and conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States.

5. *Amendment:* Chapter Two is amended by striking the heading to Part B, the heading to Subpart 1 of Part B, and the Introductory Commentary to such subpart and inserting the following:

''PART B—BASIC ECONOMIC OFFENSES

1. Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit

Introductory Commentary

These sections address basic forms of property offenses: theft, embezzlement, fraud, forgery, counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States), insider trading, transactions in stolen goods, and simple property damage or destruction. (Arson is dealt with separately in Chapter Two, Part K (Offenses Involving Public Safety)). These guidelines apply to offenses prosecuted under a wide variety of federal statutes, as well as offenses that arise under the Assimilative Crimes Act.''.

Chapter Two, Part B is amended by striking § 2B1.1, and its accompanying commentary, and inserting the following:

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

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
(A) $5,000 or less	no increase
(B) More than $5,000	add 2
(C) More than $10,000	add 4
(D) More than $30,000	add 6
(E) More than $70,000	add 8
(F) More than $120,000	add 10
(G) More than $200,000	add 12
(H) More than $400,000	add 14
(I) More than $1,000,000	add 16
(J) More than $2,500,000	add 18
(K) More than $7,000,000	add 20
(L) More than $20,000,000	add 22
(M) More than $50,000,000	add 24
(N) More than $100,000,000	add 26.

(2) (Apply the greater) If the offense—

(A) (i) involved more than 10, but less than 50, victims; or (ii) was committed through mass-marketing, increase by 2 levels; or

(B) involved 50 or more victims, increase by 4 levels.

(3) If the offense involved a theft from the person of another, increase by 2 levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.

(6) If the offense involved theft of, damage to, or destruction of, property from a national cemetery, increase by 2 levels.

(7) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(8) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(9) If the offense involved (A) the possession or use of any device-making equipment; (B) the production or trafficking of any unauthorized access device or counterfeit access device; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(10) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the offense level is less than level 14, increase to level 14.

(11) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(12) (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.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), § 2D2.1 (Unlawful Possession; Attempt or Conspiracy), § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply § 2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or

fraudulent statements or representations generally (e.g., 18 U.S.C. 1001, 1341, 1342, or 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(d) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. 1030(a)(4) or (5), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

Commentary

Statutory Provisions: 7 U.S.C. 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. 50, 77e, 77q, 77x, 78j, 78ff, 80b–6, 1644, 6821; 18 U.S.C. 38, 225, 285–289, 471–473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 1001–1008, 1010–1014, 1016–1022, 1025, 1026, 1028, 1029, 1030(a)(4)–(5), 1031, 1341–1344, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 2113(b), 2312–2317; 29 U.S.C. 501(c); 42 U.S.C. 1011; 49 U.S.C. 30170, 46317(a). For additional statutory provision(s) *see* Appendix A (Statutory Index).

Application Notes

1. Definitions.—For purposes of this guideline:

''Financial institution'' includes any institution described in 18 U.S.C. 20, 656, 657, 1005, 1006, 1007, or 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. ''Union or employee pension fund'' and ''any health, medical, or hospital insurance association,'' primarily include large pension funds that serve many persons (e.g., pension funds or large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

''Firearm'' and ''destructive device'' have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions).

''Foreign instrumentality'' and ''foreign agent'' have the meaning given those terms in 18 U.S.C. 1839(1) and (2), respectively.

''National cemetery'' means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

''Theft from the person of another'' means theft, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing and non-forcible purse-snatching, such as the theft of a purse from a shopping cart.

''Trade secret'' has the meaning given that term in 18 U.S.C. 1839(3).

2. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—''Actual loss'' means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss.—''Intended loss'' (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) Pecuniary Harm.—''Pecuniary harm'' means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, ''reasonably foreseeable pecuniary harm'' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(v) Rules of Construction in Certain Cases.—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(I) Product Substitution Cases.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(II) Procurement Fraud Cases.—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correct the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) Protected Computer Cases.—In the case of an offense involving unlawfully accessing, or exceeding authorized access to, a ''protected computer'' as defined in 18 U.S.C. 1030(e)(2), actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: reasonable costs to the victim of conducting a damage assessment, and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.

(B) Gain.—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

(C) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property unlawfully taken or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.

(ii) The cost of repairs to damaged property.

(iii) The approximate number of victims multiplied by the average loss to each victim.

(iv) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

(D) Exclusions from Loss.—Loss shall not include the following:

(i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.

(ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.

(E) Credits Against Loss.—Loss shall be reduced by the following:

(i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.

(ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

(F) Special Rules.—Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:

(i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this subdivision, 'counterfeit access device' and 'unauthorized access device' have the meaning given those terms in Application Note 7(A).

(ii) Government Benefits.—In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, loss is $50.

(iii) Davis-Bacon Act Violations.—In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. 276a, criminally prosecuted under 18 U.S.C. 1001), the value of benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.

(iv) Ponzi and Other Fraudulent Investment Schemes.—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in access of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).

(v) Certain Other Unlawful Misrepresentation Schemes.—In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.

(vi) Value of Controlled Substances.—In a case involving controlled substances, loss is the estimated street value of the controlled substances.

(3) Victim and Mass-Marketing Enhancement under Subsection (b)(2).—

(A) Definitions.—For purposes of subsection (b)(2):

(i) ''Mass-marketing'' means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (I) purchase goods or services; (II) participate in a contest or sweepstakes; or (III) invest for financial profit. ''Mass-marketing'' includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.

(ii) ''Victim'' means (I) any person who sustained any part of the actual loss determined under subsection (b)(1); or (II) any individual who sustained bodily injury as a result of the offense. ''Person'' includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

(B) Undelivered United States Mail.—

(i) In General.—In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, ''victim'' means any person (I) described in subdivision (A)(ii) of this note; or (II) who was the intended recipient, or addressee, of the undelivered United States mail.

(ii) Special Rule.—A case described in subdivision (B)(i) of this note that involved a Postal Service (I) relay box; (II) collection box; (III) delivery vehicle; or (IV) satchel or cart, shall be considered to have involved 50 or more victims.

(iii) Definition.—''Undelivered United States mail'' means mail that has not actually been received by the addressee or his agent (e.g., mail taken from the addressee's mail box).

(C) Vulnerable Victims.—If subsection (b)(2)(B) applies, an enhancement under § 3A1.1(b)(2) shall not apply.

4. Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4).—For purposes of subsection (b)(4), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:

(A) The regularity and sophistication of the defendant's activities.

(B) The value and size of the inventory of stolen property maintained by the defendant.

(C) The extent to which the defendant's activities encouraged or facilitated other crimes.

(D) The defendant's past activities involving stolen property.

5. Application of Subsection (b)(7).—

(A) In General.—The adjustments in subsection (b)(7) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.

(B) Misrepresentations Regarding Charitable and Other Institutions.—Subsection (b)(7)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant's personal gain).

Subsection (b)(7)(A) applies, for example, to the following:

(i) A defendant who solicited contributions for a non-existent famine relief organization.

(ii) A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.

(iii) A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant's personal benefit.

(C) Fraud in Contravention of Prior Judicial Order.—Subsection (b)(7)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in § 2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)).

(D) College Scholarship Fraud.—For purposes of subsection (b)(7)(D):

'Financial assistance' means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.

'Institution of higher education' has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. 1001).

(E) Non-Applicability of Enhancements.—

(i) Subsection (b)(7)(A).—If the conduct that forms the basis for an enhancement under subsection (b)(7)(A) is the only conduct that forms the basis for an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under § 3B1.3.

(ii) Subsection (b)(7)(B) and (C).—If the conduct that forms the basis for an enhancement under subsection (b)(7)(B) or (C) is the only conduct that forms the basis for an adjustment under § 3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under § 3C1.1.

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

(A) Definition of United States.—For purposes of subsection (b)(8)(B), 'United States' means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

(B) Sophisticated Means Enhancement.—For purposes of subsection (b)(8)(C), 'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

(C) Non-Applicability of Enhancement.—If the conduct that forms the basis for an enhancement under subsection (b)(8) is the only conduct that forms the basis for an adjustment under § 3C1.1, do not apply that adjustment under § 3C1.1.

7. Application of Subsection (b)(9).—

(A) Definitions.—For purposes of subsection (b)(9):

'Counterfeit access device' (i) has the meaning given that term in 18 U.S.C. 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service. 'Telecommunications service' has the meaning given that term in 19 U.S.C. 1029(e)(9).

'Device-making equipment' has the meaning given that term in 18 U.S.C. 1029(e)(6); and (ii) includes (I) any hardware or software that has been configured as described in 18 U.S.C. 1029(a)(9); and (II) a scanning receiver referred to in 18 U.S.C. 1029(a)(8). 'Scanning receiver' has the meaning given that term in 18 U.S.C. 1029(e)(8).

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

''Produce'' includes manufacture, design, alter, authenticate, duplicate, or assemble. ''Production'' includes manufacture, design, alteration, authentication, duplication, or assembly.

''Unauthorized access device'' has the meaning given that term in 18 U.S.C. 1029(e)(3).

Identification Documents.—Offenses involving identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply § 2L2.1 (Trafficking in a Document Relating to Naturalization) or § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.

(C) Application of Subsection (b)(9)(C)(i).—

(i) In General.—Subsection (b)(9)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

(ii) Examples.—Examples of conduct to which subsection (b)(9)(C)(i) applies are as follows:

(I) A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.

(II) A defendant obtains an individual's name and address from a source (e.g., from a diver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.

(iii) Nonapplicability of Subsection (b)(9)(C)(i).—Examples of conduct to which subsection (b)(9)(C)(i) does not apply are as follows:

(I) A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.

(II) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.

(D) Application of Subsection (b)(9)(C)(ii).—Subsection (b)(9)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.

8. Chop Shop Enhancement under Subsection (b)(10).—Subsection (b)(10) provides a minimum offense level in the case of an ongoing, sophisticated operation (such as an auto theft ring or 'chop shop') to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts. 'Vehicles' refers to all forms of vehicles, including aircraft and watercraft.

9. Gross Receipts Enhancement under Subsection (b)(12)(A).—

(A) In General.—For purposes of subsection (b)(12)(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).

10. Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(12)(B).—For purposes of subsection (b)(12)(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 without 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.

11. Cross Reference in Subsection (c)(3).—Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. 1001, or similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which § 2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which § 2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses.

12. Continuing Financial Crimes Enterprise.—If the defendant is convicted under 18 U.S.C. 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the 'continuing financial crimes enterprise'.

13. Partially Completed Offenses.—In the case of a partially completed offense (e.g., an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 of the Commentary to § 2X1.1.

14. Multiple Count Indictments.—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).

15. Departure Considerations.—

(A) Upward Departure Considerations.—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. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.

(ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records).

(iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).

(iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).

(v) The offense endangered the solvency or financial security of one or more victims.

(vi) In a case involving stolen information from a 'protected computer', as defined in 18 U.S.C. 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.

(vii) In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:

(I) The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.

(II) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.

(III) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.

(B) Downward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United Sates).

It also covers offenses involving altering or removing motor vehicle identification numbers, trafficking in automobiles or automobile parts with altered or obliterated identification numbers, odometer laws and regulations, obstructing correspondence, the falsification of documents or records relating to a benefit plan covered by the Employment Retirement Income Security Act, and the failure to maintain, or falsification of, documents required by the Labor Management Reporting and Disclosure Act.

Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increase risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under § 2B3.1 (Robbery).

A minimum offense level of level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of 'organized scheme' is used as an alternative to 'loss' in setting a minimum offense level.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Offenses that involve the use of financial transactions or financial accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum offense level of level 12 is provided for these offenses.

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

Subsection (b)(7)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public law 106–420.

Subsection (b)(8) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.

Subsections (b)(9)(A) and (B) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.

Subsection (b)(9)(C) implements the directive to the commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as ''affirmative identity theft'' or ''breeding'', in which a defendant uses another individual's name, social security number, or some other form of identification (the ''means of identification'') to ''breed'' (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. 1028(d) broadly defines ''means of identification'', the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were ''bred'' (i.e., produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been ''stolen.'' Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

Subsection (b)(11)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)(12)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.

Subsection (b)(12)(B) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (d) implements the instruction to the Commission in section 805(c) of Public Law 104–132.''.

Chapter Two, Part B is amended by striking § 2B1.3 and its accompanying commentary.

Chapter Two is amended by striking the heading of Part F, § 2F1.1 and its accompanying commentary, and § 2F1.2 and its accompanying commentary, and by adding at the end of Part B the following:

''§ 2B1.4. Insider Trading

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) If the gain resulting from the offense exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

Commentary

Statutory Provisions: 15 U.S.C. 78j and 17 CFR 240.10b–5. For additional statutory provisions(s), see Appendix A (Statutory Index).

Application Note

1. *Application of Subsection of § 3B1.3.*—(Section 3B1.3 (Abuse of

Position of Trust or Use of Special Skill) should be applied only if the defendant occupied and abused a position of special trust. Examples might include a corporate president or an attorney who misused information regarding a planned but unannounced takeover attempt. It typically would not apply to an ordinary ''tippee''.

Background: This guideline applies to certain violations of Rule 10b-5 that are commonly referred to as 'inside trading'. Insider trading is treated essentially as a sophisticated fraud. Because the victims and their losses are difficult if not impossible to identify, the gain, i.e., the total increase in value realized through trading in securities by the defendant and persons acting in concert with the defendant or to whom the defendant provide inside information, is employed instead of the victims' losses.

Certain other offenses, e.g., 7 U.S.C. 13(e), that involve misuse of inside information for personal gain also appropriately may be covered by this guideline.''.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1 by striking subdivision (f); and by redesignating subdivisions (g) through (l) as subdivisions (f) through (k), respectively.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 4 in the second paragraph by striking the last sentence.

The Commentary to § 1B1.2 captioned ''Application Notes'' is amended in Note 1 in the fourth paragraph by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended in Note 5 by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1(Theft, Property Destruction, and Fraud)''.

The Commentary to § 2B2.1 captioned ''Application Notes'' is amended in Note 1 by striking '' 'More than minimal planning,' 'firearm,' '' and inserting '' 'Firearm,' ''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by striking the text of Note 2 and inserting:

'' 'Loss' '' means the value of the property taken, damaged, or destroyed.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by adding at the end the following:

''4. More than Minimal Planning.—'More than minimal planning' means more planning than is typical for commission of the offense in a simple form. 'More than minimal planning' also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which § 3C1.1 (Obstructing or Impeding the Administration of Justice) applies. 'More than minimal planning' shall be considered to be present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. For example, checking the area to make sure no witnesses were present would not alone constitute more than minimal planning. By contrast, obtaining building plans to plot a particular course of entry, or disabling an alarm system, would constitute more than minimal planning.''.

Section 2B2.3(b) is amended by striking subdivision (3) and inserting the following:

''(3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (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.''.

The Commentary to § 2B2.3 captioned ''Application Notes'' is amended in Note 2 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2B3.1 captioned ''Application Notes'' is amended by striking the text of Note 3 and inserting:

'' 'Loss' means the value of the property taken, damaged, or destroyed''.

Section 2B3.(b) is amended by striking subdivision (1) and inserting the following:

''(1) If the greater of the amount obtained or demanded (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.''.

Section 2B4.1(b) is amended by striking subdivision (1) and inserting the following:

''(1) If the greater of the value of the bribe or the improper benefit to be conferred (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.''.

Section 2B5.1(b) is amended by striking subdivision (1) and inserting the following:

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

The Commentary to § 2B5.1 captioned ''Application Notes'' is amended in Note 3 by inserting ''Inapplicability to Genuine but Fraudulently Altered Instruments.—'' before '' 'Counterfeit,' ''; and by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2B5.3(b) is amended by striking subdivision (1) and inserting the following:

''(1) If the infringement amount (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.''.

The Commentary to § 2B5.3 captioned ''Background'' is amended in the first paragraph by striking ''guidelines'' and inserting ''guideline''.

Section 2B6.1(b) is amended by striking subdivision (1) and inserting the following:

''(1) If the retail value of the motor vehicles or parts (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.''.

The Commentary to § 2B6.1 captioned ''Application Notes'' is amended in Note 1 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2B6.1 captioned ''Application Notes'' is amended in Note 2 by striking ''corresponding'' before ''number'' and inserting ''term 'increase by the''; and by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount''.

Section 2C1.1(b) is amended by striking subdivision (2)(A) and inserting the following:

''(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest (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.''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended in Note 2 by striking '' 'Loss' is discussed in the Commentary to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and includes both actual and intended loss'' and inserting '' 'Loss', for purposes of subsection (b)(2)(A), shall be determined in accordance with Application Note 2 of the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2C1.2(b) is amended by striking subdivision (2)(A) and inserting the following:

''(A) If the value of the gratuity (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.''.

Section 2C1.6(b) is amended by striking subdivision (1) and inserting the following:

''(1) If the value of the gratuity (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.''.

Section 2C1.7(b) is amended by striking subdivision (1)(A) and inserting the following:

''(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.''.

The Commentary to § 2C1.7 captioned ''Application Notes'' is amended by striking the text of Note 3 and inserting:

'' 'Loss', for purposes of subsection (b)(1)(A), shall be determined in accordance with Application Note 2 of the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud).''.

Section 2E5.1(b) is amended by striking subdivision (2) and inserting the following:

''(2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (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.''.

Section 2G2.2(b)(2)(A) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2G3.1(b)(1)(A) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2G3.2(b)(2) is amended by striking ''at § 2F1.1(b)(1)'' and inserting ''in § 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2H3.3(a) is amended by striking the text of subdivision (2) and inserting: ''if the conduct was theft or destruction of mail, apply § 2B1.1 (Theft, Property Destruction, and Fraud).''; and by striking subdivision (3).

The Commentary to § 2H3.3 captioned ''Background'' is amended by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or § 2B1.3 (Property Damage or Destruction)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2J1.1 captioned ''Application Notes'' is amended in Note 2 by striking ''(Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''(Theft, Property Destruction, and Fraud)''.

Section 2K1.4(a) is amended by striking the text of subdivision (3) and inserting: ''2 plus the offense level from § 2B1.1 (Theft, Property Destruction, and Fraud).''; and by striking subdivision (4).

Section 2K1.4(b)(2) is amended by striking ''(4)'' and inserting ''(3)''.

Section 2N2.1(b)(1) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2N2.1 captioned ''Statutory Provisions'' is amended by inserting '', 6810, 7734'' after ''150gg''.

The Commentary to § 2N2.1 captioned ''Application Notes'' is amended in Note 2 by inserting ''theft, property destruction, or'' after ''involved''; and by striking ''theft, bribery, revealing trade secrets, or destruction of property'' and inserting ''bribery''.

The Commentary to § 2N2.1 captioned ''Application Notes'' is amended in Note 4 by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2N3.1(b)(1) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2N3.1 captioned ''Background'' is amended by striking ''the guideline for fraud and deception, § 2F1.1,'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2Q1.6(a)(2) is amended by striking ''§ 2B1.3 (Property Damage or Destruction)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2Q2.1(b) is amended by striking subdivision (3)(A) and inserting the following:

''(A) If the market value of the fish, wildlife, or plants (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 ''.

Section 2S1.3(a) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2T1.1(b)(2) is amended by striking ''concealment'' and inserting ''means''; and by inserting after ''levels.'' the following: ''If the resulting offense level is less than level 12, increase to level 12.''.

Section 2T1.1(c)(1) is amended by adding at the end the following:

''(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.''.

Section 2T1.1(c)(2) is amended in the second paragraph by striking ''Note'' and inserting ''Notes''; by inserting ''(A)'' before ''If''; and by adding at the end the following:

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

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended in Note 1 in the first paragraph by inserting '', except in willful evasion of payment cases under 26 U.S.C. 7201 and willful failure to pay cases under 26 U.S.C. 7203'' after ''penalties''.

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended by striking the text of Note 4 and inserting the following:

''Sophisticated Means Enhancement.—For purposes of subsection (b)(2), 'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.''.

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended by

striking the text of Note 7 and inserting the following:

''If the offense involved both individual and corporate tax returns, the tax loss is the aggregate tax loss from the individual tax offense and the corporate tax offense added together. Accordingly, in a case in which a defendant fails to report income derived from a corporation on both the defendant's individual tax return and the defendant's corporate tax return, the tax loss is the sum of (A) the unreported or diverted amount multiplied by (i) 28%; or (ii) the tax rate for the individual tax offense, if sufficient information is available to make a more accurate assessment of that tax rate; and (B) the unreported or diverted amount multiplied by (i) 34%; or (ii) the tax rate for the corporate tax offense, if sufficient information is available to make a more accurate assessment of that tax rate. For example, the defendant, the sole owner of a Subchapter C corporation, fraudulently understates the corporation's income in the amount of $100,000 on the corporation's tax return, diverts the funds to the defendant's own use, and does not report these funds on the defendant's individual tax return. For purposes of this example, assume the use of 34% with respect to the corporate tax loss and the use of 28% with respect to the individual tax loss. The tax loss attributable to the defendant's corporate tax return is $34,000 ($100,000 multiplied by 34%). The tax loss attributable to the defendant's individual tax return is $28,000 ($100,000 multiplied by 28%). The tax loss for the offenses are added together to equal $62,000 ($34,000 + $28,000).''.

Section 2T1.4(b)(2) is amended by striking ''concealment'' and inserting ''means''; and by inserting after ''levels.'' the following: ''If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2T1.4 captioned ''Application Notes'' is amended by striking the text of Note 3 and inserting the following:

''Sophisticated Means.—For purposes of subsection (b)(2), 'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.''.

Section 2T1.6(b)(1) is amended by striking ''(Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''(Theft, Property Destruction, and Fraud)''.

Section 2T3.1(b)(1) is amended by striking ''concealment'' and inserting ''means''; and by inserting after ''levels.'' the following: ''If the resulting offense level is less than level 12, increase to level 12.''.

The Commentary to § 2T3.1 captioned ''Application Notes'' is amended by striking the text of Note 3 and inserting the following:

''Sophisticated Means.—For purposes of subsection (b)(1), 'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.''.

Section 2T4.1 is amended by striking the text and inserting the following:

''Tax loss (apply the greatest)	Offense level
(A) $2,000 or less	6
(B) More than $2,000	8
(C) More than $5,000	10
(D) More than $12,500	12
(E) More than $30,000	14
(F) More than $80,000	16
(G) More than $200,000	18
(H) More than $400,000	20
(I) More than $1,000,000	22
(J) More than $2,500,000	24
(K) More than $7,000,000	26
(L) More than $20,000,000	28
(M) More than $50,000,000	30
(N) More than $100,000,000	32.''.

The Commentary to § 3B1.3 captioned ''Application Notes'' is amended by adding after Note 3 the following:

''4. The following additional illustrations of an abuse of a position of trust pertain to theft or embezzlement from employee pension or welfare benefit plans or labor unions:

(A) If the offense involved theft or embezzlement from an employee pension or welfare benefit plan and the defendant was a fiduciary of the benefit plan, an adjustment under this section for abuse of a position of trust will apply. ''Fiduciary of the benefit plan'' is defined in 29 U.S.C. 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.

(B) If the offense involved theft or embezzlement from a labor union and the defendant was a union officer or occupied a position of trust in the union (as set forth in 29 U.S.C. 501(a)), an adjustment under this section for an abuse of a position of trust will apply.''.

Section 3D1.2(d) is amended in the second paragraph by striking ''2B1.3'' and inserting ''2B1.4''; and by striking ''§§ 2F1.1, 2F1.2;''.

The Commentary to § 3D1.2 captioned ''Application Notes'' is amended in Note 6 in the third paragraph by striking '', and would include, for example, larceny, embezzlement, forgery, and fraud''.

Section 3D1.3(b) is amended by striking ''(e.g., theft and fraud)''.

The Commentary to § 3D1.3 captioned ''Application Notes'' is amended in Note 3 by striking ''(e.g., theft and fraud)''; and by striking the last sentence.

The Commentary following § 3D1.5 captioned ''Illustrations of the Operation of the Multiple-Count Rules'' is amended by striking Illustration 2; and by redesignating Illustrations 3 and 4 as Illustrations 2 and 3, respectively.

The Commentary following § 3D1.5 captioned ''Illustrations of the Operation of the Multiple-Count Rules'' is amended in Illustration 3, as redesignated by this amendment, by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''; and by striking ''§ 2B4.1 or § 2F1.1'' and inserting ''§ 2B1.1 or § 2B4.1''.

The Commentary to § 8A1.2 captioned ''Application Notes'' is amended in Note 3(i) by striking ''§§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 8C2.1(a) is amended by striking ''2B1.3'' and inserting ''2B1.4''; and by striking ''§§ 2F1.1, 2F1.2;''.

The Commentary to § 8C2.1 captioned ''Application Notes'' is amended in Note 2 by striking ''§ 2F1.1 (Fraud and Deceit)'' each place it appears and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. § 6 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 7 U.S.C. § 6b(A) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 7 U.S.C. § 6b(B) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 7 U.S.C. § 6b(C) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 7 U.S.C. § 6c by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 7 U.S.C. § 6h by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 7 U.S.C. § 6o by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 7 U.S.C. § 13(a)(2) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 7 U.S.C. § 13(a)(3) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 7 U.S.C. § 13(a)(4) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 7 U.S.C. § 13(d) by striking ''2F1.2'' and inserting ''2B1.4'';

In the line referenced to 7 U.S.C. § 13(f) by striking ''2F1.2'' and inserting ''2B1.4'';

In the line referenced to 7 U.S.C. § 23 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 7 U.S.C. § 270 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 7 U.S.C. § 2024(b) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 7 U.S.C. § 2024(c) by striking ''2F1.1'' and inserting ''2B1.1'';

By inserting after the line referenced to 7 U.S.C. § 6810 the following new line:

''7 U.S.C. § 7734 2N2.1'';

In the line referenced to 12 U.S.C. § 631 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 15 U.S.C. § 50 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 15 U.S.C. § 77e by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 15 U.S.C. § 77q by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 15 U.S.C. § 77x by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 15 U.S.C. § 78j by striking ''2F1.1'' and inserting ''2B1.1''; and by striking ''2F1.2'' and inserting ''2B1.4'';

In the line referenced to 15 U.S.C. § 78ff by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 15 U.S.C. § 80b–6 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 15 U.S.C. § 158 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 15 U.S.C. § 645(a) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 15 U.S.C. § 645(b) by striking '', 2F1.1'';

In the line referenced to 15 U.S.C. § 645(c) by striking '', 2F1.1'';

In the line referenced to 15 U.S.C. § 714m(a) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 15 U.S.C. § 714m(b) by striking '', 2F1.1'';

In the line referenced to 15 U.S.C. § 1281 by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 15 U.S.C. § 1644 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 15 U.S.C. § 1681q by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 15 U.S.C. § 1693n(a) by striking ''2F1.1'' and inserting ''2B1.1'';

By inserting after the line referenced to 15 U.S.C. § 2615 the following new line:

''15 U.S.C. § 6821 2B1.1'';

In the line referenced to 16 U.S.C. § 114 by striking '', 2B1.3'';

In the line referenced to 16 U.S.C. § 117c by striking '', 2B1.3'';

In the line referenced to 16 U.S.C. § 123 by striking ''2B1.3,'';

In the line referenced to 16 U.S.C. § 146 by striking ''2B1.3,'';

In the line referenced to 16 U.S.C. § 413 by striking '', 2B1.3'';

In the line referenced to 16 U.S.C. § 433 by striking '', 2B1.3'';

In the line referenced to 16 U.S.C. § 831t(b) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 16 U.S.C. § 831t(c) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 32(a),(b) by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 33 by striking ''2B1.3''and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 37 by striking ''2B1.3'' and inserting ''2B1.1'';

By inserting after the line referenced to 18 U.S.C. § 37 the following new line:

''18 U.S.C. § 38 2B1.1'';

In the line referenced to 18 U.S.C. § 43 by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 112(a) by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 152 by striking ''2B4.1, 2F1.1'' and inserting ''2B1.1, 2B4.1'';

In the line referenced to 18 U.S.C. § 153 by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 155 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 225 by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 285 by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 286 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 287 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 288 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 289 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 332 by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 335 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 470 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 471 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 472 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 473 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 474 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 474A by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 476 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 477 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 478 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 479 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 480 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 481 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 482 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 483 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 484 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 485 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 486 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 488 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 491 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 493 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 494 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 495 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 496 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 497 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 498 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 499 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 500 by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 501 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 502 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 503 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 505 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 506 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 507 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 508 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 509 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 510 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 513 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 514 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 642 by inserting ''2B1.1,'' before ''2B5.1'' and striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 656 by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 657 by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 659 by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 663 by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 665(a) by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 666(a)(1)(A) by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 709 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 712 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 911 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 914 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 915 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 917 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 970(a) by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1001 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1002 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1003 by inserting ''2B1.1,'' before ''2B5.1'' and striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 1004 by inserting ''2B1.1,'' before ''2B5.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 1005 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1006 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1007 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1010 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1011 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1012 by inserting ''2B1.1,'' before ''2C1.3''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 1013 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1014 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1015 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1016 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1017 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1018 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1019 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1020 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1021 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1022 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1023 by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 1025 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1026 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1028 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1029 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1030(a)(4) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1030(a)(5) by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1030(a)(6) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1031 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1032 by inserting ''2B1.1,'' before ''2B4.1''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 1033 by striking ''2F1.1,'';

In the line referenced to 18 U.S.C. § 1035 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1341 by inserting ''2B1.1,'' before ''2C1.7''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 1342 by inserting ''2B1.1,'' before ''2C1.7''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 1343 by inserting ''2B1.1,'' before ''2C1.7''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 1344 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1347 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1361 by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1362 by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1363 by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1366 by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1422 by inserting ''2B1.1,'' before ''2C1.2''; and by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 1702 by striking ''2B1.3,'';

In the line referenced to 18 U.S.C. § 1703 by striking ''2B1.3,'';

In the line referenced to 18 U.S.C. § 1704 by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 1705 by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1706 by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1708 by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 1712 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1716C by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1720 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1728 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1852 by striking '', 2B1.3'';

In the line referenced to 18 U.S.C. § 1853 by striking '', 2B1.3'';

In the line referenced to 18 U.S.C. § 1854 by striking '', 2B1.3'';

In the line referenced to 18 U.S.C. § 1857 by striking ''2B1.3,'' and inserting ''2B1.1,'';

In the line referenced to 18 U.S.C. § 1861 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1902 by striking ''2F1.2'' and inserting ''2B1.4'';

In the line referenced to 18 U.S.C. § 1919 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1920 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1923 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 1992 by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 2071 by striking '', 2B1.3'';

In the line referenced to 18 U.S.C. § 2072 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 2073 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 2197 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 2272 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 2275 by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 2276 by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 2280 by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 2281 by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 18 U.S.C. § 2314 by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 2315 by striking '', 2F1.1'';

In the line referenced to 18 U.S.C. § 2332a by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 19 U.S.C. § 1434 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 19 U.S.C. § 1435 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 19 U.S.C. § 1436 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 19 U.S.C. § 1919 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 19 U.S.C. § 2316 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 20 U.S.C. § 1097(a) by striking '', 2F1.1'';

In the line referenced to 20 U.S.C. § 1097(b) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 20 U.S.C. § 1097(d) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 21 U.S.C. § 333(a)(2) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 22 U.S.C. § 1980(g) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 22 U.S.C. § 2197(n) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 22 U.S.C. § 4221 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 25 U.S.C. § 450d by striking '', 2F1.1'';

In the line referenced to 26 U.S.C. § 7208 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 26 U.S.C. § 7214 by inserting ''2B1.1,'' before ''2C1.1''; and by striking '', 2F1.1'';

In the line referenced to 26 U.S.C. § 7232 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 29 U.S.C. § 1141 by inserting ''2B1.1,'' before ''2B3.2''; and by striking '', 2F1.1'';

In the line referenced to 38 U.S.C. § 787 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 38 U.S.C. § 3502 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 41 U.S.C. § 423(e) by inserting ''2B1.1,'' before ''2C1.1''; and by striking '', 2F1.1'';

In the line referenced to 42 U.S.C. § 408 by striking ''2F1.1'' and inserting ''2B1.1'';

By inserting after the line referenced to 42 U.S.C. § 408 the following new line:

''42 U.S.C. § 1011 2B1.1'';

In the line referenced to 42 U.S.C. § 1307(a) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 42 U.S.C. § 1307(b) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 42 U.S.C. § 1307a-7b by striking '', 2F1.1'';

In the line referenced to 42 U.S.C. § 1383(d)(2) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 42 U.S.C. § 1383a(a) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 42 U.S.C. § 1383a(b) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 42 U.S.C. § 1395nn(a) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 42 U.S.C. § 1395nn(c) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 42 U.S.C. § 1396h(a) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 42 U.S.C. § 1713 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 42 U.S.C. § 1760(g) by striking '', 2F1.1'';

In the line referenced to 42 U.S.C. § 1761(o)(1) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 42 U.S.C. § 1761(o)(2) by striking '', 2F1.1'';

In the line referenced to 42 U.S.C. § 3220(a) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 42 U.S.C. § 3220(b) by striking '', 2F1.1'';

In the line referenced to 42 U.S.C. § 3426 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 42 U.S.C. § 3791 by striking '', 2F1.1'';

In the line referenced to 42 U.S.C. § 3792 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 42 U.S.C. § 3795 by striking '', 2F1.1'';

In the line referenced to 42 U.S.C. § 5157(a) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 45 U.S.C. § 359(a) by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 46 U.S.C. § 1276 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 49 U.S.C. § 121 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 49 U.S.C. § 11903 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 49 U.S.C. § 11904 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 49 U.S.C. § 14912 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 49 U.S.C. § 16102 by striking ''2F1.1'' and inserting ''2B1.1'';

By inserting after the line referenced to 49 U.S.C. § 16104 the following new line:

''49 U.S.C. § 30170 2B1.1'';

By inserting after the line referenced to 49 U.S.C. § 46312 the following new line:

''49 U.S.C. § 46317(a) 2B1.1'';

In the line referenced to 49 U.S.C. § 60123(d) by striking ''2B1.3'' and inserting ''2B1.1'';

In the line referenced to 49 U.S.C. § 80116 by striking ''2F1.1'' and inserting ''2B1.1'';

In the line referenced to 49 U.S.C. § 80501 by striking ''2B1.3'' and inserting ''2B1.1''; and

In the line referenced to 49 U.S.C. App. § 1687(g) by striking ''2B1.3'' and inserting ''2B1.1''.

Reason for Amendment: This ''Economic Crime Package'' is a six-part amendment that is the result of Commission study of economic crime issues over a number of years. The major parts of the amendment are: (1) Consolidation of the theft, property destruction, and fraud guidelines; (2) a revised, common loss table for the consolidated guideline, and a similar table for tax offenses; (3) a revised, common definition of loss for the consolidated guideline; (4) revisions to guidelines that refer to the loss table in the consolidated guideline; (5) technical and conforming amendments; and (6) amendments regarding tax loss.

Consolidation of Theft, Property Destruction, and Fraud; Miscellaneous Revisions

The first part of this amendment consolidates the guidelines for theft, § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property), property destruction, § 2B1.3 (Property Damage or Destruction), and fraud, § 2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) into one guideline, § 2B1.1 (Theft, Property Destruction, and Fraud). Consolidation will provide similar treatment for similar offenses for which pecuniary harm is a major factor in determining the offense level and, therefore, decrease unwarranted sentencing disparity that may be caused by undue complexity in the guidelines. Consolidation addresses concerns raised over several years by probation officers, judges, and practitioners about the difficulties of determining for particular cases, whether to apply § 2B1.1 or § 2F1.1 and the disparate sentencing outcomes that can result depending on that decision. Commentators have noted that inasmuch as theft and fraud offenses are conceptually similar, there is no strong reason to sentence them differently.

The base offense level for the consolidated guideline is level 6. This maintains the base offense level for fraud offenses, but represents a two-level increase for theft and property destruction offenses, which prior to this amendment was level 4. The increase of two levels in the base offense levels for theft and property destruction offenses will have minimal impact for low-level theft offenses involving offenders in criminal history Category I or Category II. Commission analysis indicates that only a few defendants will move from Zone A (where probation without conditions of confinement is possible) to Zone B or Zone C, and those that are moved into a zone at higher offense levels in the Sentencing Table generally will have criminal history categories above Category I. As a result, the Commission decided against promulgating a two-level reduction for offenses involving loss amounts less than $2,000.

The amendment deletes the two-level enhancement for more than minimal planning previously at §§ 2B1.1(b)(4)(A) and 2F1.1(b)(2)(A). The two-fold reason for this change was to obviate the need for judicial fact-finding about this frequently occurring enhancement and to avoid the potential overlap between the more than minimal planning enhancement and the sophisticated means enhancement previously at § 2F1.1(b)(6) and now, by this amendment, at § 2B1.1(b)(8).

The amendment also eliminates the alternative prong of the more than minimal planning enhancement, at § 2F1.1(b)(2)(B) prior to this amendment, which provided a two-level increase if the offense involved more than one victim. The amendment replaces this enhancement with a specific offense characteristic for offenses that involved large numbers of victims. This change addresses three concerns. First, as a result of the consolidation, the more-than-one-victim enhancement, if retained, would apply in cases that, prior to this amendment, were not subject to such an enhancement. Second, a two-level increase in every case involving more than one victim is arguably inconsistent with the approach in subsection (b)(2) of § 3A1.1 (Hate Crime Motivation or Vulnerable Victim), which provides a two-level increase if the offense involved a large number of vulnerable victims. Third, in practice, the more than minimal planning enhancement was so closely linked with this enhancement that the decision to eliminate the former argues strongly for also eliminating the latter.

The amendment provides a two-level enhancement for offenses involving ten or more, but fewer than 50, victims, and a four-level increase for offenses involving 50 or more victims. This provision is designed to provide a measured increment that results in increased punishment for offenses involving larger numbers of victims. Its applicability to those cases in which victims, both individuals and organizations, sustain an actual loss under subsection (b)(1) or sustain bodily injury.

A special rule is provided for application of the victim enhancement for offenses involving United States mail because of (i) the unique proof problems often attendant to such offenses, (ii) the frequently significant, but difficult to quantify, non-monetary

losses in such offenses, and (iii) the importance of maintaining the integrity of the United States mail.

In addition, the amendment moves the mass-marketing enhancement into the new victim-related specific offense characteristic, as an alternative to the two-level adjustment for more than ten, but fewer than 50, victims. The provision is retained to remain responsive to the congressional directive that led to its original promulgation and reflects the Commission's expectation that most telemarketing cases, or similar mass-marketing cases, will have at least ten victims and, receive this enhancement. The mass-marketing alternative enhancement also will continue to apply in cases in which mass-marketing has been used to target a large number of persons, regardless of the number of persons who have sustained an actual loss or injury.

In addition, the amendment provides that if a victim enhancement applies, the enhancement under § 3A1.1(b)(2) for ''a large number of vulnerable victims'' does not also apply because the more serious conduct already would have resulted in a higher penalty level.

In response to issues raised in a circuit conflict, the amendment revises the commentary related to subsection (b)(4)(B) of § 2B1.1 to clarify the meaning of ''person in the business of receiving and selling stolen property.'' The amendment addresses an issue that has arisen in case law regarding what conduct receives a defendant for the 4-level enhancement.

In determining the meaning of ''in the business of'', some circuits apply what has been termed the ''fence test'', under which the court must consider (1) if the stolen property was bought and sold, and (2) to what extent the stolen property transactions encouraged others to commit property crimes. Other circuits have adopted the ''totality of the circumstances test'' that focuses on the regularity and sophistication of the defendant's operation. Compare *United States* v. *Esquivel*, 919 F.2d 957 (5th Cir. 1990), *with United States* v. *St. Cyr*, 997 F.2d 698 (1st Cir. 1992). Under either test, courts consider the sophistication and regularity of the business as well as the control, volume, turnover, relationship with thieves, and connections with buyers. Although the factors considered by all of these circuits are similar, the approaches are different.

After consideration, the Commission adopted the totality of circumstances approach because it is more objective and more properly targets the conduct of the individual who is actually in the business of fencing. *See United States* v. *St. Cyr, supra.*

In addition, this amendment resolves a circuit conflict regarding the scope of the enhancement in the consolidated guideline for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency. (Prior to this amendment, the enhancement was at subsection (b)(4)(A) of § 2F1.1). The conflict concerns whether the misrepresentation enhancement applies only in cases in which the defendant does not have any authority to act on behalf of the covered organization or government agency or if it applies more broadly to cases in which the defendant has a legitimate connection to the covered organization or government agency, but misrepresents that the defendant is acting solely on behalf of that organization or agency. *Compare, e.g., United States* v. *Marcum*, 16 F.3d 599 (4th Cir. 1994) (enhancement appropriate even though defendant did not misrepresent his authority to act on behalf of the organization but rather only misrepresented that he was conducting an activity wholly on behalf of the organization), *with United States* v. *Frazier*, 53 F.3d 1105 (10th Cir. 1995) (application of the enhancement is limited to cases in which the defendant exploits the victim by claiming to have authority which in fact does not exist).

The amendment follows the broader view of the Fourth Circuit. It provides for application of the enhancement, now, by this amendment, at § 2B1.1(b)(7)(A), if the defendant falsely represented that the defendant was acting to obtain a benefit for a covered organization or agency when, in fact, the defendant intended to divert all or part of that benefit (for example, for the defendant's personal gain), regardless of whether the defendant actually was associated with the organization or government agency. The Commission determined that the enhancement was appropriate in such cases because the representation that the defendant was acting to obtain a benefit for the organization enables the defendant to commit the offense. In the case of an employee who also holds a position of trust, the amendment provides an application note instructing the court not to apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) if the same conduct forms the basis both for the enhancement and the adjustment in § 3B1.3.

The amendment implements the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106–420, by providing an additional alternative enhancement that applies if the offense involves a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education. The enhancement targets the provider of the financial assistance or scholarship services, not the individual applicant for such assistance or scholarship, consistent with the intent of the legislation.

This amendment makes two minor substantive changes to the enhancement for conscious or reckless risk of serious bodily injury, now, by this amendment, at subsection (b)(11)(A). First, it increases the minimum offense level from level 13 to level 14 to promote proportionality within this guideline. For example, within the theft and fraud guidelines prior to this amendment, there were other specific offense characteristics that had a higher floor offense level than the risk of bodily injury enhancement: (1) ''chop shops'' (level 14); (2) jeopardizing the solvency of a financial institution (level 24); and (3) personally receiving more than $1,000,000 from a financial institution (level 24). Second, it inserts ''death'' before the term ''or serious bodily injury'' to clarify that the risk of the greater harm also is covered. Including risk of death also provides consistency with similar provisions in other parts of the *Guidelines Manual*, where risk of death is always included with risk of serious bodily injury.

The amendment modifies the four-level increase and minimum offense level of level 24 for a defendant who personally derives more than $1,000,000 in gross receipts from an offense that affected a financial institution, now, by this amendment, at subsection (b)(12)(A). The amendment retains the minimum offense level but reduces the four-level enhancement to two levels because of the increased offense levels that will result from the loss table for the consolidated guideline. The two-level increase was retained because elimination of the enhancement entirely would not provide an appropriate punishment for those offenders involved with losses that are in the $1,000,000 to $2,500,000 range of loss.

The enhancement also was modified to address issues about what it means to ''affect'' a financial institution and how to apply the enhancement to a case in which there are more than one financial institution involved. Accordingly, the revised provision focuses on whether the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense.

The amendment includes a new cross reference (subsection (c)(3)) that is more generally applicable and intended to apply whenever a broadly applicable fraud statute is used to reach conduct that is addressed more specifically in another Chapter Two guideline. Prior to this amendment, the fraud guideline contained an application note that instructed the user to move to another, more appropriate Chapter Two guideline, under specified circumstances. Although this note was not a cross reference, but rather a reminder of the principles enunciated in § 1B1.2, it operated like a cross reference in the sense that it required use of a different guideline.

This amendment also makes a minor revision (adding ''in a broader form'') to the background commentary regarding the implementation of the directive in section 2507 of Public Law 101–647, nullifying the effect of *United States* v. *Tomasino*, 206 F. 3d 739 (7th Cir. 2000).

Loss Tables

The amendment provides revised loss tables for this consolidated guideline and for the tax offense guidelines. A principle feature of the new tables is that they expand the previously existing one-level increments into two-level increments, thus increasing the range of losses that correspond to an individual increment, compressing the table, and reducing fact-finding. The new loss tables also provide substantial increases in penalties for moderate and higher loss amounts, even, for fraud and theft offenses, notwithstanding the elimination of the two-level enhancement for more than minimal planning. These higher penalty levels respond to comments received from the Department of Justice, the Criminal Law Committee of the Judicial Conference, and others, that the offenses sentenced under the guidelines consolidated by this amendment under-punish individuals involved with moderate and high loss amounts, relative to penalty levels for offenses of similar seriousness sentenced under other guidelines.

Some offenders accountable for relatively low dollar losses will receive slightly lower offense levels under the new loss table for the consolidated guideline because of (1) the elimination of the enhancement for more than minimal planning; (2) the change from one-level to two-level increments for increasing loss amounts; (3) the selection of the breakpoints for the loss increments (including $5,000 as the first loss amount that results in an increase); and (4) the slope chosen for the relationship between increases in loss amount and increases in offense level at the lower loss amounts. This amendment reflects a decision by the Commission that this effect on penalty levels at lower loss amounts is appropriate for several reasons: (1) The lower offense levels provide appropriate deterrence and punishment, generally, (2) at lower offense levels more defendants will be subject to the court's ability to fashion sentencing alternatives as appropriate (see, e.g., § 5C1.1 (Imposition of a Term of Imprisonment)); and (3) these penalty levels may facilitate the payment of restitution.

The loss table for the consolidated guideline provides the first of incremental increases for cases in which loss exceeds $5,000, rather than $2,000 provided previously in § 2F1.1, or $100 provided previously in § 2B1.1. The Commission believes this will reduce the fact-finding burden on courts for less serious offenses that are generally subject to greater sentencing flexibility because of the availability of alternatives to incarceration.

The amendment also provides a revised loss table in § 2T4.1 (Tax Table) for tax offenses that ensures significantly higher penalty levels for offenses involving moderate and high tax loss in a similar manner and degree as the loss table for the consolidated guideline. The new table is designed to reflect more appropriately the seriousness of tax offenses and to maintain proportionality with the offenses sentenced under the consolidated guideline.

The tax loss table is similar to the loss table for the consolidated guideline, except it does not reduce generally any sentences for offenders involved with lower loss amounts. The tax table provides its first increment for loss at $2,000, rather than the $5,000 threshold under the consolidated guideline (and the $1,700 threshold under the tax loss table prior to this amendment). These differences are intended to avoid unintended decreases that would occur otherwise. The increases in the new tax loss table for offenders involved with lower loss amounts are intended to maintain the long-standing treatment of tax offenses relative to theft and fraud offenses.

Definition of Loss

This amendment provides a new definition of loss applicable to offenses previously sentenced under §§ 2B1.1, 2B1.3, and 2F1.1. The revised definition makes clarifying and substantive revisions to the definitions of loss previously in the commentary to §§ 2B1.1 and 2F1.1, resolves a number of circuit conflicts, addresses a variety of application issues, and promotes consistency in application.

Significantly, the new definition of loss retains the core rule that loss is the greater of actual and intended loss. The Commission concluded that, for cases in which intended loss is greater than actual loss, the intended loss is a more appropriate initial measure of the culpability of the offender. Conversely, in cases in which the actual loss is greater, that amount is a more appropriate measure of the seriousness of the offense.

A definition is provided for intended loss that is consistent with the rule regarding the interaction of actual and intended loss.

The amendment includes a resolution of the circuit conflict relating to the meaning and application of intended loss.

The amendment resolves the conflict to provide that intended loss includes unlikely or impossible losses that are intended, because their inclusion better reflects the culpability of the offender. *Compare United States* v. *Geevers*, 226 F.3d 186 (3d Cir. 2000) (agreeing with the majority of circuits holding that impossibility is not in and of itself a limit on the intended loss for purposes of calculating sentences under the guidelines * * * impossibility does not require a sentencing court to lower its calculations of intended loss); and *United States* v. *Coffman*, 94 F.3d 330 (7th Cir. 1996) (rejecting the argument that a loss that cannot possibly occur cannot be intended); *United States* v. *Koenig*, 952 F.2d 267 (9th Cir. 1991) (holding that § 2F1.1 only requires a calculation of intended loss and does not require a finding that the intentions were realistic); *United States* v. *Klisser*, 190 F. 3d 34, 36 (2d Cir. 1999) (same); *United States* v. *Blitz*, 151 F. 3d 1002, 1010 (9th Cir. 1998) (same); *United States* v. *Studevent*, 116 F. 3d 1559, 1563 (D.C. Cir. 1997) (same); *United States* v. *Wai-Keung*, 115 F. 3d 874, 877 (11th Cir. 1997) (same), with *United States* v. *Galbraith*, 20 F. 3d 1054, 1059 (10th Cir. 1993) (because intended loss only includes losses that are possible, in an undercover sting operation the intended loss is zero); and *United States* v. *Watkins*, 994 F.2d 1192, 1196 (6th Cir. 1993) (holding that a limitation on the broad reach of the intended loss rule is that the intended loss must have been possible to be considered relevant).

Accordingly, concepts such as ''economic reality'' or ''amounts put at risk'' will no longer be considerations in the determination of intended loss. *See United States* v. *Bonanno*, 146 F.3d 502 (7th Cir. 1998) (holding that the relevant inquiry is how much the scheme put at

risk); and *United States* v. *Wells*, 127 F. 3d 739 (8th Cir. 1997) (citing *United States* v. *Morris*, 18 F.3d 562 (8th Cir. 1994)) (holding that intended loss properly was measured by the possible loss the defendant intended, and did not hinge on actual or net loss).

This amendment also resolves differing circuit interpretations of the standard of causation applicable for actual loss, an issue that was not addressed expressly in the prior definition of actual loss. Various circuits recognized three arguably inconsistent standards for loss causation. First, § 1B1.3 (Relevant Conduct) provides that a defendant is responsible for all losses—foreseen or unforeseen—that result from the defendant's actions or that result from the foreseeable actions of co-participants. *See United States* v. *Sarno*, 73 F.3d 1470 (9th Cir. 1995) (holding that ''[a] sentence calculated pursuant to the loss tables * * * is properly based on actual loss notwithstanding the fact that this loss may be greater than the intended, expected or foreseeable loss''), cert. denied, 518 U.S. 1020 (1996); and *United States* v. *Lopreato*, 83 F.3d 571 (2d Cir. 1996) (holding that in a bribery case, the defendant is responsible for all losses, foreseeable or not). A second view is premised on the fact that prior to this amendment commentary in § 2F1.1 limited the loss amount to the value of the money, property, or services unlawfully taken. *See United States* v. *Marlatt*, 24 F.3d 1005 (7th Cir. 1994) (refusing to count foreseeable losses in loss figure because they did not represent the actual thing taken). A third view is that the commentary's explicit inclusion of consequential damages in the loss determination for contract procurement and product substitution cases implies that only non-consequential or direct damages are included in other cases. *See United States* v. *Thomas*, 62 F.3d 1332 (11th Cir. 1995), *cert. denied*, 516 U.S. 1166 (1996) (only non-consequential or direct damages are included in loss). *See also United States* v. *Daddona*, 34 F.3d 163 (3d Cir.), *cert. denied*, 513 U.S. 1002 (1994) (holding that merely incidental or consequential damages may not be counted in computing loss); and *United States* v. *Newman*, 6 F.3d 623 (9th Cir. 1993) (holding that loss caused by the defendant arsonist was only the value of the property destroyed by the fire, not costs of putting out the fire).

The amendment defines ''actual loss'' as the ''reasonably foreseeable pecuniary harm'' that resulted from the offense. The amendment incorporates this causation standard that, at a minimum, requires factual causation (often called ''but for'' causation) and provides a rule for legal causation (i.e., guidance to courts regarding how to draw the line as to what losses should be included and excluded from the loss determination). Significantly, the application of this causation standard in the great variety of factual contexts in which it is expected to occur appropriately is entrusted to sentencing judges.

''Pecuniary harm'' is defined in a manner that excludes emotional distress, harm to reputation, and other non-economic harm, in order to foreclose the laborious effort sometimes necessary to quantify non-economic harms (as in some tort proceedings, for example).

''Reasonably foreseeable pecuniary harm'' is defined to include pecuniary harms that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense. The Commission determined that this standard better ensures the inclusion in loss of those harms that reflect the seriousness of the offense and the culpability of the offender.

The definition deletes the previous rule that, by negative implication, excludes consequential damages (except in specified cases), thus resolving a circuit conflict. *Compare United States* v. *Izydore*, 167 F.3d 213 (5th Cir. 1999) (the fact that the Commission prescribed consequential losses in only specific fraud cases, and not others, is strong evidence that consequential damages were omitted from the general loss definition by design rather than mistake), *with United States* v. *Gottfried*, 58 F.3d 648 (D.C. Cir. 1995) (holding that merely incidental or consequential damages may not be counted in computing loss). The Commission decided, however, not to use the term ''consequential damages,'' or any similar civil law distinction between direct and indirect harms. Rather, the Commission determined that the reasonable foreseeability standard provides sufficient guidance to courts as to what type of harms are included in loss.

In addition, this amendment preserves the special provisions addressing loss in protected computer offenses and the inclusion of consequential damages in product substitution and contract procurement offenses; however, these special cases are re-characterized as rules of construction to avoid any negative implications regarding other types of offenses.

The amendment reflects a decision by the Commission that interest and similar costs shall be excluded from loss. However, the amendment provides that a departure may be warranted in the rare case in which exclusion of interest will under-punish the offender. Thus, the rule resolves the circuit split regarding whether ''bargained for'' interest may be included in loss. *Compare United States* v. *Henderson,* 19 F.3d 917 (5th Cir.), *cert. denied,* 513 U.S. 877 (1994) (holding that interest should be included if the victim had a reasonable expectation of receiving interest from the transaction); *United States* v. *Gilberg,* 75 F.3d 15 (1st Cir. 1996) (including in loss interest on fraudulently procured mortgage loan); and *United States* v. *Sharma,* 190 F.3d 220 (3d Cir. 1999) (holding that Application Note 8 of § 2F1.1 requires the exclusion of ''opportunity cost'' interest, but did not intend to exclude bargained-for interest), *with United States* v. *Hoyle,* 33 F.3d 415 (4th Cir. 1994), *cert. denied,* 513 U.S. 1133 (1995) (excluding interest from the determination of loss for sentencing purposes); and *United States* v. *Guthrie,* 144 F.3d 1006 (6th Cir. 1998) (holding that when the defendant concealed assets in a bankruptcy proceeding, the lower court's determination that loss to creditors included interest was erroneous). This rule is consistent with the general purpose of the loss determination to serve as a rough measurement of the seriousness of the offense and culpability of the offender and avoids unnecessary litigation regarding the amount of interest to be included.

The loss definition also excludes from loss certain costs incurred by the government and victims in connection with criminal investigation and prosecution of the offense. Such losses are likely to occur in a broad range of cases, would present a fact-finding burden in those cases, and would not contribute to the ability of loss to perform its essential function.

The loss definition also provides for the exclusion from loss of certain economic benefits transferred to victims, to be measured at the time of detection. This provision codifies the ''net loss'' approach that has developed in the case law, with some modifications made for policy reasons. This crediting approach is adopted because the seriousness of the offense and the culpability of a defendant is better determined by using a net approach. This approach recognizes that the offender who transfers something of value to the victim(s) generally is committing a less serious offense than an offender who does not.

The amendment adopts ''time of detection'' as the most appropriate and least burdensome time for measuring the value of the transferred benefits. The Commission determined that valuing such benefits at the time of transfer would be especially problematic in cases in which the offender misrepresented the value of an item that is difficult to value. Although the time of detection standard will allow some fluctuation in value which may inure to the defendant's benefit or detriment, the Commission determined that, because the time of detection is closer in time to the sentencing and occurs at a point when the authorities are aware of the criminality, its use generally would make it easier to determine a more accurate value of the benefit.

The definition of ''time of detection'' was adopted because there may be situations in which it is difficult to prove that the defendant knew the offense was detected even if it was already discovered. In addition, the words ''about to be detected'' are included to cover those situations in which the offense is not yet detected, but the defendant knows it is about to be detected. In such a case, it would be inappropriate to credit the defendant with benefits transferred to the victim after that defendant's awareness.

The definition of ''loss'' also provides special rules for certain schemes. One rule includes in loss (and excludes from crediting) the benefits received by victims of persons fraudulently providing professional services. This rule reverses case law that has allowed crediting (or exclusion from loss) in cases in which services were provided by persons posing as attorneys and medical personnel. *See United States* v. *Maurello,* 76 F.3d 1304 (3d Cir. 1996) (calculating loss by subtracting the value of satisfactory legal services from amount of fees paid to a person posing as a lawyer); and *United States* v. *Reddeck,* 22 F.3d 1504 (10th Cir. 1994) (reducing loss by the value of education received from a sham university). The Commission determined that the seriousness of these offenses and the culpability of these offenders is best reflected by a loss determination that does not credit the value of the unlicensed benefits provided. In addition, this provision eliminates the additional burden that would be imposed on courts if required to determine the value of these benefits.

Similarly, the definition of loss provides a special rule that includes in loss (and excludes from crediting) the value of items that were falsely represented as approved by a regulatory agency, for which regulatory approval was obtained by fraud, or for which regulatory approval was required but not obtained. The Commission determined that the seriousness of these offenses and the culpability of these offenders is best reflected by a loss determination that does not credit the value of these items. This decision reflects the importance of the regulatory approval process to public health, safety, and confidence.

Regarding investment schemes, the amendment resolves a circuit conflict regarding whether and how to credit payments made to victims. *Compare United States* v. *Mucciante,* 21 F.3d 1228 (2nd Cir. 1994) (under the Guidelines, loss includes the value of all property taken, even though all or part of it was returned.); *United States* v. *Deavours,* 219 F.3d 400 (5th Cir. 2000) (intended loss is not reduced by any sums returned to investors); and *United States* v. *Loayza,* 107 F.3d 257 (4th Cir.1997) (declining to follow the approach of net loss and holding defendants responsible for the value of all property taken, even though all or a part is returned), with *United States* v. *Holiusa,* 13 F.3d 1043 (7th Cir.1994) (holding that only the net loss should be included in loss, thus allowing a credit for returned interest), and *United States* v. *Orton,* 73 F.3d 331 (11th Cir. 1996) (only payments made to losing investors should be credited, not payments to investors who made a profit).

This amendment adopts the approach of the Eleventh Circuit that excludes the gain to any individual investor in the scheme from being used to offset the loss to other individual investors because any gain realized by an individual investor is designed to lure others into the fraudulent scheme. *See United States* v. *Orton, supra.*

The definition retains the rule providing for the use of gain when loss cannot reasonably be determined. It clarifies that there must be a loss for gain to be considered. In doing so, the Commission resolved another circuit conflict. *Compare United States* v. *Robie,* 166 F.3d 444 (2d Cir. 1999) (holding that use of defendant's gain for purposes of subsection (b)(1) is improper if there is no economic loss to the victim), *with United States* v. *Haas,* 171 F.3d 259 (5th Cir. 1999) (stating that ''if the loss is either incalculable or zero, the district court must determine the § 2F1.1 sentence enhancement by estimating the gain to the defendant as a result of his fraud''). The Commission decided not to expand the use of gain to situations in which loss can be determined but the gain is greater than the loss because such instances should occur infrequently, the efficiency of the criminal operation as reflected in the amount of gain ordinarily should not determine the penalty level, and the traditional use of loss is generally adequate.

The amendment revises the special rule on determining loss in cases involving diversion of government program benefits to resolve another circuit conflict. The revision is intended to clarify that loss in such cases only includes amounts that were diverted from intended recipients or uses, not benefits received or used by authorized persons. In other words, even if such benefits flowed through an unauthorized intermediary, as long as they went to intended recipients for intended uses, the amount of those benefits should not be included in loss. *Compare United States* v. *Henry,* 164 F.3d 1304 (10th Cir. 1999) (holding that loss includes the value of gross benefits paid, rather than the value of benefits improperly received or diverted in determining the loss), *with United States* v. *Peters,* 59 F.3d 732 (8th Cir. 1995) (determining that loss is the value of benefits diverted from intended recipients); and *United States* v. *Barnes,* 117 F.3d 328 (7th Cir. 1997) (holding that the sentence is calculated only on the value of the government benefits diverted from intended recipients or users). This net loss approach is more consistent with general rules for determining loss.

Referring Guidelines for Theft and Fraud

The amendment includes revisions to the guidelines that, prior to this amendment, referred to the loss tables in § 2B1.1 or § 2F1.1. Pursuant to this amendment, these guidelines will refer to the loss tables in the consolidated guideline. Prior to this amendment, the referring guidelines used the tables in §§ 2B1.1 and 2F1.1, which provided the first loss increment for losses in excess of $2,000. Because the consolidated loss table provides the first loss increment for losses in excess of $5,000, the referring guidelines are amended to provide a one-level increase in a case in which the loss is more than $2,000, but did not exceed $5,000. This increase is provided to avoid a one-level decrease that would otherwise occur for an offense involving losses of more than $2,000 but not more than $5,000.

Two referring guidelines (§§ 2B2.1 (Burglary of a Residence or a Structure Other than a Residence) and 2B3.1 (Robbery)) that use the definition of loss previously in § 2B1.1 will retain that definition of loss rather than the new loss definition in the consolidated guideline. The existing definition has

not proven problematic for cases sentenced under these guidelines.

Technical and Conforming Amendments

The amendment includes a number of technical and conforming amendments, most of which are necessitated by the consolidation and the deletion of the more than minimal planning enhancement.

Computing Tax Loss

This amendment addresses several issues related to tax loss. It addresses a circuit conflict regarding how tax loss under § 2T1.1 (Tax Evasion) is computed for cases that involve a defendant's under-reporting of income on both individual and corporate tax returns. Such a case often arises when (1) the defendant fails to report, and pay corporate income taxes on, income earned by the corporation; (2) the defendant diverts that unreported corporate income for the defendant's personal use; and (3) the defendant fails to report, and to pay personal income taxes on, that diverted income. The amendment provides that the amount of the federal tax loss is the sum of the federal income tax due from the corporation and the amount of federal income tax due from the individual.

The amendment thereby resolves a circuit conflict as to the methodology used to calculate tax loss in cases involving a corporate diversion. Two circuits use a sequential method to aggregate the tax loss. Under this method, the court determines the corporate federal income tax that would have been due, subtracts that amount from the amount diverted to the defendant personally, then determines the personal federal income tax that would have been due on the reduced diverted amount. *See United States* v. *Harvey*, 996 F.2d 919 (7th Cir. 1993); and *United States* v. *Martinez-Rios*, 143 F.3d 662 (2d Cir. 1998). The Commission adopted the alternative method used in *United States* v. *Cseplo*, 42 F.3d 360 (6th Cir. 1994), in which the court determines the corporate federal income tax due on the diverted amount, and adds that amount to the personal federal income tax due on the total amount diverted. This clarifies the prior rule in Application Note 7 of § 2T1.1 that ''if the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together'' and reflects the Commission's conclusion that, in cases of corporate diversions, the method for computing total tax loss adopted by the Sixth Circuit in Cseplo more accurately reflects the seriousness of the total harm caused by these offenses than would be reflected by the alternative method.

In evasion-of-payment tax cases, the Commission amended the definition of ''tax loss'' to include interest and penalties because, in contrast to evasion-of-assessment tax cases, such amounts appropriately are included in tax loss for such cases. This amendment limits the inclusion of interest or penalties to willful evasion of payment cases under 26 U.S.C. 7201 and willful failure to pay cases under 26 U.S.C. 7203. The nature of these cases is such that the interest and penalties often greatly exceed the assessed tax amount constituting the bulk of the harm associated with these offenses.

This amendment also revises the sophisticated concealment enhancement in subsection (b)(2) of §§ 2T1.1 (Tax Evasion) and 2T1.4 (Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud) to conform to the sophisticated means enhancement in the consolidated guideline, including imposition of a minimum offense level of level 12. This revision is appropriate inasmuch as certain tax offenses can be committed using sophisticated means in addition to being concealed in a sophisticated manner. Indeed, tax offenses committed in a sophisticated manner are more serious offenses, and reflect a greater culpability on the part of the offender (just as a tax offense concealed in a sophisticated manner reflects greater culpability). Consequently, this revision will allow the enhancement to apply to a somewhat greater range of tax offenses than the previously existing sophisticated concealment enhancement.

In addition, the amendment revises ''offshore bank accounts'' by substituting ''financial'' for ''bank'', to ensure that the enhancement applies to conduct involving similar kinds of accounts, consistent with language in § 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity). A similar revision is made in § 2B1.1.

6. *Amendment:* Section 2B5.1(b)(2) is amended by inserting ''(A)'' after ''defendant''; and by striking '', and the offense level as determined above is less than 15, increase to level 15.'' and inserting ''; or (B) controlled or possessed (i) counterfeiting paper similar to a distinctive paper; or (ii) a feature or device essentially identical to a distinctive counterfeit deterrent, increase by 2 levels.''.

Section 2B5.1(b) is amended by redesignating subdivisions (3) and (4) as subdivisions (4) and (5), respectively; and by inserting after subdivision (2) the following:

''(3) If subsection (b)(2)(A) applies, and the offense level determined under that subsection is less than level 15, increase to level 15.''.

The Commentary to § 2B5.1 captioned ''Statutory Provisions'' is amended by inserting ''A'' after ''474''.

The Commentary to § 2B5.1 captioned ''Application Notes'' is amended by striking Note 1 and inserting the following:

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

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

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

The Commentary to § 2B5.1 captioned ''Application Notes'' is amended in Note 2 by inserting ''Applicability to Counterfeit Bearer Obligations of the United States.—'' before ''This guideline''.

The Commentary to § 2B5.1 captioned ''Application Notes'' is amended by striking Note 4 and inserting the following:

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

The Commentary to § 2B5.1 captioned ''Background'' is amended by striking ''(b)(3)'' and inserting ''(b)(4)''.

Reason for Amendment: The frequency of counterfeiting offenses has increased significantly since 1995 due to the increasing affordability and availability of personal computers and digital printers. This amendment addresses concerns raised by the Department of the Treasury and the United States Secret Service regarding both the operation of, and the penalties provided by, § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States). The amendment increases penalties for counterfeiting activity in two ways.

First, the amendment adds a two-level enhancement for manufacturing, in addition to the minimum offense level of level 15 for manufacturing. This change will ensure some degree of additional punishment for all offenders who engage in manufacturing activity.

Second, the amendment adds a two-level enhancement (which would apply

alternatively to the manufacturing enhancement) if the offense involved possessing or controlling (1) paper that is similar to a distinctive paper used by the United States for its currency, obligations, or securities; or (2) a feature or device that is essentially identical to a distinctive counterfeit deterrent used by the United States for its currency, obligations, or securities. This enhancement is justified because of the higher statutory maximum penalties under 18 U.S.C. 474A (*i.e.*, a term of imprisonment of up to 25 years compared to 10, 15, and 20 years for other counterfeiting offenses). In addition, use of paper similar to ''distinctive paper'' and use of features and devices essentially identical to ''distinctive counterfeit deterrents'' (both of which are defined in § 2B5.1 consistently with the statute) make the counterfeit item more passable and the offense more sophisticated.

In addition, the amendment deletes the language in the commentary of § 2B5.1 that suggests that the manufacturing adjustment does not apply if the defendant ''merely photocopies''. That commentary was intended to make the manufacturing minimum offense level of level 15 inapplicable to notes that are so obviously counterfeit that they are unlikely to be accepted. Particularly with the advent of digital technology, it cannot be said that photocopying necessarily produces a note so obviously counterfeit as to be impassible.

7. *Amendment:* Section 2C1.3 is amended in the title by adding ''; Payment or Receipt of Unauthorized Compensation'' after ''Interest''.

Section 2C1.3 is amended by adding after subsection (b) the following:

'' (c) Cross Reference.

(1) If the offense involved a bribe or gratuity, apply § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than the offense level determined above.''.

The Commentary to § 2C1.3 captioned ''Statutory Provisions'' is amended by inserting '', 209, 1909'' after ''208''.

The Commentary to § 2C1.3 captioned ''Application Note'' is amended in Note 1 by inserting ''Abuse of Position of Trust.—'' before ''Do not''.

The Commentary to § 2C1.3 is amended by striking the background.

Chapter Two, Part C is amended by striking § 2C1.4 and its accompanying commentary. Section 8C2.1(a) is amended by striking ''2C1.4,''.

Reason for Amendment: The amendment (1) consolidates §§ 2C1.3 (Conflict of Interest) and 2C1.4 (Payment or Receipt of Unauthorized Compensation) covering payments to obtain public office, to promote ease of application; and (2) adds a cross reference in § 2B1.1 (Theft, Property Destruction, and Fraud) to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) and § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) to account for aggravating conduct often occurring in offenses involving the unlawful supplementation of the salary of various federal officials and employees committed in violation of 18 U.S.C. 209.

The amendment simplifies guideline operation by consolidating §§ 2C1.3 and 2C1.4. Consolidation is appropriate because the gravamen of the offenses covered by §§ 2C1.3 and 2C1.4 is similar: unauthorized receipt of a payment in respect to an official act. The cross reference to § 2C1.1 or § 2C1.2 was added by this amendment because the cases to which these guidelines apply usually involve a conflict of interest offense that is associated with a bribe or gratuity.

8. *Amendment:* Section 2D1.1(b)(5) through (7), Notes 20 and 21 of the Commentary to § 2D1.1 captioned ''Application Notes'', the ninth and tenth paragraphs of the Commentary to § 2D1.1 captioned ''Background'', and § 2D1.10, effective December 16, 2001 (see USSC Guidelines Manual Supplement to the 2000 Supplement to Appendix C, Amendment 608), are repromulgated with the following changes:

Section 2D1.1(b) is amended by striking subdivision (5); by redesignating subdivisions (6) and (7) as subdivisions (5) and (6), respectively; by redesignating subdivisions (5)(A) and (5)(B), as redesignated by this amendment, as subdivisions (5)(B) and (5)(C), respectively; and by inserting before subdivision (5)(B), as redesignated by this amendment, the following:

''(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.''.

Section 2D1.1(b)(5)(B), as redesignated by this amendment, is amended by striking ''subsection (b)(6)(B)'' and inserting ''subdivision (C)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by striking Note 20 and inserting the following:

''20. Hazardous or Toxic Substances.''—Subsection (b)(5)(A) applies if the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(5)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under § 5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§ 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 21(A) by striking ''(b)(6)'' and inserting ''(b)(5)(B) or (C)''; by striking ''may consider factors such as the following'' and inserting ''shall include consideration of the following factors''; by striking ''or'' after ''at the laboratory,'' and inserting ''and''; by striking ''or'' after ''disposed,'' and inserting ''and''; by striking ''or'' after ''the offense'' and inserting ''and''; by striking ''amphetamine or methamphetamine''; and by inserting ''whether the laboratory is located'' after ''e.g.,''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 21(B) by striking ''(b)(6)(B)'' and inserting ''(b)(5)(C)''.

The Commentary to § 2D1.1 captioned ''Background'' is amended in the ninth paragraph by inserting ''(A)'' after ''(b)(5)''; and in the tenth paragraph by striking ''Subsection (b)(6) implements'' and inserting ''Subsections (b)(5)(B) and (C) implement, in a broader form,''; and by striking ''878'' and inserting ''310''.

The Commentary to § 2D1.10 captioned ''Application Note'' is amended in Note 1 by striking ''may consider factors such as the following'' and inserting ''shall include consideration of the following factors''; by striking ''or'' after ''at the laboratory,'' and inserting ''and''; by striking ''or'' after ''disposed,'' and inserting ''and''; by striking ''or'' after ''the offense'' and inserting ''and''; by striking ''amphetamine or methamphetamine''; and by inserting ''whether the laboratory is located'' after ''e.g.,''.

The Commentary to § 2D1.10 captioned ''Background'' is amended by striking ''878'' and inserting ''310''.

Reason for Amendment: The Commission promulgated an emergency amendment addressing the directive in section 102 (the ''substantial risk directive'') of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310 (the ''Act''), with an effective date of December 16, 2000. (See USSC Guidelines Manual Supplement to the 2000 Supplement to Appendix C, Amendment 608.) This amendment repromulgates the emergency amendment, with modifications, as a permanent amendment.

The substantial risk directive instructs the Commission to amend the federal sentencing guidelines with respect to any offense relating to the manufacture, attempt to manufacture, or conspiracy to manufacture amphetamine or methamphetamine in (1) the Controlled Substances Act, 21 U.S.C. 801–90; (2) the Controlled Substances Import and Export Act, 21 U.S.C. 951–71; or (3) the Maritime Drug Law Enforcement Act, 46 U.S.C. App. 1901–04.

The Act requires the Commission, in carrying out the substantial risk directive, to provide the following enhancements—

(A) if the offense created a substantial risk of harm to human life (other than a life described in subparagraph (B)) or the environment, increase the base offense level for the offense—

(i) by not less than 3 offense levels above the applicable level in effect on the date of the enactment of this Act; or

(ii) if the resulting base offense level after an increase under clause (i) would be less than level 27, to not less than level 27; or

(B) if the offense created a substantial risk of harm to the life of a minor or incompetent, increase the base offense level for the offense—

(i) by not less than 6 offense levels above the applicable level in effect on the date of the enactment of this Act; or

(ii) if the resulting base offense level after an increase under clause (i) would be less than level 30, to not less than level 30.

The emergency amendment provided enhancements in §§ 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and 2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance) that also apply in the case of an attempt or a conspiracy to manufacture amphetamine or methamphetamine. The amendment did not amend § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) or § 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment). Although offenses that involve the manufacture of amphetamine or methamphetamine also are referenced in Appendix A (Statutory Index) to §§ 2D1.11 and 2D1.12, the cross references in these guidelines, which apply if the offense involved the manufacture of a controlled substance, will result in application of § 2D1.1 and accordingly, the enhancements.

The basic structure of the emergency amendment to §§ 2D1.1 and 2D1.10 tracked the structure of the substantial risk directive. Accordingly, in § 2D1.1, the amendment provided a three-level increase and a minimum offense level of level 27 if the offense (1) involved the manufacture of amphetamine or methamphetamine; and (2) created a substantial risk of harm either to human life or the environment. For offenses that created a substantial risk of harm to the life of a minor or an incompetent, the amendment provided a six-level increase and a minimum offense level of level 30.

However, the structure of the emergency amendment to § 2D1.10 differed from the structure of the emergency amendment to § 2D1.1 with respect to the first prong of the enhancement (regarding substantial risk of harm to human life or to the environment). Specifically, the emergency amendment provided a three-level increase and a minimum offense level of level 27 if the offense involved the manufacture of amphetamine or methamphetamine without making application of the enhancement dependent upon whether the offense also involved a substantial risk of either harm to human life or the environment. Consideration of whether the offense involves a substantial risk of harm to human life also is unnecessary because § 2D1.10 applies only to convictions under 21 U.S.C. 858, and the creation of a substantial risk of harm to human life is an element of an offense under 21 U.S.C. 858. Therefore, the base offense level already takes into account the substantial risk of harm to human life. Consideration of whether the offense involved a substantial risk of harm to the environment was unnecessary because the directive predicated application of the enhancement on substantial risk of harm either to human life or to the environment, and the creation of a substantial risk of harm to human life necessarily is taken into account as an element of the offense.

Neither the substantial risk directive nor any statutory provision defines ''substantial risk of harm.'' Based on an analysis of relevant case law that interpreted ''substantial risk of harm,'' the emergency amendment provided commentary setting forth factors that may be relevant in determining whether a particular offense created a substantial risk of harm. The definition of ''incompetent'' was modeled after several state statutes.

This permanent amendment re-promulgates, with modifications, the emergency amendment regarding the substantial risk directive. This amendment differs from the emergency amendment in several respects:

First, in § 2D1.1, this amendment treats the existing specific offense characteristic in § 2D1.1(b)(5), relating to a two-level enhancement for environmental violations occurring in the course of a drug trafficking offense, as an alternative to the three-level enhancement for substantial risk of harm to human life or the environment. This portion of the amendment is in response to an issue related to the substantial risk directive regarding how to implement it in a manner consistent with the earlier environmental hazard directive in section 303 of the Comprehensive Methamphetamine Control Act, Pub. L. 104–237. The emergency amendment made the enhancements cumulative. However, this permanent amendment makes the new guideline provision alternative with the pre-existing enhancement for environmental hazards in § 2D1.1.

Second, in § 2D1.1, this amendment lists four factors that the court ''shall'', as opposed to ''may'', consider to determine whether subsection (b)(6)(A)

or (B) applies. Similarly, in § 2D1.10, this amendment lists four factors the court ''shall'' consider to determine whether subsection (b)(1)(B) applies. The list of four factors was identified by the Commission to assist the courts in defining the meaning of ''substantial risk of harm'' for offenses related to the production and trafficking of precursor chemicals and the manufacture of amphetamine and methamphetamine.

Third, in § 2D1.1, this amendment provides that the court (1) shall consider any costs of environmental cleanup and harm to individuals and property in cases involving the manufacture of amphetamine or methamphetamine in determining the amount of restitution under § 5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§ 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), and (2) should consider such costs and harms in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine.

The amendment also makes a minor technical change in the background commentary.

9. *Amendment:* The subdivision captioned ''LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*'' of the Drug Equivalency Tables of Note 10 of the Commentary to § 2D1.1 captioned ''Application Notes'', effective May 1, 2001 (see USSC Guidelines Manual Supplement to the 2000 Supplement to Appendix C Amendment 609), is repromulgated without change.

Reason for Amendment: This amendment repromulgates (as a permanent amendment) without change the emergency amendment previously promulgated that addressed the directive in section 3664 of the Ecstasy Anti-Proliferation Act of 2000, Pub. L. 106–310 (the ''Act''). (See USSC Guidelines Manual Supplement to the 2000 Supplement to Appendix C, Amendment 609). That directive instructs the Commission to provide increased penalties for the manufacture, importation, exportation, or trafficking of ''Ecstasy''. The directive specifically requires the Commission to increase the base offense level for 3,4-Methylenedioxymethamphetamine (MDMA), 3,4-Methylenedioxyamphetamine (MDA), 3,4-Methylenedioxy-N-ethylamphetamine (MDEA), Paramethoxymethamphetamine (PMA), and any other controlled substance that is marketed as ''Ecstasy'' and that has either a chemical structure similar to MDMA or an effect on the central nervous system substantially similar to or greater than MDMA.

The amendment addresses the directive by amending the Drug Equivalency Tables in § 2D1.1, Application Note 10, to increase substantially the marihuana equivalencies for the specified controlled substances, which has the effect of substantially increasing the penalties for offenses involving ''Ecstasy''. The new penalties for ''Ecstasy'' trafficking provide penalties which, gram for gram, are more severe than those for powder cocaine. Under the Drug Equivalency Tables, one gram of powder cocaine has a marihuana equivalency of 200 grams. This amendment sets the marihuana equivalency for one gram of ''Ecstasy'' at 500 grams.

There is a combination of reasons why the Commission has substantially increased the penalties in response to the congressional directive. Much evidence received by the Commission indicated that ''Ecstasy'' (1) has powerful pharmacological effects; (2) has the capacity to cause lasting physical harms, including brain damage; and (3) is being abused by rapidly increasing numbers of teenagers and young adults. Indeed, the market for ''Ecstasy'' is overwhelmingly comprised of persons under the age of 25 years.

The Commission considered whether the penalty levels for ''Ecstasy'' should be set at the same levels as for heroin (one gram of heroin has a marihuana equivalency of 1000 grams) and decided that somewhat lesser penalties were appropriate for ''Ecstasy'' for a number of reasons: (1) The potential for addiction is greater with heroin; (2) heroin distribution often involves violence while, at this time, violence is not reported in ''Ecstasy'' markets; (3) because heroin is a narcotic and is often injected, the risk of death from overdose is much greater than for ''Ecstasy''; and (4) because heroin is often injected, there are more secondary health consequences, such as infections and the transmission of the human immunodeficiency virus (HIV) and hepatitis than for ''Ecstasy''.

Finally, based on information regarding ''Ecstasy'' trafficking patterns, the penalty levels chosen are appropriate and sufficient to target serious and high-level traffickers and to provide appropriate punishment, deterrence, and incentives for cooperation. The penalty levels chosen for ''Ecstasy'' offenses provide five year sentences for serious traffickers (those whose relevant conduct involved approximately 800 pills) and ten year sentences for high-level traffickers (those whose relevant conduct involved approximately 8,000 pills).

10. *Amendment:* Section 2D1.1(b)(4) is amended by inserting ''amphetamine or'' before ''methamphetamine'' each place it appears.

The Commentary to § 2D1.1 captioned ''Statutory Provisions'' is amended by inserting ''; 49 U.S.C. 46317(b)'' after ''960(a), (b)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 19 by inserting ''amphetamine or'' before ''methamphetamine''.

Appendix A (Statutory Index), as amended by amendment 5, is further amended by inserting after the line referenced to 49 U.S.C. 46317(a) the following new line:

''49 U.S.C. 46317(b) 2D1.1''.

The sixth entry, relating to Amphetamine and Amphetamine (actual), in each of subdivisions (1) through (14) of section 2D1.1(c), Note (B) of the ''*Notes to Drug Quantity Table'' in § 2D1.1(c), Note 9 of the Commentary to § 2D1.1 captioned ''Application Notes'', and the subdivision captioned ''Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*'' of the Drug Equivalency Tables in Note 10 of the Commentary to § 2D1.1 captioned ''Application Notes'', effective May 1, 2001 (see USSC Guidelines Manual Supplement to the 2000 Supplement to Appendix C Supplement, Amendment 610), are repromulgated with the following change:

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*'' by striking ''1 gm of Dextroamphetamine = 200 gm of marihuana''.

Reason for Amendment: This amendment repromulgates as a permanent amendment the emergency amendment previously promulgated to implement the directive in section 3611 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310 (the ''Act''), which directs the Commission to provide increased guideline penalties for amphetamine offenses such that those penalties are comparable to the base offense level for methamphetamine offenses. The directive provided the Commission emergency amendment authority. (*See* USSC Guidelines Manual Supplement to the 2000 Supplement to Appendix C, Amendment 610.)

This amendment revises § 2D1.1 to include amphetamine in the Drug Quantity Table in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or

Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). This amendment also treats amphetamine and methamphetamine identically, at a 1:1 ratio (i.e., the same quantities of amphetamine and methamphetamine will result in the same base offense level) because of the similarities of the two substances. Specifically, amphetamine and methamphetamine (1) are chemically similar; (2) are produced by a similar method and are trafficked in a similar manner; (3) share similar methods of use; (4) affect the same parts of the brain; and (5) have similar intoxicating effects. The amendment also distinguishes between pure amphetamine (i.e., amphetamine (actual)) and amphetamine mixture in the same manner, and at the same quantities, as pure methamphetamine (i.e., methamphetamine (actual)) and methamphetamine mixture, respectively. The Commission determined that the 1:1 ratio is appropriate given the similarity of these two controlled substances.

This amendment differs from the emergency amendment in that it also (1) amends § 2D1.1(b)(4) to make the enhancement for the importation of methamphetamine applicable to amphetamine offenses as well, and makes a conforming change in the commentary to § 2D1.1 in Application Note 19; (2) deletes as unnecessary the marihuana equivalency for dextroamphetamine in the Drug Equivalency Tables in § 2D1.1; and (3) amends Appendix A (Statutory Index) to refer a new offense at 49 U.S.C. 46317(b), (prohibiting transportation of controlled substances by aircraft) to § 2D1.1.

11. *Amendment:* Section 2D1.1(c)(1) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by adding at the end the following: ''30,000,000 units or more of Schedule I or II Depressants; 1,875,000 units or more of Flunitrazepam.''.

Section 2D1.1(c)(2) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by adding at the end the following: ''At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants; At least 625,000 but less than 1,875,000 units of Flunitrazepam.''.

Section 2D1.1(c)(3) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by adding at the end the following: ''At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants; At least 187,500 but less than 625,000 units of Flunitrazepam.''.

Section 2D1.1(c)(4) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by adding at the end the following: ''At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants; At least 62,500 but less than 187,500 units of Flunitrazepam.''.

Section 2D1.1(c)(5) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by adding at the end the following: ''At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants; At least 43,750 but less than 62,500 units of Flunitrazepam.''.

Section 2D1.1(c)(6) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by adding at the end the following: ''At least 400,000 but less than 700,000 units of Schedule I or II Depressants; At least 25,000 but less than 43,750 units of Flunitrazepam.''.

Section 2D1.1(c)(7) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by adding at the end the following: ''At least 100,000 but less than 400,000 units of Schedule I or II Depressants; At least 6,250 but less than 25,000 units of Flunitrazepam.''.

Section 2D1.1(c)(8) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by adding at the end the following: ''At least 80,000 but less than 100,000 units of Schedule I or II Depressants; At least 5,000 but less than 6,250 units of Flunitrazepam.''.

Section 2D1.1(c)(9) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by adding at the end the following: ''At least 60,000 but less than 80,000 units of Schedule I or II Depressants; At least 3,750 but less than 5,000 units of Flunitrazepam.''.

Section 2D1.1(c)(10) is amended in the line referenced to Schedule I or II Depressants by striking ''40,000 or more'' and inserting ''At least 40,000 but less than 60,000''; and in the line referenced to Flunitrazepam, by striking ''2,500 or more'' and inserting ''At least 2,500 but less than 3,750''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''Flunitrazepam**'' in the heading by striking ''**'' after ''Flunitrazepam''; and by striking the following:

''** Provided, that the combined equivalent weight of flunitrazepam, all Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances shall not exceed 99.99 kilograms of marihuana.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''Schedule I or II Depressants***'' in the heading by striking ''***'' after ''Schedule I or II Depressants''; and by striking the following:

''***Provided, that the combined equivalent weight of all Schedule I or II depressants, Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''Schedule III Substances****'' by striking ''Schedule I or II depressants,'' after ''Schedule III Substances,''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 17 by striking ''(e.g., the maximum offense level in the Drug Quantity Table for flunitrazepam is level 20)''.

Reason for Amendment: This amendment implements the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. 106–172 (the ''Act''), which provides the emergency scheduling of gamma hydroxybutyric acid (''GHB'') as a Schedule I controlled substance under the Controlled Substances Act when the drug is used illicitly. The Act also amended section 401(b)(1)(C) of the Controlled Substances Act, 21 U.S.C. 841(b)(1)(C), and section 1010(b)(3) of the Controlled Substances Import and Export Act, 21 U.S.C. 960(b)(3), to provide penalties of not more than 20 years' imprisonment for an offense that involves GHB.

This amendment eliminates the maximum base offense level of level 20 in the Drug Quantity Table of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) for Schedule I and II depressants (including GHB). The same change is made with respect to flunitrazepam, which, for sentencing purposes, is tied to Schedule I and II depressants. The Commission determined that increased penalties for the more serious offenses involving Schedule I and II depressants are appropriate.

Corresponding changes to the Drug Equivalency Tables in § 2D1.1 were made for both Flunitrazepam and Schedule I or II depressants by eliminating the maximum marihuana equivalency when offenses involving these controlled substances also involve

offenses for controlled substances in Schedules III, IV, or V.

12. *Amendment:* Section 2D1.1(b)(6), as redesignated by amendment 8, is amended by inserting ''subsection (a) of'' after ''(1)–(5) of''; and by striking ''and the offense level determined above is level 26 or greater''.

The Commentary to § 2D1.1 captioned ''Application Notes'', as amended by amendments 8, 10, and 11, is further amended by striking Note 14; and by redesignating Notes 15 through 21 as Notes 14 through 20, respectively.

Section 5C1.2 is amended in the first paragraph by striking ''In'' and inserting ''(a) Except as provided in subsection (b), in''.

Section 5C1.2 is amended by inserting after subsection (a), as so designated by this amendment, the following:

''(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17.''.

The Commentary to § 5C1.2 captioned ''Application Notes'' is amended in Note 2 by striking ''subdivision'' and inserting ''subsection (a)''.

The Commentary to § 5C1.2 captioned ''Application Notes'' is amended in Note 3 by striking ''subdivisions'' and inserting ''subsection (a)''; and striking ''subdivision'' and inserting ''subsection (a)''.

The Commentary to § 5C1.2 captioned ''Application Notes'' is amended in Notes 4 through 7 by striking ''subdivision'' each place it appears and inserting ''subsection (a)''.

Reason for Amendment: This amendment expands the eligibility for the two-level reduction in subsection (b)(6) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) for persons who meet the criteria set forth in § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) to include defendants with an offense level less than level 26. The Commission determined that limiting the applicability of this reduction to defendants with an offense level of level 26 or greater is inconsistent with the general principles underlying this two-level reduction (and the related safety valve provision, see 18 U.S.C. 3553(f)) to provide lesser punishment for first time, nonviolent offenders.

This amendment also establishes in § 5C1.2 a minimum offense level of level 17 for a defendant who meets the requirements set forth in § 5C1.2, and for whom the statutorily required minimum sentence is at least five years, in order to comply more strictly with the directive to the Commission at section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322.

13. *Amendment:* The subdivision captioned ''List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)*******'' in the Drug Equivalency Tables in Note 10 of the Commentary to § 2D1.1 captioned ''Application Notes'' and § 2D1.11, effective May 1, 2001 (see USSC Guidelines Manual Supplement to the 2000 Supplement to Appendix C, Amendment 611), are repromulgated with the following changes:

Section 2D1.11 is amended in the heading to subsection (d)(1) by striking ''(d)(1)'' before ''Ephedrine,'' and inserting ''(d)''.

Section 2D1.11 is amended in the heading to subsection (d)(2) by striking ''(d)(2)'' before ''Chemical'' and inserting ''(e)''.

Section 2D1.11(e)(1), as redesignated by this amendment, is amended by striking the period after ''3, 4-Methylenedioxyphenyl-2-propanone'' and inserting a semicolon; and by adding at the end the following: ''10,000 KG or more of Gamma-butyrolactone.''.

Section 2D1.11(e)(2), as redesignated by this amendment, is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following: ''At least 3,000 KG but less than 10,000 KG of Gamma-butyrolactone;''; and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by adding at the end the following: ''376.2 G or more of Iodine.''.

Section 2D1.11(e)(3), as redesignated by this amendment, is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following: ''At least 1,000 KG but less than 3,000 KG of Gamma-butyrolactone;''; and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by adding at the end the following: ''At least 125.4 G but less than 376.2 G of Iodine.''.

Section 2D1.11(e)(4), as redesignated by this amendment, is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following: ''At least 700 KG but less than 1,000 KG of Gamma-butyrolactone;''; and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by adding at the end the following: ''At least 87.8 G but less than 125.4 G of Iodine.''.

Section 2D1.11(e)(5), as redesignated by this amendment, is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following: ''At least 400 KG but less than 700 KG of Gamma-butyrolactone;''; and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by adding at the end the following: ''At least 50.2 G but less than 87.8 G of Iodine.''.

Section 2D1.11(e)(6), as redesignated by this amendment, is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following: ''At least 100 KG but less than 400 KG of Gamma-butyrolactone;''; and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by adding at the end the following: ''At least 12.5 G but less than 50.2 G of Iodine.''.

Section 2D1.11(e)(7), as redesignated by this amendment, is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following: ''At least 80 KG but less than 100 KG of Gamma-butyrolactone;''; and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by adding at the end the following: ''At least 10 G but less than 12.5 G of Iodine. ''.

Section 2D1.11(e)(8), as redesignated by this amendment, is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following: ''At least 60 KG but less than 80 KG of Gamma-butyrolactone;''; and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by adding at the end the following: ''At least 7.5 G but less than 10 G of Iodine.''.

Section 2D1.11(e)(9), as redesignated by this amendment, is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following:

''At least 40 KG but less than 60 KG of Gamma-butyrolactone;''; and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by adding at the end the following: ''At least 5 G but less than 7.5 G of Iodine.''.

Section 2D1.11(e)(10), as redesignated by this amendment, is amended in the subdivision captioned ''List I Chemicals'' by adding at the end the following: ''Less than 40 KG of Gamma-butyrolactone;''; and in the subdivision

captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by adding at the end the following: ''Less than 5 G of Iodine.''.

Reason for Amendment: This amendment repromulgates, with additional changes, the emergency amendment previously promulgated in response to the three-part directive in section 3651 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310 (the ''Act''), regarding enhanced punishment for trafficking in List I chemicals. (See Guidelines Manual Supplement to the 2000 Supplement to Appendix C, Amendment 611). That section provided the Commission emergency amendment authority to implement the directive.

This amendment provides a new chemical quantity table in § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) specifically for ephedrine, pseudoephedrine, and phenylpropanolamine (PPA). The table ties the base offense levels for these chemicals to the base offense levels for methamphetamine (actual) set forth in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), assuming a 50 percent actual yield of the controlled substance from the chemicals. (Methamphetamine (actual) is used rather than methamphetamine mixture because ephedrine and pseudoephedrine produce methamphetamine (actual), and PPA produces amphetamine (actual)). This yield is based on information provided by the Drug Enforcement Administration (DEA) that the typical yield of these substances for clandestine laboratories is 50 to 75 percent.

This new chemical quantity table has a maximum base offense level of level 38 (as opposed to a maximum base offense level of level 30 for all other precursor chemicals). Providing a maximum base offense level of level 38 complies with the directive to establish penalties for these precursors that ''correspond to the quantity of controlled substance that reasonably could have been manufactured using the quantity of ephedrine, phenylpropanolamine, or pseudoephedrine possessed or distributed.'' Additionally, this eliminates the six-level distinction that currently exists between precursor chemical offenses that involve intent to manufacture amphetamine or methamphetamine and such offenses that also involve an actual attempt to manufacture amphetamine or methamphetamine.

This amendment eliminates the Ephedrine Equivalency Table in § 2D1.11 and, in its place, provides a general rule for the court to determine the base offense level in cases involving multiple precursors (other than ephedrine, pseudoephedrine, or PPA) by using the quantity of the single chemical resulting in the greatest offense level. An upward departure is provided for cases in which the offense level does not adequately address the seriousness of the offense.

However, this amendment provides an exception to that general rule for offenses that involve a combination of ephedrine, pseudoephedrine, or PPA because these chemicals often are used in the same manufacturing process. In a case that involves two or more of these chemicals, the base offense level will be determined using the total quantity of these chemicals involved. The purpose of this exception is twofold: (1) Any of the three primary precursors in the same table can be combined without difficulty; and (2) studies conducted by the DEA indicate that because the manufacturing process for amphetamine is essentially identical to the manufacturing process for methamphetamine, there are cases in which the different precursors are included in the same batch of drugs. If the chemical is PPA, amphetamine results; if the chemical is ephedrine or pseudoephedrine, methamphetamine results.

The amendment also adds to the Drug Equivalency Tables in § 2D1.1 a conversion table for these precursor chemicals, providing for a 50 percent conversion ratio. This is based on data from the DEA that the actual yield from ephedrine, pseudoephedrine, or PPA typically is in the range of 50 to 75 percent. The purpose of this part of the amendment is to achieve the same punishment level (as is achieved by the first part of this amendment) for an offense involving any of these precursor chemicals when such offense involved the manufacture of amphetamine or methamphetamine and, as a result, is sentenced under § 2D1.1 pursuant to the cross reference in § 2D1.11.

This amendment also increases the base offense level for Benzaldehyde, Hydriodic Acid, Methylamine, Nitroethane, and Norpseudoephedrine by re-calibrating these levels to the appropriate quantity of methamphetamine (actual) that could be produced assuming a 50 percent yield of chemical to drug and retaining a cap at level 30. Previously, these chemicals had been linked to methamphetamine (mixture) penalty levels. Based on a study conducted by the DEA, ephedrine and pseudoepehdrine are the primary precursors used to make methamphetamine in the United States. Phenylproponolamine is the primary precursor used to make amphetamine. Unlike the five additional List I chemicals, the chemical structures of ephedrine, pseudoephedrine, and PPA are so similar to the resulting drug (i.e., methamphetamine or amphetamine) that the manufacture of methamphetamine or amphetamine from ephedrine, pseudoephedrine, or PPA is a very simple one-step synthesis which anyone can perform using a variety of chemical reagents. The manufacture of methamphetamine or amphetamine from the five additional List I chemicals is a more complex process which requires a heightened level of expertise.

This amendment adds to the emergency amendment in two ways. First, it amends the Chemical Quantity Table in § 2D1.11 to include gamma-butyrolactone (GBL), a precursor for gamma hydroxybutyric acid (GHB), as a List I chemical. This change is in response to the Hillory J. Farias and Samantha Reid Date Rape Prohibition Act of 2000, Pub. L. 106–172, which added GBL to the list of List 1 chemicals in section 401 (b)(1)(C) of the Controlled Substances Act, 21 U.S.C. 841(b)(1)(C). Offense levels for GBL were established in the same manner as other List I chemicals. The offense level for a specific quantity of GHB that can be produced from a given quantity of GBL, assuming a 50 percent yield, was determined using the Drug Quantity Table in § 2D1.1. From this offense level, six levels were subtracted to reflect the fact that an attempt to manufacture is not a required element of these offenses and, therefore, they are less serious offenses than offenses covered by § 2D1.1.

Second, the amendment adds iodine to the Chemical Quantity Table in § 2D1.1 in response to a recent classification of iodine as a List II chemical. Iodine is used to produce hydrogen iodide which, in the presence of water, becomes hydriodic acid, a List I chemical that is a reagent used in the production of amphetamine and methamphetamine. The penalties for iodine were established based upon its conversion to hydriodic acid.

14. *Amendment:* Section 2D1.12 is amended in the title by inserting ''Transportation, Exportation,'' after ''Distribution,''; and by striking ''or Equipment'' and inserting '', Equipment, Chemical, Product, or Material''.

Section 2D1.12(a)(1), (a)(2), and (b)(1) are amended by inserting ''flask,'' after ''prohibited'' each place it appears; and by inserting '', chemical, product, or material'' after ''equipment'' each place it appears.

The Commentary to § 2D1.12 captioned ''Statutory Provisions'' is amended by inserting ''§ '' before ''843''; and by inserting '', 864'' after ''(7)''.

The Commentary to § 2D1.12 captioned ''Application Notes'' is amended by striking the text of Note 1 and inserting the following:

''If the offense involved the large-scale manufacture, distribution, transportation, exportation, or importation of prohibited flasks, equipment, chemicals, products, or material, an upward departure may be warranted.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 21 U.S.C. § 863 the following:

''21 U.S.C. 864–2D1.12''.

Reason for Amendment: This amendment addresses the new offense, in section 423 of the Controlled Substances Act, 21 U.S.C. 864, of stealing or transporting across state lines anhydrous ammonia knowing, intending, or having reasonable cause to believe that such anhydrous ammonia will be used to manufacture a controlled substance. This new offense, created by section 3653 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310, carries the statutory penalties contained in section 403(d) of the Controlled Substances Act, 21 U.S.C. 843, i.e., not more than four years' imprisonment (or not more than eight years' imprisonment in the case of certain prior convictions), or not more than ten years' imprisonment (or not more than 20 years' imprisonment in the case of certain prior convictions) if the offense involved the manufacture of methamphetamine.

The amendment references the new offense to § 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy). Reference to this guideline is appropriate because the new offense is similar to other offenses that already are referenced to the guideline and have the same penalty structure, such as 21 U.S.C. 843(a)(6), which among other things, makes it unlawful to possess any chemical, product, or material that may be used to manufacture a controlled substance. In addition, this amendment expands the coverage of Application Note 1 to also apply to cases involving the transportation and exportation of prohibited chemicals, products, or material. Finally, the amendment makes minor, non-substantive changes to the guideline in order to fully incorporate the new and existing offenses.

15. *Amendment:* Sections 2G1.1, 2G2.1, 2H4.1, 2H4.2, and 5E1.1, and each line in Appendix A (Statutory Index) referenced to 18 U.S.C. 241, 1589, 1590, 1591, or 1592, or to 29 U.S.C. 1851, effective May 1, 2001 (see USSC Guidelines Manual Supplement to the 2000 Supplement to Appendix C, Amendment 612), are repromulgated with the following changes:

Section 5E1.1(a)(1) is amended by inserting '', or 21 U.S.C. 853(q)'' after ''3663A''.

The Commentary to § 5E1.1 captioned ''Background'' is amended in the first paragraph by inserting '', and 21 U.S.C. 853(q)'' after ''3663A''.

Reason for Amendment: This amendment repromulgates as a permanent amendment the previously promulgated emergency amendment on human trafficking. (See USSC Guidelines Manual Supplement to the 2000 Supplement to Appendix C, Amendment 612.) The amendment implements the congressional directive in section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106–386 (the ''Act'').

The directive requires the Commission to amend, if appropriate, the guidelines applicable to human trafficking (i.e., peonage, involuntary servitude, and forced labor) offenses. It also requires the Commission to ensure that the guidelines ''are sufficiently stringent to deter and adequately reflect the heinous nature of these offenses.'' In compliance with the directive, the amendment (1) creates a new guideline, § 2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act); (2) refers violations of four new statutes, 18 U.S.C. 1589 (Forced Labor), 1590 (Trafficking with Respect to Peonage, Involuntary Servitude or Forced Labor), 1591 (Sex Trafficking of Children by Force, Fraud or Coercion), and 1592 (Unlawful Conduct with Respect to Documents in Furtherance of Peonage, Involuntary Servitude, or Forced Labor) to the appropriate guidelines; and (3) makes changes, consistent with the directive, which both enhance sentences and reflect changes to three existing statutes: 18 U.S.C. 1581(a) (Peonage), 1583 (Enticement into Slavery) and 1584 (Sale into Involuntary Servitude).

To address this multi-faceted directive, the amendment makes changes to several existing guidelines and creates a new guideline for criminal violations of the Migrant and Seasonal Agricultural Worker Protection Act. Although the directive instructs the Commission to amend the guidelines applicable to the Fair Labor Standards Act (29 U.S.C. 201 et. seq.), a criminal violation of the Fair Labor Standards Act is only a Class B misdemeanor. See 29 U.S.C. 216. Thus, the guidelines are not applicable to those offenses.

The amendment references the new offense at 18 U.S.C. 1591 to § 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct). Section 1591 provides criminal penalties for a defendant who participates in the transporting or harboring of a person, or who benefits from participating in such a venture, with the knowledge that force, fraud, or coercion will be used to cause that person to engage in a commercial sex act or with knowledge that the person is not 18 years old and will be forced to engage in a commercial sex act. Despite the statute's inclusion in a chapter of title 18 devoted mainly to peonage offenses, section 1591 offenses are more analogous to the offenses referenced to the prostitution guideline.

Section 1591 cases alternatively have been referred in Appendix A (Statutory Index) to § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production). This has been done in anticipation that some portion of section 1591 cases will involve forcing or coercing children to engage in commercial sex acts for the purpose of producing pornography. Such offenses, as recognized by the higher base offense level at § 2G2.1, are more serious because they both involve specific harm to an individual victim and further an additional criminal purpose, namely, commercial pornography.

The amendment maintains the view that § 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) continues to be an appropriate tool for determining sentences for violations of 18 U.S.C. 1581, 1583, and 1584. Section 2H4.1 also is designed to cover offenses under three new statutes: 18 U.S.C. 1589, 1590, and 1592. Section 1589 provides criminal penalties for a defendant who provides or obtains the labor or services of another by the use of threats of serious harm or physical restraint against a person, or by a scheme or plan intended to make the person believe that physical restraint or serious harm would result from not performing the labor or services. This statute also applies to defendants who provide or obtain labor or services of another by abusing or threatening abuse

of the law or the legal process. See 18 U.S.C. 1589.

Section 1590 provides criminal penalties for a defendant who harbors, transports, or is otherwise involved in obtaining, a person for labor or services. Section 1592 provides criminal penalties for a defendant who knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person in the course of a violation of § 1581 (peonage), § 1583 (enticement into slavery), § 1584 (sale into involuntary servitude), § 1589 (forced labor), § 1590 (trafficking with respect to these offenses), § 1591 (sex trafficking of children by force, fraud, or coercion), or § 1594(a) (attempts to violate these offenses). Section 1592 also provides criminal penalties for a defendant who, with intent to violate § 1581, § 1583, § 1584, § 1589, § 1590, or § 1591, knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person. These statutes prohibit the types of behaviors that traditionally have been sentenced under § 2H4.1.

The amendment provides an alternative, less punitive base offense level of level 18 for those who violate 18 U.S.C. 1592, an offense which limits participation in peonage cases to the destruction or wrongful confiscation of a passport or other immigration document. This alternative, lower base level reflects the lower statutory maximum sentence for section 1592 offenses (i.e., 5 years' imprisonment).

Section 2H4.1(b)(2) has been expanded to provide a four-level increase if a dangerous weapon was used and a two-level increase if a dangerous weapon was brandished or its use was threatened. Prior to this amendment, only actual use of a dangerous weapon was covered. This change reflects the directive to consider an enhancement for the use or threatened use of a dangerous weapon. The commentary to § 2H4.1 is amended to clarify that the threatened use of a dangerous weapon applies regardless of whether a dangerous weapon was actually present.

The amendment also creates a new guideline, § 2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act), in response to the directive to amend the guidelines applicable to such offenses. These offenses, which have a statutory maximum sentence of one year imprisonment for first offenses and three years' imprisonment for subsequent offenses, were not, prior to this amendment, referred to any specific guideline. The amendment provides a base offense level of level 6 in recognition of the low statutory maximum sentences set for these cases by Congress. Further, these offenses typically involve violations of regulatory provisions. Setting the base offense level at level 6 provides consistency with guidelines for other regulatory offenses. See, e.g., §§ 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) and 2N3.1 (Odometer Laws and Regulations). Subsections (b)(1), an enhancement for bodily injury, and (b)(2), an enhancement applicable to defendants who commit the instant offense after previously sustaining a civil penalty for similar misconduct, have been established to respond to the directive that the Commission consider sentencing enhancement for this aggravated conduct. This provision addresses the Department of Justice's and the Department of Labor's concern regarding the need for enhanced penalties in cases involving prior administrative and civil adjudications.

This amendment also addresses that portion of section 112 of the Act that amends chapter 77 of title 18, United States Code, to provide mandatory restitution for peonage and involuntary servitude offenses. The amendment amends § 5E1.1 (Restitution) to include a reference to 18 U.S.C. 1593 in the guideline provision regarding mandatory restitution.

By enactment of various sentencing enhancements and encouraged upward departures for areas of concern identified by Congress, the Commission has provided for more severe sentences for perpetrators of human trafficking offenses in keeping with the conclusion that the offenses covered by this amendment are both heinous in nature and being committed with increasing frequency.

In addition, to repromulgating the emergency amendment, this amendment responds to section 3613 of the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106–310, that amends 21 U.S.C. 853(q) to provide mandatory restitution for offenses involving the manufacture of methamphetamine. Accordingly, the amendment amends § 5E1.1 (Restitution) to include a reference to 21 U.S.C. 853(q) in the guideline provision regarding mandatory restitution.

16. *Amendment:* Section 2H3.1 is amended in the title by striking ''or'' and inserting a semicolon; and by inserting ''; Disclosure of Tax Return Information'' after ''Eavesdropping''.

Section 2H3.1 is amended by striking subsection (a) and inserting the following:

''(a) Base Offense Level (Apply the greater):

(1) 9; or

(2) 6, if the defendant was convicted of 26 U.S.C. 7213A or 26 U.S.C. 7216.''.

Section 2H3.1(b)(1) is amended by striking ''conduct'' and inserting ''offense''.

Section 2H3.1(c)(1) is amended by striking ''conduct'' and inserting ''offense''; and by striking ''that offense'' and inserting ''that other offense''.

The Commentary to § 2H3.1 captioned ''Statutory Provisions'' is amended by inserting ''26 U.S.C. 7213(a)(1)–(3), (a)(5), (d), 7213A, 7216;'' after ''2511;''.

The Commentary to § 2H3.1 captioned ''Application Note'' is amended by striking ''Note'' and inserting ''Notes''; by redesignating Note 1 as Note 2; and by inserting before Note 2, as redesignated by this amendment, the following:

''1. Definitions.—For purposes of this guideline, 'tax return' and 'tax return information' have the meaning given the terms 'return' and 'return information' in 26 U.S.C. 6103(b)(1) and (2), respectively.''.

The Commentary to § 2H3.1 captioned ''Application Notes'' as re-captioned by this amendment, is amended in Note 2, as redesignated by this amendment, by inserting ''Satellite Cable Transmissions.—'' before ''If the''.

The Commentary to § 2H3.1 captioned ''Background'' is amended by adding at the end the following additional paragraph:

''This section also refers to conduct relating to the disclosure and inspection of tax returns and tax return information, which is proscribed by 26 U.S.C. 7213(a)(1)–(3), (5), (d), 7213A, and 7216. These statutes provide for a maximum term of imprisonment of five years for most types of disclosure of tax return information, but provide a maximum term of imprisonment of one year for violations of 26 U.S.C. 7213A and 7216.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 26 U.S.C. 7212(b) the following new lines:

''26 U.S.C. § 7213(a)(1) 2H3.1
26 U.S.C. § 7213(a)(2) 2H3.1
26 U.S.C. § 7213(a)(3) 2H3.1
26 U.S.C. § 7213(a)(5) 2H3.1
26 U.S.C. § 7213(d) 2H3.1
26 U.S.C. § 7213A 2H3.1'';

And by inserting after the line referenced to 26 U.S.C. § 7215 the following new line:

''26 U.S.C. § 7216 2H3.1''.

Reason for Amendment: This amendment responds to the Internal Revenue Service Restructuring and Reform Act of 1998, Public Law 105–206 (''the Act''). The Act created new tax offenses pertaining to the unlawful disclosure of tax-related information contained on computer software and to unlawful requests for tax audits. In addition, the Taxpayer Browsing Protection Act of 1997, Public Law 105–35, created another tax offense pertaining to the unlawful inspection of tax information.

Specifically, Public Law 105–35 expanded 26 U.S.C. 7213 to prohibit federal and state employees and certain other persons from disclosing tax-related computer software. Public Law 105–35 also created an offense at 26 U.S.C. 7213A making it unlawful for federal and state employees and certain other persons to inspect tax return information in any way other than that authorized under the Internal Revenue Code.

This is a two-part amendment. First, this amendment updates Appendix A (Statutory Index) by referring most of these offenses to § 2H3.1 (Interception of Communications and Eavesdropping). Prior to this amendment, no guideline provision or statutory reference was expressly promulgated to address tax offenses that implicated privacy interests. Under subsection (a) of § 1B1.2 (Applicable Guidelines) and under § 2X5.1 (Other Offenses), courts are required to use the most analogous offense guideline from Chapter Two (Offense Conduct) in each pending case brought under a statute having no reference in the guidelines' statutory index.

In general, the guideline most analogous for these offenses is § 2H3.1. Section 2H3.1 concerns offenses against privacy and, in large measure, these tax-related offenses are devoted to protecting taxpayer privacy interests. Section 2H3.1 also contains a cross reference to ''another offense'' if a greater offense level will result.

Second, this amendment adds a three-level decrease in the base offense level under § 2H3.1 for the least serious types of offense behavior, in which there was no intent to harm or obtain pecuniary gain. The base offense level for § 2H3.1 is level 9 with a range of 4 to 10 months (in criminal history Category I). The Commission determined that a base offense level of level 9 is too severe for the misdemeanor offenses contained in 26 U.S.C. §§ 7213A (Unauthorized Inspection) and 7216 (Unauthorized Disclosure), and the three-level decrease addresses this concern.

17. Amendment: Section 2K1.3(a) is amended by striking the text of subdivision (3) and inserting the following:

''16, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; or (B) knowingly distributed explosive materials to a prohibited person; or''.

The Commentary to § 2K1.3 captioned ''Statutory Provisions'' is amended by inserting ''(l)-(o), (p)(2),'' after ''(i),''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended by striking the text of Note 3 and inserting the following:

''For purposes of subsection (a)(3), 'prohibited person' means any person described in 18 U.S.C. 842(i).''.

Section 2K2.1(a)(4)(B) is amended by striking ''is'' after ''(i)'' and inserting ''was''; and by inserting ''at the time the defendant committed the instant offense'' after ''prohibited person''.

Section 2K2.1(a)(6) is amended by striking ''is'' after ''(A)'' and inserting ''was''; and by inserting ''at the time the defendant committed the instant offense'' after ''prohibited person''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended by striking the text of Note 6 and inserting the following:

''For purposes of subsections (a)(4)(B) and (a)(6), 'prohibited person' means any person described in 18 U.S.C. 922(g) or 922(n).''.

Reason for Amendment: This amendment makes two revisions regarding the definition of ''prohibited person'' in subsection (a)(3) of § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials) and subsections (a)(4)(B) and (a)(6) of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). First, the amendment adopts the definitions of prohibited person found in specific statutes for explosive and firearm offenses. (There is no uniform statutory definition of prohibited person.) The relevant statutory provision for § 2K1.3 is 18 U.S.C. § 842(i), and the relevant statutory provisions for § 2K2.1 are 18 U.S.C. 922(g) and (n).

Second, the amendment clarifies that the pertinent alternative base offense level applies only when the offender attains the requisite status prior to committing the instant offense. This clarification is consistent with the amendment on prior felonies, which provides for increased punishment only when the offender sustains certain felony convictions prior to committing the instant offense.

18. *Amendment*: Section 2K1.3(a)(1) is amended by striking ''had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;'';

Section 2K1.3(a)(2) is amended by striking ''had one prior felony conviction of either a crime of violence or a controlled substance offense; or' and inserting 'committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended by striking the text of Note 2 and inserting the following:

''For purposes of this guideline:

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

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

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

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended in Note 9 by inserting before the first paragraph the following:

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

Section 2K2.1(a)(1) is amended by striking ''had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;''.

Section 2K2.1(a)(2) is amended by striking ''had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;''.

Section 2K2.1(a)(3) is amended by striking ''had one prior felony conviction of either a crime of violence or controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;''.

Section 2K2.1(a)(4)(A) is amended by striking ''had one prior felony conviction of either a crime of violence or controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or''.

Section 2K2.1(a) is amended in subdivision (4)(B) by striking ''; or'' after ''922(d)'' and inserting a semi-colon; in subdivision (5), by striking ''; or'' after ''921(a)(30)'' and inserting a semi-colon; and in subdivision (6) by striking ''; or'' after ''§ 922(d)'' and inserting a semi-colon.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended by striking Note 5 and inserting the following:

''5. For purposes of this guideline:

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

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

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

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 15 by inserting before the first paragraph the following:

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

Reason for Amendment: This amendment modifies subsections (a)(1) and (a)(2) of § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials) and subsections (a)(1), (a)(2), (a)(3) and (a)(4)(A) of § 2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition) to resolve a circuit conflict regarding whether a crime committed after the commission of the instant offense and before sentencing for the instant offense is counted as a prior felony conviction for purposes of determining the defendant's base offense level. *Compare United States* v. *Pugh*, 158 F.3d 1308, 1311 (D.C. Cir. 1998) (finding the guideline language ambiguous but the commentary language clear, thereby counting prior felony conviction that was sentenced prior to sentencing for the instant federal offense, even if the defendant committed the prior felony offense after the instant federal offense); *United States* v. *McCary*, 14 F.3d 1502, 1506 (10th Cir. 1994) (the defendant's base offense level is to be determined on the basis of the defendant's status as of the date the district court imposed sentence, not the date of the offense for which he had previously been convicted); and *United States* v. *Laihben*, 167 F.3d 1364 (11th Cir. 1999) (district court properly considered defendant's conviction, which occurred after commission of, but before sentencing, on the federal firearms offense, in determining offense level), with *United States* v. *Barton*, 100 F.3d 43, 46 (6th Cir. 1996) (defendant's state drug crime, which was committed after federal offense of being a felon in possession of firearm, could not have been counted as prior felony conviction under § 2K2.1(a), even though defendant was convicted and sentenced on state offense prior to sentencing on federal charge; only those convictions that occur prior to the commission of the firearm offense may be counted against the defendant in determining the base offense level)) and *United States* v. *Oetken*, 241 F.3d 1057 (8th Cir. 2001) (only convictions that occur prior to the commission of the offense qualify as ''prior convictions'').

The amendment adopts the minority view that an offense committed after the commission of any part of the offense cannot be counted as a prior felony conviction. The amendment clarifies, in § 2K1.3(a)(1) and (a)(2) and in § 2K2.1(a)(1), (a)(2), (a)(3) and (a)(4)(A), that the instant offense must have been committed subsequent to sustaining the prior felony conviction. In so doing, this amendment adopts a rule that is consistent with the requirements concerning the use of prior convictions under §§ 4B1.1 (Career Offender) and 4B1.2 (Definitions of Terms Used in Section 4B1.1).

This amendment also clarifies that in cases in which more than one prior felony conviction is required for application of the base offense level in § 2K1.3 or § 2K2.1, the prior felony convictions must be counted separately under Chapter Four (Criminal History and Criminal Livelihood).

The amendment makes nonsubstantive clarifying changes in the definitions of ''controlled substance offense'', ''crime of violence'', and ''felony conviction'' for purposes of §§ 2K1.3 and 2K2.1.

19. *Amendment*: Section 2K2.1(b)(1) is amended in the table by striking subdivisions (A) through (F) and inserting the following:

''(A) 3–7	add 2
(B) 8–24	add 4
(C) 25–99	add 6
(D) 100–199	add 8
(E) 200 or more	add 10.''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 16 by striking ''significantly'' and inserting ''substantially''; and by striking ''fifty'' and inserting ''200''.

Reason for Amendment: This amendment responds to a recommendation from the Bureau of Alcohol, Tobacco and Firearms (ATF) to increase the penalties in § 2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition) for offenses involving more than 100 firearms.

The amendment modifies the firearms table at § 2K2.1(b)(1), to provide enhancements in two-level increments.

Prior to this amendment, the table provided enhancements in one-level increments. This change has the effect of compressing the table by providing a wider range in each subdivision of the table for the number of firearms involved in the offense. Compressing the table in this manner diminishes some of the fact-finding required to determine how many firearms were involved in the offense and provides some increase in penalties. The amendment provides additional two-level increases for offenses that involve either 100–199 firearms, or 200 or more firearms. These increases are provided to ensure adequate and proportionate punishment in cases that involve large numbers of firearms.

The proposed amendment also makes a conforming change to Application Note 16 of § 2K2.1 regarding upward departures.

20. Amendment: Chapter Two, Part L, Subpart 1 is amended by striking § 2L1.2, and its accompanying commentary, and inserting the following:

''§ 2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense committed for profit, increase by 16 levels;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. 1325(a) (second or subsequent offense only), 8 U.S.C. 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes

1. Application of Subsection (b)(1).—

(A) In General.''For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) If all or any part of a sentence of imprisonment was probated, suspended, deferred, or stayed, 'sentence imposed' refers only to the portion that was not probated, suspended, deferred, or stayed.

(B) Definitions.—For purposes of subsection (b)(1):

(i) 'Committed for profit' means committed for payment or expectation of payment.

(ii) 'Crime of violence'—

(I) means an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another; and

(II) includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.

(iii) 'Drug trafficking offense' means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(iv) 'Felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

(v) 'Firearms offense' means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. 921, or of an explosive material as defined in 18 U.S.C. 841(c).

(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 5845(a), or of an explosive material as defined in 18 841(c).

(III) A violation of 18 U.S.C. 844(h).

(IV) A violation of 18 U.S.C. 924(c).

(V) A violation of 18 U.S.C. 929(a).

2. Application of Subsection (b)(1)(C).—For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in 8 U.S.C. 1101(a)(43), without regard to the date of conviction of the aggravated felony.

3. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):

(A) 'Misdemeanor' means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) 'Three or more convictions' means at least three convictions for offenses that (i) were separated by an intervening arrest; (ii) did not occur on the same occasion; (iii) were not part of a single common scheme or plan; or (iv) were not consolidated for trial or sentencing.

4. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

5. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).''.

Reason for Amendment: This amendment responds to concerns raised by a number of judges, probation officers, and defense attorneys, particularly in districts along the southwest border between the United States and Mexico, that § 2L1.2 (Unlawfully Entering or Remaining in the United States) sometimes results in disproportionate penalties because of the 16-level enhancement provided in the guideline for a prior conviction for an aggravated felony. The disproportionate penalties result because the breadth of the definition of ''aggravated felony'' provided in 8 U.S.C. 1101(a)(43), which is incorporated into the guideline by reference, means that a defendant who previously was convicted of murder, for example, receives the same 16-level enhancement as a defendant previously convicted of simple assault. The Commission also observed that the criminal justice system has been addressing this inequity on an ad hoc basis in such cases by increased use of departures.

This amendment responds to these concerns by providing a more graduated sentencing enhancement of between 8 levels and 16 levels, depending on the seriousness of the prior aggravated

felony and the dangerousness of the defendant. In doing so, the Commission determined that the 16-level enhancement is warranted if the defendant previously was deported, or unlawfully remained in the United States, after a conviction for certain serious offenses, specifically, a drug trafficking offense for which the sentence imposed exceeded 13 months, a felony that is a crime of violence, a felony that is a firearms offense, a felony that is a national security or terrorism offense, a felony that is a human trafficking offense, and a felony that is an alien smuggling offense committed for profit. Other felony drug trafficking offenses will receive a 12-level enhancement. All other aggravated felony offenses will receive an 8-level enhancement.

This amendment also deletes an application note providing that a downward departure may be warranted based on the seriousness of the offense if the 16-level enhancement applied and (1) the defendant has previously been convicted of only one felony offense; (2) such offense was not a crime of violence or firearms offense; and (3) the term of imprisonment for such offenses did not exceed one year. The Commission determined that the graduation of the 16-level enhancement based on the seriousness of the prior conviction negated the need for this departure provision. As a result, this amendment may have the indirect result of reducing the departure rate for cases sentenced under § 2L1.2. In addition, this amendment renders moot a circuit conflict regarding whether the three criteria set forth in the application note are the exclusive basis for a downward departure from the 16-level enhancement. *Compare United States* v. *Sanchez-Rodriguez*, 161 F.3d 556 (9th Cir. 1998) (holding that Application Note 5 to § 2L1.2 does not limit the circumstances under which a downward departure from the 16-level enhancement is warranted); and *United States* v. *Alfaro-Zayas*, 196 F.3d 1338 (11th Cir. 1999) (same), *with United States* v. *Tappin*, 205 F.3d 536 (2d Cir. 2000) (holding that a defendant must satisfy all three criteria set forth in Application Note 5 in § 2L1.2 to receive a downward departure from the 16-level enhancement).

This amendment also makes a number of other minor changes to § 2L1.2, to provide guidance regarding the application of the enhancement for the commission of three or more prior misdemeanors and to provide definitions for terms used in the guideline.

21. *Amendment:* The heading to Chapter Two, Part M is amended by adding at the end ''And Weapons of Mass Destruction''.

Section 2M5.1 is amended by striking subsection (a) and inserting the following:

''(a) Base Offense Level (Apply the greater):

(1) 26, if national security controls or controls relating to the proliferation of nuclear, biological, or chemical weapons or materials were evaded; or

(2) 14, otherwise.''.

Section 2M5.2(a)(1) is amended by striking ''22'' and inserting ''26''.

The heading to Chapter Two, Part M, Subpart 6 is amended by striking ''Atomic Energy'' and inserting ''Nuclear, Biological, And Chemical Weapons And Materials, And Other Weapons of Mass Destruction''.

Chapter Two, Part M is amended by striking § 2M6.1 and inserting the following:

''§ 2M6.1. Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy

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

(1) 42, if the offense was committed with intent (A) to injure the United States; or (B) to aid a foreign nation or a foreign terrorist organization;

(2) 28, if subsections (a)(1) and (a)(3) do not apply; or

(3) 20, if the offense (A) involved a threat to use a nuclear weapon, nuclear material, or nuclear by-product material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (B) did not involve any conduct evidencing an intent or ability to carry out the threat.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) or (a)(3) applies; and (B) the offense involved a threat to use, or otherwise involved (i) a select biological agent; (ii) a listed precursor or a listed toxic chemical; (iii) nuclear material or nuclear byproduct material; or (iv) a weapon of mass destruction that contains any agent, precursor, toxic chemical, or material referred to in subdivision (i), (ii), or (iii), increase by 2 levels.

(2) If (A) subsection (a)(2) applies; and (B)(i) any victim died or sustained permanent or life-threatening bodily injury, increase by 4 levels; (ii) any victim sustained serious bodily injury, increase by 2 levels; or (iii) the degree of injury is between that specified in subdivisions (i) and (ii), increase by 3 levels.

(3) If (A) subsection (a)(2) or (a)(3) applies; and (B) the offense resulted in (i) substantial disruption of public, governmental, or business functions or services; or (ii) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by 4 levels.

(c) Cross References

(1) If the offense resulted in death, apply § 2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or § 2A1.2 (Second Degree Murder) otherwise, if the resulting offense level is greater than that determined above.

(2) If the offense was tantamount to attempted murder, apply § 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the defendant is convicted of a single count involving (A) conduct that resulted in the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if such conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. 175, 229, 831, 842(p)(2), 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. 2332a(c)(2)(B), (C), and (D), but including any biological agent, toxin, or vector); 42 U.S.C. 2077(b), 2122, 2131. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes

1. Definitions.''For purposes of this guideline:

'Biological agent' has the meaning given that term in 18 U.S.C. 178(1).

'Chemical weapon' has the meaning given that term in 18 U.S.C. 229F(1).

'Foreign terrorist organization' (A) means an organization that engages in terrorist activity that threatens the security of a national of the United States or the national security of the United States; and (B) includes an organization designated by the Secretary of State as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. 1219). ''National of the United States'' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

'Listed precursor or a listed toxic chemical' means a precursor or a toxic chemical, respectively, listed in Schedule I of the Annex on Chemicals to the Chemical Weapons Convention. See 18 U.S.C. 229F(6)(B), (8)(B). 'Precursor' has the meaning given that term in 18 U.S.C. 229F(6)(A). 'Toxic chemical' has the meaning given that term in 18 U.S.C. 229F(8)(A).

'Nuclear byproduct material' has the meaning given that term in 18 U.S.C. § 831(f)(2).

'Nuclear material' has the meaning given that term in 18 U.S.C. 831(f)(1).

'Select biological agent' means a biological agent or toxin identified by the Secretary of Health and Human Services on the select agent list established pursuant to section 511(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104–132. See 42 CFR part 72.

'Toxin' has the meaning given that term in 18 U.S.C. 178(2).

'Vector' has the meaning given that term in 18 U.S.C. 178(4).

'Weapon of mass destruction' has the meaning given that term in 18 U.S.C. 2332a(c)(2)(B), (C), and (D).

2. Threat Cases.—Subsection (a)(3) applies in cases that involved a threat to use a weapon, agent, or material covered by this guideline but that did not involve any conduct evidencing an intent or ability to carry out the threat. For example, subsection (a)(3) would apply in a case in which the defendant threatened to contaminate an area with anthrax and also dispersed into the area a substance that appeared to be anthrax but that the defendant knew to be harmless talcum powder. In such a case, the dispersal of talcum powder does not evidence an intent on the defendant's part to carry out the threat. In contrast, subsection (a)(3) would not apply in a case in which the defendant threatened to contaminate an area with anthrax and also dispersed into the area a substance that the defendant believed to be anthrax but that in fact was harmless talcum powder. In such a case, the dispersal of talcum powder was conduct evidencing an intent to carry out the threat because of the defendant's belief that the talcum powder was anthrax.

Subsection (a)(3) shall not apply in any case involving both a threat to use any weapon, agent, or material covered by this guideline and the possession of that weapon, agent, or material. In such a case, possession of the weapon, agent, or material is conduct evidencing an intent to use that weapon, agent, or material.

3. Application of Special Instruction.—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under this guideline or under another guideline in Chapter Two (Offense Conduct) by use of a cross reference under subsection (c).''.

The Commentary to § 2X1.1 captioned ''Application Notes'' is amended in Note 1 by inserting after the line referenced to ''§ 2E5.1;'' the following: ''§ 2M6.1;''.

The Commentary to § 2X1.1 captioned ''Application Notes'' is amended in Note 1 by inserting after the line referenced to ''§ 2H1.1'' the following: ''§ 2M6.1;''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 842(l)-(o) the following new line:

''18 U.S.C. § 842(p)(2) 2K1.3, 2M6.1'';

By inserting after the line referenced to 18 U.S.C. § 155 the following new line:

''18 U.S.C. § 175 2M6.1'';

By inserting after the line referenced to 18 U.S.C. § 228 the following new line:

''18 U.S.C. § 229 2M6.1'';

In the line referenced to 18 U.S.C. § 2332a by striking ''2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.5, 2A2.1, 2A2.2, 2B1.3,'' and by inserting '', 2M6.1'' after ''2K1.4''; and

By inserting after the line referenced to 50 U.S.C. App. § 462 the following new line:

''50 U.S.C. App. § 1701 2M5.1, 2M5.2''.

Reason for Amendment: This amendment responds to a statutory provision expressing a sense of Congress and addresses two offenses relating to biological and chemical weapons. Specifically, the amendment responds to section 1423(a) of the National Defense Authorization Act for Fiscal Year 1997, Public Law 104–201, that expressed a sense of Congress that guideline penalties are inadequate for certain offenses involving the importation and exportation of nuclear, chemical, and biological weapons, materials, or technologies by providing a four-level increase for those offenses in subsection (a)(1) of both §§ 2M5.1 (Evasion of Export Controls) and 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without a Required Validated Export License). This increase serves to make the penalty structure for those offenses proportional to other national security guidelines in Chapter Two, Part M. In addition, Appendix A (Statutory Index) is amended to refer one of the offenses, 50 U.S.C. 1701 (which prior to this amendment was not referenced in the Statutory Index), to both §§ 2M5.1 and 2M5.2.

The amendment also substantially revises § 2M6.1 to incorporate offenses at 18 U.S.C. § 175, relating to biological weapons, and 18 U.S.C. 229, relating to chemical weapons. Specifically, the amendment modifies § 2M6.1 as follows:

First, the amendment provides three alternative base offense levels. The first alternative base offense level of level 42 applies if the offense was committed with the intent to injure the United States or to aid a foreign government or foreign terrorist organization and incorporates the 12-level enhancement previously at subsection (b)(1). Therefore, this change does not affect the overall offense level for these offenses. ''Foreign terrorist organizations'' are added because such groups are investing in the acquisition of unconventional weapons such as nuclear, biological, and chemical agents. This first alternative base offense level is expected to apply to cases previously covered by the guideline (i.e., the acquisition of nuclear material from nuclear facilities in order to assist foreign governments, thereby creating a threat to the national security), as well as to cases that implicate the national security and involve biological and chemical weapons and other weapons of mass destruction.

The amendment provides that, if the base offense level of level 42 applies, none of the adjustments in subsection (b) shall apply. However, if death results, the cross reference allows for the possibility of a greater offense level through application of the first degree murder guideline.

The second alternative base offense level of level 28 applies to those cases that do not threaten the national security of the United States, and is expected to apply in most cases.

The third alternative base offense level of level 20 applies to cases which involve a threat to use a nuclear, biological, or chemical weapon or material, or other weapon of mass destruction, but do not involve any conduct evidencing an intent or ability to carry out the threat and, accordingly, are less serious offenses.

Second, the amendment provides a two-level enhancement in subsection (b)(1) if the offense or threat involved particularly dangerous types of nuclear, chemical, and biological weapons and materials that are defined in the

guideline commentary by reference to the applicable statutory and regulatory provisions. This enhancement reflects the distinctions already made in international treaties, provisions of title 18, United States Code, relevant regulatory schemes, and the fact that certain types of weapons and materials are inherently more lethal and pose a greater threat to the public safety.

Third, the amendment provides a four-level enhancement in subsection (b)(2) if any victim died or sustained permanent or life-threatening bodily injury, and a two-level enhancement if any victim sustained serious bodily injury. If the degree of injury is between permanent or life-threatening bodily injury and serious bodily injury, a three-level enhancement is provided. This enhancement is modeled after the enhancement found in § 2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury).

Fourth, the amendment provides a four-level enhancement for cases involving a substantial disruption of public, governmental, or business functions or services, or the substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense.

Fifth, the amendment provides two cross references, applicable if the resulting offense level is greater and either death resulted (in which case the first or second degree murder guideline would apply), or if the offense was tantamount to attempted murder (in which case the attempted murder guideline would apply). These cross references are also modeled after the cross reference found in § 2N1.1.

Sixth, the amendment provides a special instruction that if the defendant is convicted of one count involving the death of, serious bodily injury to, or attempted murder of, more than one victim, the grouping rules will be applied as if the defendant had been convicted of separate counts for each such victim.

Seventh, the amendment amends Appendix A to refer violations of 18 U.S.C. § 175 and 229 to § 2M6.1 and to delete a number of guideline references for violations of 18 U.S.C. 2332a and instead provide a reference for that offense to §§ 2K1.4 (Arson; Property Damage by Use of Explosives) and 2M6.1 (in the case of other weapons of mass destruction).

Finally, the amendment amends the title of § 2M6.1 to include attempts and conspiracies, and adds § 2M6.1 under the sections addressing attempts and conspiracies in Application Note 1 of § 2X1.1 (Attempt, Solicitation, or Conspiracy) to indicate that attempts and conspiracies are covered expressly by the § 2M6.1 offense guideline.

22. *Amendment:* Chapter Two, Part S is amended by striking § 2S1.1, and its accompanying commentary, and inserting the following:

''§ 2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level:

(1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or

(2) 8 plus the number of offense levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence; or (iii) an offense involving firearms, explosives, national security, terrorism, or the sexual exploitation of a minor, increase by 6 levels.

(2) (Apply the Greatest):

(A) If the defendant was convicted under 18 U.S.C. § 1957, increase by 1 level.

(B) If the defendant was convicted under 18 U.S.C. § 1956, increase by 2 levels.

(C) If (i) subsection (a)(2) applies; and (ii) the defendant was in the business of laundering funds, increase by 4 levels.

(3) If (A) subsection (b)(2)(B) applies; and (B) the offense involved sophisticated laundering, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. 1956, 1957. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes

1. Definitions.—For purposes of this guideline:

'Crime of violence' has the meaning given that term in subsection (a)(1) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

'Criminally derived funds' means any funds derived, or represented by a law enforcement officer, or by another person at the direction or approval of an authorized Federal official, to be derived from conduct constituting a criminal offense.

'Laundered funds' means the property, funds, or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C. 1956 or 1957.

'Laundering funds' means making a transaction, financial transaction, monetary transaction, or transmission, or transporting or transferring property, funds, or a monetary instrument in violation of 18 U.S.C. 1956 or 1957.

'Sexual exploitation of a minor' means an offense involving (A) promoting prostitution by a minor; (B) sexually exploiting a minor by production of sexually explicit visual or printed material; (C) distribution of material involving the sexual exploitation of a minor, or possession of material involving the sexual exploitation of a minor with intent to distribute; or (D) aggravated sexual abuse, sexual abuse, or abusive sexual contact involving a minor. ''Minor'' means an individual under the age of 18 years.

2. Application of Subsection (a)(1).—

(A) Multiple Underlying Offenses.—In cases in which subsection (a)(1) applies and there is more than one underlying offense, the offense level for the underlying offense is to be determined under the procedures set forth in Application Note 3 of the Commentary to § 1B1.5 (Interpretation of References to Other Offense Guidelines).

(B) Defendants Accountable for Underlying Offense.—In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be accountable for the underlying offense under § 1B1.3(a)(1)(A). The fact that the defendant was involved in laundering criminally derived funds after the commission of the underlying offense, without additional involvement in the underlying offense, does not establish that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the underlying offense.

3. Application of Subsection (a)(2).—

(A) In General.—Subsection (a)(2) applies to any case in which (i) the defendant did not commit the underlying offense; or (ii) the defendant committed the underlying offense (or would be accountable for the underlying offense under § 1B1.3(a)(1)(A)), but the offense level for the underlying offense

is impossible or impracticable to determine.

(B) Commingled Funds.—In a case in which a transaction, financial transaction, monetary transaction, transportation, transfer, or transmission results in the commingling of legitimately derived funds with criminally derived funds, the value of the laundered funds, for purposes of subsection (a)(2), is the amount of the criminally derived funds, not the total amount of the commingled funds, if the defendant provides sufficient information to determine the amount of criminally derived funds without unduly complicating or prolonging the sentencing process. If the amount of the criminally derived funds is difficult or impracticable to determine, the value of the laundered funds, for purposes of subsection (a)(2), is the total amount of the commingled funds.

4. Enhancement for Business of Laundering Funds.—

(A) In General.—The court shall consider the totality of the circumstances to determine whether a defendant who did not commit the underlying offense was in the business of laundering funds, for purposes of subsection (b)(2)(C).

(B) Factors to Consider.—The following is a non-exhaustive list of factors that may indicate the defendant was in the business of laundering funds for purposes of subsection (b)(2)(C):

(i) The defendant regularly engaged in laundering funds.

(ii) The defendant engaged in laundering funds during an extended period of time.

(iii) The defendant engaged in laundering funds from multiple sources.

(iv) The defendant generated a substantial amount of revenue in return for laundering funds.

(v) At the time the defendant committed the instant offense, the defendant had one or more prior convictions for an offense under 18 U.S.C. 1956 or 1957, or under 31 U.S.C. 5313, 5314, 5316, 5324 or 5326, or any similar offense under state law, or an attempt or conspiracy to commit any such federal or state offense. A conviction taken into account under subsection (b)(2)(C) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

(vi) During the course of an undercover government investigation, the defendant made statements that the defendant engaged in any of the conduct described in subdivisions (i) through (iv).

5. (A) Sophisticated Laundering under Subsection (b)(3).—For purposes of subsection (b)(3), 'sophisticated laundering' means complex or intricate offense conduct pertaining to the execution or concealment of the 18 U.S.C. 1956 offense.

Sophisticated laundering typically involves the use of—

(i) fictitious entities;

(ii) shell corporations;

(iii) two or more levels (i.e., layering) of transactions, transportation, transfers, or transmissions, involving criminally derived funds that were intended to appear legitimate; or

(iv) offshore financial accounts.

(B) Non-Applicability of Enhancement.—If subsection (b)(3) applies, and the conduct that forms the basis for an enhancement under the guideline applicable to the underlying offense is the only conduct that forms the basis for application of subsection (b)(3) of this guideline, do not apply subsection (b)(3) of this guideline.

6. Grouping of Multiple Counts.—In a case in which the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, the counts shall be grouped pursuant to subsection (c) of § 3D1.2 (Groups of Closely-Related Counts).''.

Chapter Two, Part S is amended by striking section 2S1.2, and its accompanying commentary.

The Commentary to § 2S1.3 captioned ''Statutory Provisions'' is amended by inserting ''18 U.S.C. § 1960;'' before ''26 U.S.C. § 7203''; and by inserting '', 5326'' after ''5324''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1957 and the line referenced to 21 U.S.C. 854 by striking ''2S1.2'' and inserting ''2S1.1''; by inserting after the line referenced to 18 U.S.C. 1959 the following new line:

''18 U.S.C. 1960—2S1.3'';

And by inserting after the line referenced to 31 U.S.C. 5324 the following new line:

''31 U.S.C. 5326 2S1.3, 2T2.2''.

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended in Note 6 in the first paragraph by striking the second sentence and inserting the following:

''For example, in § 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant ''is convicted under 18 U.S.C. 1956'.''.

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended in Note 6 in the second paragraph by striking the last sentence and inserting the following:

''For example, § 2S1.1(b)(2)(B) (which is applicable only if the defendant is convicted under 18 U.S.C. 1956) would be applied in determining the offense level under § 2X3.1 (Accessory After the Fact) in a case in which the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. 1956.''.

Section 3D1.2(d) is amended in the second paragraph by striking ''2S1.2,''.

Section 8C2.1(a) is amended by striking ''2S1.2,''.

The Commentary to § 8C2.4 captioned ''Application Notes'' is amended in Note 5 by striking ''; 2S1.1 (Laundering of Monetary Instruments); and 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity)''.

The Commentary to § 8C2.4 captioned ''Background'' is amended in the seventh sentence by striking ''and money laundering''.

Reason for Amendment: This amendment consolidates the money laundering guidelines, §§ 2S1.1 (Laundering of Monetary Instruments) and 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity), into one guideline that applies to convictions under 18 U.S.C. 1956 or 1957, or 21 U.S.C. 854. The amendment responds in several ways to concerns that the penalty structure existing prior to this amendment for such offenses did not reflect adequately the culpability of the defendant or the seriousness of the money laundering conduct because the offense level for money laundering was determined without sufficient consideration of the defendant's involvement in, or the relative seriousness of, the underlying offense. This amendment is designed to promote proportionality by providing increased penalties for defendants who launder funds derived from more serious underlying criminal conduct, such as drug trafficking, crimes of violence, and fraud offenses that generate relatively high loss amounts, and decreased penalties for defendants who launder funds derived from less serious underlying criminal conduct, such as basic fraud offenses that generate relatively low loss amounts.

First, this amendment ties offense levels for money laundering more closely to the underlying conduct that was the source of the criminally derived funds by separating money laundering offenders into two categories for purposes of determining the base offense level. For direct money launderers (offenders who commit or would be accountable under

§ 1B1.3(a)(1)(A) (Relevant Conduct) for the underlying offense which generated the criminal proceeds), subsection (a)(1) sets the base offense level at the offense level in Chapter Two (Offense Conduct) for the underlying offense (i.e., the base offense level, specific offense characteristics, cross references, and special instructions for the underlying offense). For third party money launderers (offenders who launder the proceeds generated from underlying offenses that the defendant did not commit or would not be accountable for under § 1B1.3(a)(1)(A)), subsection (a)(2) sets the base offense level at level 8, plus an increase based on the value of the laundered funds from the table in subsection (b)(1) of § 2B1.1 (Theft, Fraud, Property Destruction).

Second, in addition to the base offense level calculation, this amendment provides an enhancement designed to reflect the differing seriousness of the underlying conduct that was the source of the criminally derived funds. Subsection (b)(1) provides a six-level enhancement for third party money launderers who knew or believed that any of the laundered funds were the proceeds of, or were intended to promote, certain types of more serious underlying criminal conduct; specifically, drug trafficking, crimes of violence, offenses involving firearms, explosives, national security, terrorism, and the sexual exploitation of a minor. The Commission determined that defendants who knowingly launder the proceeds of these more serious underlying offenses are substantially more culpable than third party launderers of criminally derived proceeds of less serious underlying offenses.

Third, this amendment provides three alternative enhancements, with the greatest applicable enhancement to be applied. These enhancements are designed to (1) ensure that all direct money launderers receive additional punishment for committing both the money laundering offense and the underlying offense, and (2) reflect the differing seriousness of money laundering conduct depending on the nature and sophistication of the offense. Specifically, subsection (b)(2)(A) provides a one-level increase if the defendant was convicted under 18 U.S.C. 1957, and subsection (b)(2)(B) provides a two-level increase if the defendant was convicted under 18 U.S.C. 1956. The one-level difference between these two enhancements reflects the fact that 18 U.S.C. 1956 has a statutory maximum penalty (20 years' imprisonment) that is twice as long as the statutory maximum penalty for violations of 18 U.S.C. 1957 (10 years' imprisonment). In addition, subsection (b)(3) provides an additional two-level increase if subsection (b)(2)(B) applies and the offense involved sophisticated laundering such as the use of fictitious entities, shell corporations, two or more levels of transactions, or offshore financial accounts. The Commission determined that, similar to fraud and tax offenses that involve sophisticated means, see subsection (b)(8) of § 2B1.1 (Theft, Property Destruction, and Fraud), subsection (b)(2) of § 2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), violations of 18 U.S.C. 1956 that involve sophisticated laundering warrant additional punishment because such offenses are more difficult and time consuming for law enforcement to detect than less sophisticated laundering. As a result of the enhancements provided by subsections (b)(2)(A), (b)(2)(B), and (b)(3), all direct money launderers will receive an offense level that is one to four levels greater than the Chapter Two offense level for the underlying offense, depending on the statute of conviction and sophistication of the money laundering offense conduct.

With respect to third party money launderers, subsection (b)(2)(C) provides a four-level enhancement if the defendant is ''in the business'' of laundering funds. The Commission determined that, similar to a professional ''fence'', see § 2B1.1(b)(4)(B), defendants who routinely engage in laundering funds on behalf of others, and who gain financially from engaging in such transactions, warrant substantial additional punishment because they encourage the commission of additional criminal conduct.

Fourth, this amendment contains an application note expressly providing instructions regarding the grouping of money laundering counts with a count of conviction for the underlying offense. In a case in which the defendant is to be sentenced on a count of conviction for money laundering and a count of conviction for the underlying offense that generated the laundered funds, this application note instructs that such counts shall be grouped pursuant to subsection (c) of § 3D1.2 (Groups of Closely-Related Counts), thereby resolving a circuit conflict on this issue. *Compare United States* v. *Cusumano,* 943 F.2d 305 (3d Cir. 1991), *cert. denied,* 502 U.S. 1036 (1992) (affirming decision to group under § 3D1.2(b) money laundering count with other offenses that ''were all part of one scheme to obtain money'' from an employee benefit fund); *United States* v. *Leonard,* 61 F.3d 1181 (5th Cir. 1995) (affirming decision to group fraud and money laundering offenses under § 3D1.2(d) because defendant's money laundering activity and fraudulent telemarketing scheme constituted the same common plan and had the same victims); and *United States* v. *Wilson,* 98 F.3d 281 (7th Cir. 1996) (district court erred in not grouping money laundering and mail fraud convictions under § 3D1.2(d)), *with United States* v. *Kneeland,* 148 F.3d 6 (1st Cir. 1998) (affirming district court decision not to group fraud and money laundering counts under § 3D1.2(d) because the offense level for fraud, unlike money laundering, is determined ''largely on the basis of total amount of harm or loss''); *United States* v. *Napoli,* 179 F.3d 1 (2d Cir. 1999), *cert. denied,* 528 U.S. 1162 (2000) (affirming decision not to group wire fraud and money laundering counts under § 3D1.2(b) or (d) because the offenses have different victims and the offense level for money laundering, unlike fraud, is not based primarily on the amount of money involved); *United States* v. *Hildebrand,* 152 F.3d 756 (8th Cir.), *cert. denied,* 525 U.S. 1033 (1998) (finding that money laundering and fraud counts should not be grouped because the fraud and money laundering guidelines do not measure the same types of harm); *United States* v. *Hanley,* 190 F.3d 1017 (9th Cir. 1999) (affirming decision not to group money laundering and wire fraud counts under § 3D1.2(d) because the guidelines for such offenses measure harm differently); and *United States* v. *Johnson,* 971 F.2d 562 (10th Cir. 1992) (district court erred in grouping money laundering and fraud counts under § 3D1.2(d) because the measurement of harm for fraud is not the same as that for money laundering).

Finally, this amendment provides that convictions under 18 U.S.C. 1960 are referenced to § 2S1.3 (Structuring Transactions to Evade Reporting Requirements). Operation of money transmitting businesses without an appropriate license is proscribed by 18 U.S.C. 1960, as are failures to comply with certain reporting requirements issued under 31 U.S.C. 5330. The Commission determined that offenses involving these regulatory requirements serve many of the same purposes as Currency Transaction Reports, Currency and Monetary Instrument Reports, Reports of Foreign Bank and Financial Accounts, and Reports of Cash Payments over $10,000 Received in a

Trade or Business, violations regarding which currently are referenced to § 2S1.3, and that, therefore, violations of 18 U.S.C. § 1960 also should be referenced to § 2S1.3.

23. *Amendment:* The Commentary to § 3B1.2 is amended by striking Notes 1 through 4 and the background and inserting the following:

''1. Definition.—For purposes of this guideline, 'participant' has the meaning given that term in Application Note 1 of § 3B1.1 (Aggravating Role).

2. Requirement of Multiple Participants.—This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.

3. Applicability of Adjustment.—

(A) Substantially Less Culpable than Average Participant.—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.

A defendant who is accountable under § 1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under § 1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.

(B) Conviction of Significantly Less Serious Offense.—If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 14 under § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under § 2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

(C) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

4. Minimal Participant.—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant. It is intended that the downward adjustment for a minimal participant will be used infrequently.

5. Minor Participant.—Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants, but whose role could not be described as minimal.''.

Reason for Amendment: This amendment resolves a circuit conflict regarding whether a defendant who is accountable under § 1B1.3 (Relevant Conduct) only for conduct in which the defendant personally was involved, and who performs a limited function in concerted criminal activity, is precluded from consideration for an adjustment under § 3B1.2 (Mitigating Role). *Compare United States* v. *Burnett*, 66 F.3d 137 (7th Cir. 1995) (''where a defendant is sentenced only for the amount of drugs he handled, he is not entitled to a § 3B1.2 reduction''), *with United States* v. *Rodriguez De Varon*, 175 F.3d 930 (11th Cir. 1999) (a defendant is not automatically precluded from consideration for a mitigating role adjustment in a case in which the defendant is held accountable solely for the amount of drugs he personally handled). Although this circuit conflict arose in the context of a drug offense, the amendment resolves it in a manner that makes the rule applicable to all types of offenses.

The amendment adopts the approach articulated by the Eleventh Circuit in *United States* v. *Rodriguez De Varon, supra*, that § 3B1.2 does not automatically preclude a defendant from being considered for a mitigating role adjustment in a case in which the defendant is held accountable under § 1B1.3 solely for the amount of drugs the defendant personally handled. In considering a § 3B1.2 adjustment, a court must measure the defendant's role against the relevant conduct for which the defendant is held accountable at sentencing, whether or not other defendants are charged.

In contrast to the holding in *United States* v. *Burnett, supra*, this amendment allows the court to apply traditional analysis on the applicability of a reduction pursuant to § 3B1.2, even in a case in which a defendant is held liable under § 1B1.3 only for conduct (such as drug quantities) in which the defendant was involved personally.

The substantive impact of this amendment in resolving the circuit conflict is to provide, in the context of a drug courier, for example, that the court is not precluded from considering a § 3B1.2 adjustment simply because the defendant's role in the offense was limited to transporting or storing drugs, and the defendant was accountable under § 1B1.3 only for the quantity of drugs the defendant personally transported or stored. The amendment does not require that such a defendant receive a reduction under § 3B1.2, or suggest that such a defendant can receive a reduction based only on those facts; rather, the amendment provides only that such a defendant is not precluded from consideration for such a reduction if the defendant otherwise qualifies for the reduction pursuant to the terms of § 3B1.2.

In addition to resolving the circuit conflict, the amendment makes the following non-substantive revisions to § 3B1.2 to clarify guideline application: (1) Incorporating commentary from the Introduction to Chapter Three, Part B (Role in the Offense) that there must be more than one participant before application of a mitigating role adjustment may be considered; (2) incorporating into this guideline the definition of ''participant'' from § 3B1.1 (Aggravating Role); (3) moving into an application note significant background commentary that has been cited frequently in appellate decisions; (4) adding a section on fact-based

determinations to Application Note 3 that emphasizes the significant judicial role in decision-making on the applicability of § 3B1.2; (5) maintaining commentary language that the minimal role adjustment is intended to be used infrequently; and (6) making technical amendments to the Commentary to clarify applicable rules (such as the addition of headings for, and the reordering of, application notes in the commentary) that are intended to have no substantive impact.

The language regarding ''average participant'' is moved from the Background into Application Note 3(A) to provide guidance as to the applicability of § 3B1.2. For a reduction to apply, the court, at a minimum, must make a factual determination that the defendant's role was significantly less culpable than the average participant.

24. *Amendment:* The Commentary to § 2J1.6 captioned ''Application Notes'' is amended in Note 3 in the first sentence of the second paragraph by striking ''In'' and inserting ''However, in''; and by inserting ''other than a case of failure to appear for service of sentence,'' after ''offense and the failure to appear,''.

The Commentary to § 2M3.9 captioned ''Application Notes'' is amended by inserting after Note 2 the following:

''3. A term of imprisonment imposed for a conviction under 50 U.S.C. § 421 shall be imposed consecutively to any other term of imprisonment.''.

Reason for Amendment: This amendment makes two minor technical changes. First, the amendment makes an editorial change in the commentary to § 2J1.6 (Failure to Appear by Defendant) to improve the transition between the first and second paragraphs of Application Note 3. Second, the amendment adds an application note to § 2M3.9 (Disclosure of Information Identifying a Covert Agent) that implements the consecutive sentencing requirement of 50 U.S.C. 421, relating to the disclosure of information identifying a covert agent.

[FR Doc. 01–13966 Filed 6–5–01; 8:45 am]

BILLING CODE 2210–40–P; 2211–01–P