UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2004.

SUMMARY: Pursuant to its authority under 28 U.S.C. § 994(p), the Commission has promulgated amendments to the sentencing guidelines, policy statements, commentary, and statutory index. This notice sets forth the amendments and the reason for each amendment.

DATES: The Commission has specified an effective date of November 1, 2004, for the amendments set forth in 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 Web site at *http://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 generally submits guideline amendments to Congress pursuant to 28 U.S.C. § 994(p) not later than the first day of May each year. 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 December 30, 2003 (*see* 68 FR 75339), and January 14, 2004 (*see* 69 FR 2169). The Commission held a public hearing on the proposed amendments in Washington, DC, on March 17, 2004. After a review of hearing testimony and additional public comment, the Commission promulgated the amendments set forth in this notice. On April 30, 2004, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2004.

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

John R. Steer,

Vice Chair.

1. *Amendment:* The Commentary to § 2A1.1 captioned ''Application Notes'' is amended by striking Notes 1 and 2 and inserting the following:

''1. Applicability of Guideline.—This guideline applies in cases of premeditated killing. This guideline also applies when death results from the commission of certain felonies. For example, this guideline may be applied as a result of a cross reference (*e.g.*, a kidnapping in which death occurs), or in cases in which the offense level of a guideline is calculated using the underlying crime (*e.g.*, murder in aid of racketeering).

2. Imposition of Life Sentence.—

(A) Offenses Involving Premeditated Killing.—In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. 3553(e).

(B) Felony Murder.—If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. For example, a downward departure may be warranted if in robbing a bank, the defendant merely passed a note to the teller, as a result of which the teller had a heart attack and died. The extent of the departure should be based upon the defendant's state of mind (*e.g.*, recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, departure below the minimum guideline sentence provided for second degree murder in § 2A1.2 (Second Degree Murder) is not likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.

3. Applicability of Guideline When Death Sentence Not Imposed.—If the defendant is sentenced pursuant to 18 U.S.C. 3591 *et seq.* or 21 U.S.C. § 848(e), a sentence of death may be imposed under the specific provisions contained in that statute. This guideline applies when a sentence of death is not imposed under those specific provisions.''.

Section 2A1.2(a) is amended by striking ''33'' and inserting ''38''.

Section 2A1.2 is amended by striking the commentary captioned ''Background'' and inserting the following:

''Application Note:

1. Upward Departure Provision.—If the defendant's conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted. *See* § 5K2.8 (Extreme Conduct).''.

Section 2A1.3(a) is amended by striking ''25'' and inserting ''29''.

Section 2A1.3 is amended by striking the commentary captioned ''Background''.

Section 2A1.4(a) is amended in subdivision (1) by striking ''conduct was criminally negligent'' and inserting ''offense involved criminally negligent conduct''; and by striking subdivision (2) and inserting the following:

''(2) (Apply the greater):

(A) 18, if the offense involved reckless conduct; or

(B) 22, if the offense involved the reckless operation of a means of transportation.''.

Section 2A1.4 is amended by adding at the end the following:

''(b) Special Instruction.

(1) If the offense involved the involuntary manslaughter of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the involuntary manslaughter of each person had been contained in a separate count of conviction.''.

The Commentary to § 2A1.4 captioned ''Application Notes'' is amended in the heading by striking ''Notes'' and inserting ''Note''; and by striking Notes 1 and 2 and inserting the following:

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

'Criminally negligent' means conduct that involves a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is not reckless. Offenses with this characteristic usually will be encountered as assimilative crimes.

'Means of transportation' includes a motor vehicle (including an automobile or a boat) and a mass transportation vehicle. 'Mass transportation' has the meaning given that term in 18 U.S.C. § 1993(c)(5).

'Reckless' means a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that

a reasonable person would exercise in such a situation. 'Reckless' includes all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. § 1112. A homicide resulting from driving a means of transportation, or similarly dangerous actions, while under the influence of alcohol or drugs ordinarily should be treated as reckless.''.

Section 2A1.5(a) is amended by striking ''28'' and inserting ''33''.

Section 2A2.1(a) is amended in subdivision (1) by striking ''28'' and inserting ''33''; and in subdivision (2) by striking ''22'' and inserting ''27''.

Section 2A2.1(b)(1) is amended by striking ''(A) If'' and inserting ''If (A)''; and by striking ''if'' each place it appears.

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

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

'First degree murder' means conduct that, if committed within the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. § 1111.

'Permanent or life-threatening 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. Upward Departure Provision.—If the offense created a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted.''.

Section 2A2.2(a) is amended by striking ''15'' and inserting ''14''.

Section 2A2.2(b)(2) is amended by striking ''(A) If'' and inserting ''If (A)''; and by striking ''if'' each place it appears.

Section 2A2.2(b)(3) is amended in subdivision (A) by striking ''2'' and inserting ''3''; in subdivision (B) by striking ''4'' and inserting ''5''; in subdivision (C) by striking ''6'' and inserting ''7''; in subdivision (D) by striking ''3'' and inserting ''4''; and in subdivision (E) by striking ''5'' and inserting ''6''.

Section 2A2.2.(b)(3) is amended by striking ''Provided, however,'' and all that follows through ''not exceed 9 levels.'' and inserting the following:

''However, the cumulative adjustments from application of subdivisions (2) and (3) shall not exceed 10 levels.''.

Section 2A2.2(b) is amended by adding at the end the following:

''(6) If the defendant was convicted under 18 U.S.C. § 111(b) or § 115, increase by 2 levels.''.

The Commentary to § 2A2.2 captioned ''Application Notes'' is amended by striking Note 2 and all that follows through ''For purposes of subsection (b)(1),'' and inserting the following:

''2. Application of Subsection (b)(1).—For purposes of subsection (b)(1),'';

and by adding at the end the following:

''3. 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).

4. Application of Official Victim Adjustment.—If subsection (b)(6) applies, § 3A1.2 (Official Victim) also shall apply.''.

The Commentary to § 2A2.2 captioned ''Background'' is amended by adding at the end the following:

''Subsection (b)(6) implements the directive to the Commission in subsection 11008(e) of the 21st Century Department of Justice Appropriations Act (the 'Act'), Public Law 107–273. The enhancement in subsection (b)(6) is cumulative to the adjustment in § 3A1.2 (Official Victim) in order to address adequately the directive in section 11008(e)(2)(D) of the Act, which provides that the Commission shall consider 'the extent to which sentencing enhancements within the Federal guidelines and the authority of the court to impose a sentence in excess of the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by' 18 U.S.C. §§ 111 and 115.''.

Section 2A2.3(a) is amended in subdivision (1) by striking ''6'' and inserting ''7'', and by striking ''conduct'' and inserting ''offense''; and in subdivision (2) by striking ''3'' and inserting ''4''.

Section 2A2.3(b)(1) is amended by inserting ''(A) the victim sustained bodily injury, increase by 2 levels; or (B)'' after ''If''.

Section 2A2.3 is amended by adding at the end the following:

''(c) Cross Reference

(1) If the conduct constituted aggravated assault, apply § 2A2.2 (Aggravated Assault).''.

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

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

'Bodily injury', 'dangerous weapon', and 'firearm' have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

'Minor assault' means a misdemeanor assault, or a felonious assault not covered by § 2A2.2 (Aggravated Assault).

'Substantial bodily injury' means 'bodily injury which involves (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.' *See* 18 U.S.C. § 113(b)(1).

2. Application of Subsection (b)(1).—Conduct that forms the basis for application of subsection (a)(1) also may form the basis for application of the enhancement in subsection (b)(1)(A) or (B).''.

Section 2A2.4(a) is amended by striking ''6'' and inserting ''10''.

Section 2A2.4(b) is amended by striking ''Characteristic'' and inserting ''Characteristics''; by striking in subdivision (1) ''If the conduct involved physical contact, or if'' and inserting ''If (A) the offense involved physical contact; or (B)''; and by adding at the end the following:

''(2) If the victim sustained bodily injury, increase by 2 levels.''.

The Commentary to § 2A2.4 captioned ''Application Notes'' is amended by striking Notes 1 and 2 and inserting the following:

''1. Definitions.—For purposes of this guideline, 'bodily injury', 'dangerous weapon', and 'firearm' have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

2. Application of Certain Chapter Three Adjustments.—The base offense level incorporates the fact that the victim was a governmental officer performing official duties. Therefore, do not apply § 3A1.2 (Official Victim) unless, pursuant to subsection (c), the offense level is determined under § 2A2.2 (Aggravated Assault). Conversely, the base offense level does not incorporate the possibility that the defendant may create a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement official (although an offense under 18 U.S.C. § 758 for fleeing or evading a law enforcement checkpoint at high speed will often, but not always, involve the creation of that risk). If the defendant creates that risk and no higher guideline adjustment is applicable for the conduct creating the risk, apply § 3C1.2 (Reckless Endangerment During Flight).''.

The Commentary to § 2A2.4 captioned ''Application Notes'' is amended in Note 3 by inserting ''Upward Departure Provision.—'' before ''The base''.

The Commentary to § 2A2.4 captioned ''Background'' is amended by striking the last sentence.

Section 3A1.2 is amended to read as follows:

''§ 3A1.2. Official Victim

(Apply the greatest):

(a) If (1) the victim was (A) a government officer or employee; (B) a former government officer or employee; or (C) a member of the immediate family of a person described in subdivision (A) or (B); and (2) the offense of conviction was motivated by such status, increase by 3 levels.

(b) If subsection (a)(1) and (2) apply, and the applicable Chapter Two guideline is from Chapter Two, Part A (Offenses Against the Person), increase by 6 levels.

(c) If, in a manner creating a substantial risk of serious bodily injury, the defendant or a person for whose conduct the defendant is otherwise accountable—

(1) knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom; or

(2) knowing or having reasonable cause to believe that a person was a prison official, assaulted such official while the defendant (or a person for whose conduct the defendant is otherwise accountable) was in the custody or control of a prison or other correctional facility,

increase by 6 levels.''.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended in Note 2 by striking the second sentence; and by striking in the third sentence '', Part A,''.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended in Note 3 by striking ''Subsection (a)'' and inserting ''Subsections (a) and (b)''; and by striking ''in subsection (a)'' and inserting '', for purposes of subsections (a) and (b),''.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended in Note 4 by striking ''Subsection (b)'' each place it appears and inserting ''Subsection (c)''; by striking ''subsection (b)'' each place it appears and inserting ''subsection (c)''; and by striking ''and control'' each place it appears and inserting ''or control''.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended by striking Note 5 and inserting the following:

''5. Upward Departure Provision.—If the official victim is an exceptionally high-level official, such as the President or the Vice President of the United States, an upward departure may be warranted due to the potential disruption of the governmental function.''.

Reason for Amendment: This amendment increases the base offense levels for the homicide and manslaughter guidelines to address longstanding proportionality concerns and new proportionality issues prompted by changes to other Chapter Two guidelines pursuant to the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21 (the ''PROTECT Act''). It also amends the assault guidelines and the adjustment at § 3A1.2 (Official Victim) to implement the directive in section 11008(e) of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273 (the ''Act'').

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

In addition, the Commission received public comment that the guideline penalties for all homicides, other than for first degree murder, were inadequate and in need of review. An examination of the homicide and manslaughter guidelines also was prompted by section 104 of the PROTECT Act, which directed the Commission to increase the base offense level for § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint). The Commission increased the base offense level for kidnapping by eight levels, from base offense level 24 to base offense level 32, effective May 30, 2003. This increase brought kidnapping without injury to within one level of the base offense of level 33 for second degree murder. The Commission examined data on second degree murder offenses and found that in 2002, courts departed upward from the guideline range in 34.3% of the cases. The Commission also received public comment expressing concern that an individual convicted of second degree murder who accepted responsibility might serve as little as eight years' imprisonment. By increasing the base offense level in § 2A1.2 (Second Degree Murder) to level 38, the Commission has established an approximate 20-year sentence of imprisonment for second degree murder.

Data also showed a high level of upward departure sentences for some other homicide offenses, such as voluntary manslaughter, which had a 28.6% upward departure rate in 2002. Based upon such indications that the sentences may be inadequate for these offenses, the Commission increased the base offense levels of many of the homicide guidelines to punish them more appropriately and with an eye toward restoring the proportionality found in the original guidelines. For example, the original base offense level of 28 for attempted first degree murder, § 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) is five levels lower than the original base offense level of level 33 for second degree murder. In this amendment, the five-level increase from a base offense level of level 28 to level 33 for attempted first degree murder mirrors the five-level increase for second degree murder from offense level of level 33 to level 38 and maintains the five-level difference that exists between the two. The amendment increases the base offense levels in the guidelines for §§ 2A1.2, 2A1.3 (Voluntary Manslaughter), 2A1.5 (Conspiracy or Solicitation to Commit Murder), and 2A2.1.

Additionally, the amendment adds a third alternative base offense level in § 2A1.4 (Involuntary Manslaughter) of level 22 for reckless involuntary manslaughter offenses that involved the reckless operation of a means of transportation. This new offense level completes work undertaken in the previous amendment cycle to address disparities between federal and state sentences for vehicular manslaughter and to account for the 1994 increase in the statutory maximum term of imprisonment from three to six years. The new alternative offense level focusing on the reckless operation of a means of transportation addresses concerns raised by some members of Congress and comports with a recommendation from the Commission's Native American Advisory Group that vehicular manslaughter involving alcohol or drugs should be sentenced at offense level 22. The amendment also adds a special instruction to apply § 3D1.2 (Groups of Closely Related Counts) as if there had been a separate count of conviction for each victim in cases in which more than one victim died. The purpose of the instruction is to ensure an incremental increase in punishment for single count offenses involving multiple victims.

Second, this amendment makes a number of changes to the assault guidelines and the Chapter Three adjustment relating to official victims, to implement the congressional directive and the changes in statutory maximum terms of imprisonment in the 21st

Century Department of Justice Appropriations Authorization Act. The Act increased the statutory maximum term of imprisonment for a number of offenses against current or former officers or employees of the United States, including Federal judges and magistrate judges, their families, or persons assisting in the performance of those official duties, or offenses committed on account of those duties. In response to the directive, the Commission added a new specific offense characteristic in § 2A2.2 (Aggravated Assault) to provide a two-level increase if the defendant was convicted under 18 U.S.C. § 111(b) or § 115. The Commission also amended the guideline to decrease the base offense level from level 15 to level 14, based upon information received from the Native American Advisory Group and studies indicating that federal aggravated assault sentences generally are more severe than many state aggravated assault sentences. To ensure that individuals who cause bodily injury to victims do not benefit from this decrease in the base offense level, the specific offense characteristics addressing degrees of bodily injury each were increased by one level. To maintain proportionality, reflect increased statutory penalties, and comply with the directive, the two non-aggravated assault guidelines also were amended. For § 2A2.3 (Minor Assault), the alternative base offense levels each were increased by one level, a specific offense characteristic was added to provide a two-level enhancement if the victim sustained bodily injury, and a cross-reference to § 2A2.2 was added. Similarly, § 2A2.4 (Obstructing or Impeding Officers) was amended by increasing the base offense level to level 10, and by adding a specific offense characteristic providing a two-level increase if the victim sustained bodily injury.

The amendment restructures § 3A1.2 (Official Victim) and provides a two-tiered adjustment. The amendment maintains the three-level adjustment for offenses motivated by the status of the official victim, but increases the adjustment to six levels if that defendant's offense guideline was from Chapter Two, Part A (Offenses Against the Person). For example, a threat against a federal judge sentenced pursuant to § 2A6.1 (Threatening or Harassing Communications) that is calculated at base offense level 12 could have received, before this amendment, a three-level enhancement under § 3A1.2, which would have resulted in an adjusted offense level of level 15 and a guideline range of 18 to 24 months. Under this amendment, the defendant could receive a six-level adjustment, resulting in an enhanced offense level of level 18 and a guideline range of 27 to 33 months. The six level enhancement also applies to assaultive conduct against law enforcement officers or prison officials if the defendant committed the assault in a manner creating a substantial risk of serious bodily injury. This increase comports with the directive in the Act to ''ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense'' for offenses against federal officers, officials and employees.

2. *Amendment:* Section 2A3.1(a) is amended by striking ''27'' and inserting ''30''.

Section 2A3.1(b)(1) is amended by striking ''was committed by the means set forth'' and inserting ''involved conduct described''.

Section 2A3.1(b)(6) is amended by striking ''Internet-access device'' and inserting ''interactive computer service''.

Section 2A3.1(c) is amended in the heading by striking ''Cross Reference'' and inserting ''Cross References''.

Section 2A3.1(c)(1) is amended by inserting '', if the resulting offense level is greater than that determined above'' after ''Murder)''.

Section 2A3.1(c) is amended by adding at the end the following:

''(2) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.''.

Section 2A3.1(d)(1) is amended by striking ''a correctional facility and the victim was a corrections employee'' and inserting ''the custody or control of a prison or other correctional facility and the victim was a prison official''; and by striking ''(a)'' and inserting ''(c)(2)''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by striking Notes 1 through 3 and inserting the following:

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

'Abducted', 'permanent or life-threatening bodily injury', and 'serious bodily injury' have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions). However, for purposes of this guideline, ''serious bodily injury'' means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

'Custody or control' and 'prison official' have the meaning given those terms in Application Note 4 of the Commentary to § 3A1.2 (Official Victim).

'Child pornography' has the meaning given that term in 18 U.S.C. § 2256(8).

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

'Distribution' means any act, including possession with intent to distribute, production, transportation, and advertisement, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing, but does not include the mere solicitation of such material by a defendant.

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

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

'Prohibited sexual conduct' (A) means any sexual activity for which a person can be charged with a criminal offense; (B) includes the production of child pornography; and (C) does not include trafficking in, or possession of, child pornography.

'Victim' includes an undercover law enforcement officer.

2. Application of Subsection (b)(1).—For purposes of subsection (b)(1), 'conduct described in 18 U.S.C. § 2241(a) or (b)' is: (i) using force against the victim; (ii) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the victim unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar

substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.

3. Application of Subsection (b)(3).—

(A) Care, Custody, or Supervisory Control.—Subsection (b)(3) is to be construed broadly and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement in subsection (b)(3) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 4 by inserting before ''The enhancement'' the following:

''Application of Subsection (b)(6).—

(A) Misrepresentation of Participant's Identity.—'';

and by striking the last paragraph and inserting the following:

''(B) Use of a Computer or Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if a computer or an interactive computer service was used to (i) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (ii) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by redesignating Note 5 as Note 6; and by inserting after Note 4 the following:

''5. Application of Subsection (c)(1).—

(A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

(B) Definition.—For purposes of subsection (c)(1), 'sexually explicit conduct' has the meaning given that term in 18 U.S.C. § 2256(2).''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 6, as redesignated by this amendment, by inserting ''Upward Departure Provision.''—before ''If a victim''.

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

''(a) Base Offense Level: 18''.

Section 2A3.2(b)(1) is amended by striking ''victim'' and inserting ''minor''; and by striking ''2 levels'' and inserting ''4 levels''.

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

''(2) If (A) subsection (b)(1) does not apply; and (B)(i) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct; or (ii) a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct, increase by 4 levels.

(3) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct, increase by 2 levels.''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 1 by inserting after ''Definitions.—For purposes of this guideline:'' the following:

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

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

'Minor' means (A) an individual who had not attained the age of 16 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 16 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.'';

and by striking '' 'Sexual act' '' and all that follows through ''16 years.''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 2 by striking ''Custody, Care, and Supervisory Control Enhancement.—Subsection (b)(1)'' and inserting the following:

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

(A) In General.—Subsection (b)(1)'';

by striking ''victim'' each place it appears and inserting ''minor''; and by adding at the end the following:

''(B) Inapplicability of Chapter Three Adjustment.—If the enhancement in subsection (b)(1) applies, do not apply subsection (b)(2) or § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by striking Notes 3 through 5 and inserting the following:

''3. Application of Subsection (b)(2).—

(A) Misrepresentation of Identity.—The enhancement in subsection (b)(2)(B)(i) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. Subsection (b)(2)(B)(i) is intended to apply only to misrepresentations made directly to the minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(2)(B)(i) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(2)(B)(i) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) Undue Influence.—In determining whether subsection (b)(2)(B)(ii) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.

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

undue influence can be presumed because of the substantial difference in age between the participant and the minor.

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

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by redesignating Notes 6 and 7 as Notes 5 and 6, respectively.

The Commentary to § 2A3.2 captioned ''Background'' is amended by striking ''or chapter 117 of title 18, United States Code''; by striking ''victim'' each place it appears and inserting ''minor''; and by striking ''victim's'' and inserting ''minor's''.

Section 2A3.3(a) is amended by striking ''9'' and inserting ''12''.

Section 2A3.3(b)(1) is amended by striking ''(A)''; and by striking ''; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct''.

Section 2A3.3(b)(2) is amended by striking ''(A)''; by striking ''; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct''; and by striking ''Internet-access device'' and inserting ''interactive computer service''.

The Commentary to § 2A3.3 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:

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

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).''.

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended by striking Notes 2 and 3 and inserting the following:

''2. Application of Subsection (b)(1).—The enhancement in subsection (b)(1) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(1) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor.

The misrepresentation to which the enhancement in subsection (b)(1) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

3. Application of Subsection (b)(2).—Subsection (b)(2) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(2) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.''.

Section 2A3.4(a) is amended by striking subdivisions (1) through (3) and inserting the following:

''(1) 20, if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b);

(2) 16, if the offense involved conduct described in 18 U.S.C. § 2242; or

(3) 12, otherwise.''.

Section 2A3.4(b)(1) is amended by striking ''16'' each place it appears and inserting ''20''.

Section 2A3.4(b) is amended by striking subdivisions (4) through (6) and inserting the following:

''(4) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by 2 levels.

(5) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by 2 levels.''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended in Note 1 by striking ''For purposes of this guideline—'' and all the follows through ''18 years.'' and inserting the following:

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

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

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended by striking Notes 2 and 3 and inserting the following:

''2. Application of Subsection (a)(1).—For purposes of subsection (a)(1), 'conduct described in 18 U.S.C. § 2241(a) or (b)' is: (i) using force against the victim; (ii) threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; (iii) rendering the victim unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.

3. Application of Subsection (a)(2).—For purposes of subsection (a)(2), 'conduct described in 18 U.S.C. § 2242' is: (i) threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or (ii) victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended in Note 4 by inserting before ''Subsection (b)(3)'' the following:

''Application of Subsection (b)(3).—

(A) Custody, Care, or Supervisory Control.—'';

and by adding at the end the following:

''(B) Inapplicability of Chapter Three Adjustment.—If the enhancement in subsection (b)(3) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended by striking Note 5; and by redesignating Notes 6 and 7 as Notes 5 and 6, respectively.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended in Note 5, as redesignated by this amendment, by inserting ''Misrepresentation of a Participant's Identity.—'' before ''The enhancement''; by striking ''(A)'' each place it appears; and by striking ''; or (B) facilitate

transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct'' each place it appears.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended in Note 6, as redesignated by this amendment, by striking the text and inserting the following:

''Application of Subsection (b)(5).—Subsection (b)(5) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(5) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.''.

The Commentary to § 2A3.4 captioned ''Background'' is amended by striking ''For cases involving'' and all that follows through ''level 6.''.

Chapter Two, Part G, Subpart 1 is amended by striking § 2G1.1 and its accompanying commentary and inserting the following:

''§ 2G1.1. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor

(a) Base Offense Level: 14

(b) Specific Offense Characteristic

(1) If the offense involved fraud or coercion, increase by 4 levels.

(c) Cross Reference

(1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18 U.S.C. § 2242, apply § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(d) Special Instruction.

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

Commentary

Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a victim other than a minor); 18 U.S.C. §§ 1591 (only if the offense involved a victim other than a minor), 2421 (only if the offense involved a victim other than a minor), 2422(a) (only if the offense involved a victim other than a minor).

Application Notes:

1. Definitions.—For purposes of this guideline:

'Commercial sex act' has the meaning given that term in 18 U.S.C. § 1591(c)(1).

'Prohibited sexual conduct' has the meaning given that term in Application Note 1 of § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

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

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

2. Application of Subsection (b)(1).—Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. *See* Chapter Five, Part K (Departures). For purposes of subsection (b)(1), 'coercion' includes any form of conduct that negates the voluntariness of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. This characteristic generally will not apply if the drug or alcohol was voluntarily taken.

3. Application of Chapter Three Adjustment.—For the purposes of § 3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.

4. Application of Subsection (c)(1).—

(A) Conduct Described in 18 U.S.C. § 2241(a) or (b).—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2241(a) or (b) is: (i) using force against the victim; (ii) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the victim unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.

(B) Conduct Described in 18 U.S.C. § 2242.—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2242 is: (i) threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (ii) victimizing a victim who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

5. Special Instruction at Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under § 3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.

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

Background: This guideline covers offenses that involve promoting prostitution or prohibited sexual conduct with an adult through a variety of means. Offenses that involve promoting prostitution or prohibited sexual conduct with an adult are sentenced under this guideline, unless criminal sexual abuse occurs as part of the offense, in which case the cross reference would apply.

This guideline also covers offenses under section 1591 of title 18, United States Code, that involve recruiting or transporting a person, other than a minor, in interstate commerce knowing that force, fraud, or coercion will be used to cause the person to engage in a commercial sex act.

Offenses of promoting prostitution or prohibited sexual conduct in which a minor victim is involved are to be sentenced under § 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor).''.

Chapter Two, Part G, Subpart 1, is amended by adding at the end the

following new guideline and accompanying commentary:

''§ 2G1.3. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor

(a) Base Offense Level: 24

(b) Specific Offense Characteristics

(1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by 2 levels.

(3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by 2 levels.

(4) If the offense involved (A) the commission of a sex act or sexual contact; or (B) a commercial sex act, increase by 2 levels.

(5) If the offense involved a minor who had not attained the age of 12 years, increase by 8 levels.

(c) Cross References

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

(2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

(3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, § 2A3.1 shall apply, regardless of the ''consent'' of the minor.

(d) Special Instruction

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

Commentary

Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a minor); 18 U.S.C. §§ 1591 (only if the offense involved a minor), 2421 (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2422(b), 2423, 2425.

Application Notes:

1. Definitions.—For purposes of this guideline:

'Commercial sex act' has the meaning given that term in 18 U.S.C. § 1591(c)(1).

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

'Illicit sexual conduct' has the meaning given that term in 18 U.S.C. § 2423(f).

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

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

'Prohibited sexual conduct' has the meaning given that term in Application Note 1 of the Commentary to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

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

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

2. Application of Subsection (b)(1).—

(A) Custody, Care, or Supervisory Control.—Subsection (b)(1) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement under subsection (b)(1) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. Application of Subsection (b)(2).—

(A) Misrepresentation of Participant's Identity.—The enhancement in subsection (b)(2)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Subsection (b)(2)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(2)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(2)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) Undue Influence.—In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption, for purposes of subsection (b)(2)(B), that

such participant unduly influenced the minor to engage in prohibited sexual conduct. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

4. Application of Subsection (b)(3).—Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

5. Application of Subsection (c).—

(A) Application of Subsection (c)(1).—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice, advertisement or other method, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), ''sexually explicit conduct'' has the meaning given that term in 18 U.S.C. § 2256(2).

(B) Application of Subsection (c)(3).—For purposes of subsection (c)(3):

(i) Conduct described in 18 U.S.C. § 2241(a) or (b) is: (I) using force against the minor; (II) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (III) rendering the minor unconscious; or (IV) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

(ii) Conduct described in 18 U.S.C. § 2241(c) is: (I) interstate travel with intent to engage in a sexual act with a minor who has not attained the age of 12 years; (II) knowingly engaging in a sexual act with a minor who has not attained the age of 12 years; or (III) knowingly engaging in a sexual act under the circumstances described in 18 U.S.C. § 2241(a) and (b) with a minor who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging).

(iii)Conduct described in 18 U.S.C. § 2242 is: (I) threatening or placing the minor in fear (other than by threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (II) victimizing a minor who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

6. Application of Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each minor transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate minor. Consequently, multiple counts involving more than one minor are not to be grouped together under § 3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes travel or transportation to engage in a commercial sex act or prohibited sexual conduct in respect to more than one minor, whether specifically cited in the count of conviction, each such minor shall be treated as if contained in a separate count of conviction.

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

Background: This guideline covers offenses under chapter 117 of title 18, United States Code, involving transportation of a minor for illegal sexual activity through a variety of means. This guideline also covers offenses involving a minor under section 1591 of title 18, United States Code. Offenses involving an individual who had attained the age of 18 years are covered under § 2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor).''.

Section 2G2.1(a) is amended by striking ''27'' and inserting ''32''.

Section 2G2.1(b) is amended in subdivision (1) by striking ''victim'' and inserting ''minor''; by redesignating subdivisions (2) and (3) as subdivisions (5) and (6), respectively; and by inserting after subdivision (1) the following:

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

(A) the commission of a sexual act or sexual contact, increase by 2 levels; or

(B) (i) the commission of a sexual act; and (ii) conduct described in 18 U.S.C. § 2241(a) or (b), increase by 4 levels.

(3) If the offense involved distribution, increase by 2 levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.''.

Section 2G2.1(b)(6), as redesignated by this amendment, is amended by striking ''Internet-access device'' and inserting ''interactive computer service''.

Section 2G2.1 is amended by redesignating subsection (c) as subsection (d); and by inserting after subsection (b) the following:

''(c) Cross Reference

(1) If the victim was killed in circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.''.

The Commentary to § 2G2.1 captioned ''Statutory Provisions'' is amended by striking ''(a), (b), (c)(1)(B), 2260'' and inserting '', 2260(b)''.

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended by striking Notes 1 through 5 and inserting the following:

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

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

'Distribution' means any act, including possession with intent to distribute, production, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

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

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

'Conduct described in 18 U.S.C. § 2241(a) or (b)' is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

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

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

3. Application of Subsection (b)(5).—

(A) In General.—Subsection (b)(5) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement in subsection (b)(5) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

4. Application of Subsection (b)(6).—

(A) Misrepresentation of Participant's Identity.—The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(6)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) Use of a Computer or an Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if the offense involved the use of a computer or an interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or otherwise to solicit participation by a minor in such conduct for such purpose. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

5. Application of Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under § 3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.''.

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended in Note 6 by striking ''victims'' and inserting ''minors''.

Chapter Two, Part G, Subpart 2, is amended by striking §§ 2G2.2 and 2G2.4 and their accompanying commentary and inserting after § 2G2.1 the following:

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

(a) Base Offense Level:

(1) 18, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), or § 2252A(a)(5).

(2) 22, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels.

(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels.

(3) (Apply the greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.

(C) Distribution to a minor, increase by 5 levels.

(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.

(E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.

(F) Distribution other than distribution described in subdivisions (A) through (E), increase by 2 levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, increase by 2 levels.

(7) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by 2 levels;

(B) at least 150 images, but fewer than 300, increase by 3 levels;

(C) at least 300 images, but fewer than 600, increase by 4 levels; and

(D) 600 or more images, increase by 5 levels.

(c) Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

''Distribution'' means any act, including possession with intent to distribute, production, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

''Distribution for pecuniary gain'' means distribution for profit.

''Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain'' means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. ''Thing of value'' means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the ''thing of value'' is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

''Distribution to a minor'' means the knowing distribution to an individual who is a minor at the time of the offense.

''Interactive computer service'' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

''Minor'' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

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

''Prohibited sexual conduct'' has the meaning given that term in Application Note 1 of the Commentary to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

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

2. Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, receive, or distribute such materials.

3. Application of Subsection (b)(5).—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. Application of Subsection (b)(7).—

(A) Definition of ''Images''.—''Images'' means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8).

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

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

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

5. Application of Subsection (c)(1).—

(A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

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

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

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

Section 2G3.1 is amended in the heading by adding at the end ''; Misleading Domain Names''.

Section 2G3.1(b)(1) is amended by redesignating subdivisions (D) and (E) as subdivisions (E) and (F), respectively; and by inserting after subdivision (C) the following:

''(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.'';

and in subdivision (F), as redesignated by this amendment, by striking ''(D)'' and inserting ''(E)''.

Section 2G3.1(b) is amended by redesignating subdivision (2) as subdivision (4); and by inserting after subdivision (1) the following:

''(2) If the offense involved the use of a misleading domain name on the Internet with the intent to deceive a minor into viewing material on the Internet that is harmful to minors, increase by 2 levels.

(3) If the offense involved the use of a computer or an interactive computer service, increase by 2 levels.''.

The Commentary to § 2G3.1 captioned ''Statutory Provisions'' is amended by inserting'', 2252B'' after ''1470''.

The Commentary to § 2G3.1 captioned ''Application Note'' is amended by striking ''Note'' in the heading and inserting ''Notes''; and by striking Application Note 1 and inserting the following:

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

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

'Distribution' means any act, including possession with intent to distribute, production, advertisement, and transportation, related to the transfer of obscene matter. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

'Distribution for pecuniary gain' means distribution for profit.

'Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain' means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of valuable consideration.

'Distribution to a minor' means the knowing distribution to an individual who is a minor at the time of the offense.

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

'Material that is harmful to minors' has the meaning given that term in 18 U.S.C. § 2252B(d).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

'Prohibited sexual conduct' has the meaning given that term in Application Note 1 of the Commentary to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

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

2. Inapplicability of Subsection (b)(3).—If the defendant is convicted of 18 U.S.C. § 2252B, subsection (b)(3) shall not apply.

3. Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, receive, or distribute such materials.''.

Section 3D1.2(d) is amended by striking ''2G2.4'' and inserting ''2G3.1''.

Section 5B1.3(d)(7) is amended by striking ''If the instant'' and all that follows through ''sex offenders.'' and inserting the following:

''If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to § 5D1.2 (Term of Supervised Release)—

(A) 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.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.''.

Section 5D1.2 is amended by striking subsections (a) through (c) and inserting following:

''(a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:

(1) At least three years but not more than five years for a defendant convicted of a Class A or B felony.

(2) At least two years but not more than three years for a defendant convicted of a Class C or D felony.

(3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor.

(b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—

(1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or

(2) a sex offense.

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

(c) The term of supervised release imposed shall be not less than any statutorily required term of supervised release.''.

Section 5D1.3(d)(7) is amended by striking ''If the instant'' and all that follows through ''sex offenders.'' and inserting the following:

''If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to § 5D1.2 (Term of Supervised Release)—

(A) 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.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.''.

Section 7B1.3(g) is amended by striking ''Where'' each place it appears and inserting ''If''; and in subdivision (2) by striking ''and the term of imprisonment imposed is less than the maximum term of imprisonment imposable upon revocation''.

The Commentary to § 7B1.3 captioned ''Application Notes'' is amended by striking ''and imposition of less than the maximum imposable term of imprisonment'' in Note 2; and by striking Note 6.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1466 the following:

''18 U.S.C. § 1466A 2G2.2'';

in the line referenced to 18 U.S.C. § 2252 by striking '', 2G2.4'';

in the line referenced to 18 U.S.C. § 2252A by striking '', 2G2.4'';

by inserting before the line referenced to 18 U.S.C. § 2257 the following new line:

''18 U.S.C. § 2252B 2G3.1'';

and by striking the following: ''18 U.S.C. § 2260 2G2.1, 2G2.2'',

and inserting the following:

''18 U.S.C. § 2260(a) 2G2.1

18 U.S.C. § 2260(b) 2G2.2''.

Reason for Amendment: This amendment implements the directives to the Commission regarding child pornography and sexual abuse offenses in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, (the ''PROTECT Act''), Pub. L. 108–21. This amendment makes changes to Chapter Two, Part A (Criminal Sexual Abuse), Chapter Two, Part G (Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity), §§ 3D1.2 (Groups of Closely Related Counts), 5B1.3 (Conditions of Probation), 5D1.2 (Term of Supervised Release), and 5D1.3 (Conditions of Supervised Release), and Appendix A (Statutory Index).

First, the amendment consolidates §§ 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 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), into one guideline, § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; 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; Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct). Consolidation addresses concerns raised by judges, probation officers, prosecutors, and defense attorneys regarding difficulties in determining the appropriate guideline (§ 2G2.2 or § 2G2.4) for cases involving convictions of 18 U.S.C. § 2252 or § 2252A. Furthermore, as a result of amendments directed by the PROTECT Act, these guidelines have a number of similar specific offense characteristics.

Section 103 of the PROTECT Act established five-year mandatory minimum terms of imprisonment for offenses related to trafficking and receipt of child pornography under 18 U.S.C. §§ 2252(a)(1)–(3) and 2252A(a)(1), (2), (3), (4) and (6). This section also increased the statutory maximum terms of imprisonment for these offenses from 15 years to 20 years. Furthermore, the PROTECT Act increased the statutory maximum penalty for possession offenses from five to ten years. As a result of these new mandatory minimum penalties and the increases in the statutory maxima for these offenses, the Commission increased the base offense level for these offenses.

The amendment provides two alternative base offense levels depending upon the statute of conviction. The base offense level is set at level 18 for a defendant convicted of the possession of child pornography under 18 U.S.C. § 2252(a)(4), 18 U.S.C. § 2252A(a)(5), or 18 U.S.C. § 1466A(b), and at level 22 for a defendant convicted of any other offense referenced to this guideline, primarily trafficking and receipt of child pornography. The Commission determined that a base offense level of level 22 is appropriate for trafficking offenses because, when combined with several specific offense characteristics which are expected to apply in almost every case (*e.g.*, use of a computer, material involving children under 12 years of age, number of images), the mandatory minimum of 60 months' imprisonment will be reached or exceeded in almost every case by the Chapter Two calculations. The Commission increased the base offense level for possession offenses from level 15 to level 18 because of the increase in the statutory maximum term of imprisonment from 5 to 10 years, and to maintain proportionality with receipt and trafficking offenses. The amendment also provides a two-level decrease at § 2G2.2(b)(1) for a defendant whose base offense level is level 22, whose conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor, and whose conduct did not involve an intent to traffic in or distribute the material. Thus, individuals convicted of receipt of child pornography with no intent to traffic or distribute the material essentially will have an adjusted offense level of level 20, as opposed to an offense level of level 22, for receipt with intent to traffic, prior to application of any other specific offense characteristics. The Commission's review of these cases indicated the conduct involved in such ''simple receipt'' cases in most instances was indistinguishable from ''simple possession'' cases. The statutory penalties for ''simple receipt'' cases, however, are the same as the statutory penalties for trafficking cases. Reconciling these competing concerns, the Commission determined that a two-level reduction from the base offense level of level 22 is warranted, if the defendant establishes that there was no intent to distribute the material.

The amendment also provides a new, six-level enhancement at § 2G2.2(b)(3)(D) for offenses that involve distribution to a minor with intent to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than sexual activity.

The amendment also makes a number of changes to the commentary at § 2G2.2, as follows. The amendment adds several definitions, including definitions of ''computer,'' ''image,'' and ''interactive computer service,'' to provide greater guidance for these terms and uniformity in application of the guideline. The amendment also broadens the ''use of a computer'' enhancement at § 2G2.2(b)(5) in two ways. First, the amendment expands the enhancement to include an ''interactive computer service'' (*e.g.*, Internet access devices), as defined in 47 U.S.C. § 230(f)(2). The Commission concluded that the term ''computer'' did not capture all types of Internet devices. Thus, the amendment expands the definition of ''computer'' to include other devices that involve interactive computer services (*e.g.*, Web-Tv). In addition, the amendment broadens the enhancement by explicitly providing that the enhancement applies to offenses in which the computer or interactive computer service was used to obtain possession of child pornographic material. Prior to this amendment, the enhancement only applied if the computer was used for the transmission, receipt or distribution of the material.

The PROTECT Act directly amended §§ 2G2.2 and 2G2.4 to create a specific offense characteristic related to the number of child pornography images. That specific offense characteristic provides a graduated enhancement of two to five levels, depending on the number of images. However, the congressional amendment did not provide a definition of ''image,'' which raised questions regarding how to apply the specific offense characteristic. This amendment defines the term ''image'' and provides an instruction regarding how to apply the specific offense characteristic to videotapes. Application Note 4 states that an ''image'' means any visual depiction described in 18 U.S.C. § 2256(5) and (8) and instructs that each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered one image. Furthermore, the application note provides that each video, video-clip, movie, or similar recording shall be considered to have 75 images for purposes of the specific offense characteristic. Application Note 4 also provides two possible grounds for an upward departure (if the number of images substantially under-represents the number of minors or if the length of the videotape or recording is substantially more than five minutes). Because the image specific offense characteristic created directly by Congress in the PROTECT Act essentially supercedes an earlier directive regarding a specific offense characteristic relating to the number of items (*see* Pub. L. 102–141 and Amendment 436), the Commission deleted the specific offense characteristic for possessing ten or more child pornographic items (formerly § 2G2.4(b)(3)). This deletion avoids potential litigation regarding issues of ''double counting'' if both specific offense characteristics were retained in the guideline.

In response to the increase in the use of undercover officers in child pornography investigations, the amendment expands the definition of ''minor.'' ''Minor'' is defined as (1) an

individual who had not attained the age of 18 years; (2) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (A) had not attained the age of 18 years, and (B) could be provided to a participant for the purposes of engaging in sexually explicit conduct; or (3) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

The amendment also makes clear that distribution includes advertising and posting material involving the sexual exploitation of a minor on a website for public viewing but does not include soliciting such material. In response to a circuit conflict, the amendment adds an application note to make clear that the specific offense characteristic for material portraying sadistic or masochistic conduct applies regardless of whether the defendant specifically intended to possess, receive, or distribute such material. The circuit courts have disagreed regarding whether a defendant must have specifically intended to receive the sadistic or masochistic images. Some circuit courts have required that the defendant must have intended to receive these images. *See United States* v. *Kimbrough,* 69 F.3d 723 (5th Cir. 1995); *United States* v. *Tucker,* 136 F.3d 763 (11th Cir. 1998). The Seventh Circuit has held that this specific offense characteristic is applied based on a strict liability standard, and that no proof of intent is necessary. *See United States* v. *Richardson,* 238 F.3d 837 (7th Cir. 2001). The Commission followed the Seventh Circuit's holding that the enhancement applies regardless of whether the defendant specifically intended to possess, receive, or distribute such material.

Second, section 103 of the PROTECT Act increased the mandatory minimum term of imprisonment from 10 to 15 years for offenses related to the production of child pornography under 18 U.S.C. § 2251. In response, the amendment increases the base offense level at § 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) from level 27 to level 32. A base offense level of level 32 is appropriate for production offenses because, combined with the application of several specific offense characteristics that are expected to apply in almost all production cases (*e.g.*, age of the victim), this base offense level will ensure that the 15 year mandatory minimum (180 months) will be met in by the Chapter Two calculations almost every case.

The amendment adds three new specific offense characteristics that are associated with the production of child pornography. The amendment provides, at § 2G2.1(b)(2), a two-level increase if the offense involved the commission of a sex act or sexual contact, or a four-level increase if the offense involved a sex act and conduct described in 18 U.S.C. § 2241(a) or (b) (*i.e.*, the use of force was involved). The Commission concluded that this type of conduct is more serious than the production of a picture without a sex act or the use of force, and therefore, a two-or four-level increase is appropriate. The amendment also adds a two-level increase if the production offense also involved distribution. The Commission concluded that because traffickers sentenced at § 2G2.2 receive an increase for distributing images of child pornography, an individual who produces and distributes the image(s) also should be punished for distributing the item. Lastly, the amendment adds a new, four-level increase if the offense involved material portraying sadistic or masochistic conduct. Similar to the distribution specific offense characteristic, the Commission concluded that, because § 2G2.2 contains a four-level increase for possessing, receiving or trafficking these images, the producers of such images also should receive comparable additional punishment.

Third, this amendment creates a new guideline, § 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), to specifically address offenses under chapter 117 of title 18, United States Code (Transportation for Illegal Sexual Activity and Related Crimes). Prior to the amendment, chapter 117 offenses, primarily 18 U.S.C. §§ 2422 (Coercion and Enticement) and 2423 (Transportation of Minors), were referenced by Appendix A (Statutory Index) to either § 2G1.1 or § 2A3.2. Offenses under 18 U.S.C. §§ 2422 and 2423(a) (Transportation with Intent to Engage in Criminal Sexual Activity) are referenced to § 2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct), but are then cross referenced from § 2G1.1 to § 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) in order to account for certain underlying behavior. Application of this cross reference has led to confusion among courts and practitioners. Offenses under 18 U.S.C. § 2423(b) (Travel with Intent to Engage in Sexual Act with a Juvenile) are referenced to § 2A3.1, § 2A3.2, or § 2A3.3, but most are sentenced at § 2A3.2. Until recently, the majority of cases sentenced under § 2A3.2 were statutory rape cases that occurred on Federal property (*e.g.*, military bases) or Native American lands. In fiscal years 2001 and 2002, the majority of cases sentenced under the statutory rape guideline were coercion, travel, and transportation offenses. The creation of a new guideline for these cases is intended to address more appropriately the issues specific to these offenses. In addition, the removal of these cases from § 2A3.2 will permit the Commission to more appropriately tailor that guideline to actual statutory rape cases. Furthermore, travel and transportation cases have a different statutory penalty structure than § 2243(a) statutory rape cases.

Prior to the amendment, § 2A3.2 provided alternative base offense levels of (1) level 24 for a chapter 117 violation with a sexual act; (2) level 21 for a chapter 117 violation with no sexual act (*e.g.*, a sting case); or (3) level 18 for statutory rape with no travel. The PROTECT Act created a five year mandatory minimum term of imprisonment for 18 U.S.C. §§ 2422(a) and 2423(a) and increased the statutory maximum term of imprisonment for these offenses from 15 to 30 years. The PROTECT Act, however, did not increase the statutory maximum penalty, nor did the Act add a mandatory minimum, for 18 U.S.C. § 2243(a) offenses.

This new guideline has a base offense level of level 24 to account for the new mandatory minimum terms of imprisonment established by the PROTECT Act. The new guideline provides six specific offense characteristics to provide proportionate enhancements for aggravating conduct that may occur in connection with these cases. The guideline contains enhancements for commission of a sex act or commercial sex act, use of a computer, misrepresentations of identity, undue influence, custody issues, and involvement of a minor under the age of 12 years. The amendment also provides three cross references to account for certain more serious sexual abuse conduct, including a cross reference if the offense involved conduct described in 18 U.S.C. § 2241 or

§ 2242. Furthermore, the amendment makes conforming changes to § 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct) as a result of the creation of the new travel guideline. Section 2G1.1 is expected to apply primarily to adult prostitution cases because of the creation of § 2G1.3.

Fourth, section 521 of the PROTECT Act created a new offense at 18 U.S.C. § 2252B (Misleading Domain Names on the Internet). Section 2252B(a) prohibits the knowing use of a misleading domain name on the Internet with the intent to deceive a person into viewing material constituting obscenity. Offenses under this subsection are punishable by a maximum term of imprisonment of two years. Section 2252B(b) prohibits the knowing use of a misleading domain name with the intent to deceive a minor into viewing material that is harmful to minors, with a maximum term of imprisonment of four years. The amendment refers the new offense to § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor), modifies the title of the guideline to include ''Misleading Domain Names'', and provides a two-level enhancement at § 2G3.1(b)(2), if ''the offense involved the use of a misleading domain name on the Internet with the intent to deceive a minor into viewing material on the Internet that is harmful to minors.'' In addition, the amendment also provides enhancements for the following conduct: (1) distribution to a minor that was intended to persuade, induce, entice, or coerce a minor to engage in any illegal activity; and (2) use of a computer or interactive computer service. Finally, the amendment adds § 2G3.1 to the list of guidelines at subsection (d) of § 3D1.2 (Groups of Closely Related Counts). Grouping multiple counts of these offenses pursuant to § 3D1.2(d) is appropriate because typically these offenses, as well as other pornography distribution offenses, are ongoing or continuous in nature. The amendment makes other minor technical changes to the commentary to make this guideline consistent with other Chapter Two, Part G guidelines.

Fifth, in response to a circuit conflict, this amendment adds a condition to §§ 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) permitting the court to limit the use of a computer or an interactive computer service for sex offenses in which the defendant used such items. The circuit courts have disagreed over imposition of restrictive computer use and Internet-access conditions. Some circuit courts have refused to allow complete prohibitions on computer use and Internet access (*see United States* v. *Sofsky,* 287 F.3d 122 (2nd Cir. 2002) (invalidating restrictions on computer use and Internet use); *United States* v. *Freeman,* 316 F.3d 386 (3d Cir. 2003) (same)), but other circuit courts have upheld restrictions on computer use and Internet access with probation officer permission (*see United States* v. *Fields,* 324 F.3d 1025 (8th Cir. 2003) (upholding condition prohibiting defendant from having Internet service in his home and allowing possessing of a computer only if granted permission by his probation officer); *United States* v. *Walser,* 275 F.3d 981 (10th Cir. 2001) (prohibiting Internet use but allowing Internet use with probation officer's permission); *United States* v. *Zinn,* 321 F.3d 1084 (11th Cir. 2003) (same)). Other courts have permitted a complete ban on a convicted sex offender's Internet use while on supervised release. *See United States* v. *Paul,* 274 F.3d 155 (5th Cir. 2001) (upholding complete ban on Internet use).

In addition, this amendment makes § 5D1.2 (Term of Supervised Release) consistent with changes made by the PROTECT Act regarding the applicable terms of supervised release under 18 U.S.C. § 3583 for sex offenders.

Sixth, section 401(i)(2) of the PROTECT Act directs the Commission to ''amend the Sentencing Guidelines to ensure that the Guidelines adequately reflect the seriousness of the offenses'' under sections 2243(b) (Sexual Abuse of a Ward), 2244(a)(4) (Abusive Sexual Contact), and 2244(b) (Sexual Contact with a Person without that Person's Permission) of title 18, United States Code. This amendment makes several amendments to the guidelines in Chapter Two, Part A (Criminal Sexual Abuse) to address this directive and to account for proportionality issues created by the increases in the Chapter Two, Part G guidelines. In addition, the amendment makes changes to the commentary to make the definitions in these guidelines consistent with definitions in the pornography guidelines.

Seventh, the amendment increases the base offense level at § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) from level 27 to level 30 to maintain proportionality between this guideline and § 2G2.1, the production of child pornography guideline, the base offense level of which was raised to level 32 by this amendment. Furthermore, the amendment adds the term ''interactive computer service'' to the computer enhancement in § 2A3.1.

Eighth, the amendment increases the offense levels for two specific offense characteristics at § 2A3.2. The amendment increases the custody, care, or supervisory control enhancement from two to four levels at § 2A3.2(b)(1), and changes § 2A3.2(b)(3), which involves the misrepresentation or undue influence by the defendant, from a two- to a four-level increase. The Commission concluded that an increase in the magnitude of these enhancements is appropriate because of the seriousness of such conduct. The amendment also deletes the alternative base offense level of level 21 or level 24 because these cases will be referenced to the new travel guideline at § 2G1.3.

Ninth, in response to section 401 of the PROTECT Act, the amendment increases the base offense level at § 2A3.3 (Criminal Sexual Abuse of a Ward) from level 9 to a level 12. Although 18 U.S.C. § 2243(b) offenses have only a one-year statutory maximum term of imprisonment, the Commission determined that these offenses were serious in nature and deserved punishment near that statutory maximum.

Finally, the amendment increases the alternative base offense levels in § 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact) to level 20, 16, or 12, depending on the conduct involved in the offense. Prior to the amendment, these base offenses levels were level 16, 12, or 10. Base offense level 20 applies if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b). Base offense level 16 applies if the offense involved conduct described in 18 U.S.C. § 2242, and base offense level 12 applies for all other cases sentenced at this guideline. The Commission concluded that these increases were appropriate to account for the serious conduct committed by the defendant and to maintain proportionality with other Chapter Two, Part A guidelines.

3. Amendment: Section 2B1.1(b) is amended by redesignating subdivisions (7) through (14) as subdivisions (8) through (15), respectively; and by inserting after subdivision (6) the following:

''(7) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by 2 levels.''.

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by inserting ''1037,'' after ''1031,''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 4 by redesignating subdivisions (B)

and (C) as subdivisions (C) and (D), respectively; and by inserting after subdivision (A) the following:

''(B) Applicability to Transmission of Multiple Commercial Electronic Mail Messages.—For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by redesignating Notes 6 through 18 as Notes 7 through 19, respectively; and by inserting after Note 5 the following:

''6. Application of Subsection (b)(7).—For purposes of subsection (b)(7), 'improper means' includes the unauthorized harvesting of electronic mail addresses of users of a website, proprietary service, or other online public forum.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 1035 the following new line: ''18 U.S.C. § 1037 2B1.1''.

Reason for Amendment: This amendment responds to the directive in section 4(b) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act) of 2003, Pub. L. 108–187. The Act creates five new felony offenses codified at 18 U.S.C. § 1037 and directs the Commission to review and as appropriate amend the sentencing guidelines and policy statements to establish appropriate penalties for violations of 18 U.S.C. § 1037 and other offenses that may be facilitated by sending large volumes of unsolicited electronic mail, including fraud, identity theft, obscenity, child pornography and sexual exploitation of children. The Act also requires that the Commission consider providing sentencing enhancements for several factors, including defendants convicted under 18 U.S.C. § 1037 who obtained electronic mail addresses through improper means.

The amendment refers violations of subsections of 18 U.S.C. § 1037 to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The Commission determined that reference to § 2B1.1 is appropriate because subsection 18 U.S.C. § 1037(a)(1) involves misappropriation of another's computer, and 18 U.S.C. § 1037(a)(2) through (a)(5) involve deceit. Because each offense under 18 U.S.C. § 1037 contains as an element the transmission of multiple commercial electronic messages (where ''multiple'' is defined in the statute as ''more than 100 electronic mail messages during a 24-hour period, more than 1,000 electronic mail messages during a 30-day period, or more than 10,000 electronic mail messages during a 1-year period''), the amendment provides in Application Note 4 that the mass-marketing enhancement in § 2B1.1(b)(2)(A)(ii) shall apply automatically to any defendant who is convicted of 18 U.S.C. § 1037, or who committed an offense involving conduct described in 18 U.S.C. § 1037. Broadening application of the mass marketing enhancement to all defendants sentenced under § 2B1.1 whose offense involves conduct described in 18 U.S.C. § 1037, whether or not the defendant is convicted under 18 U.S.C. § 1037, responds specifically to that part of the directive concerning offenses that are facilitated by sending large volumes of electronic mail.

Additionally, in response to the directive, a new specific offense characteristic in § 2B1.1(b)(7) provides for a two-level increase if the defendant is convicted under 18 U.S.C. § 1037 and the offense involved obtaining electronic mail addressed through improper means. A corresponding application note provides a definition of ''improper means.'' Finally, the Commission also responded to the directive concerning other offenses by making several modifications to other guidelines, as set forth in Amendment 2 of this document. For example, an amendment to the obscenity guideline, § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor), added a two-level enhancement if the offense involved the use of a computer or interactive computer service.

4. *Amendment:* The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 15, as redesignated by Amendment 3 of this document, by adding at the end the following:

''For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).''.

Chapter Two, Part C is amended by striking §§ 2C1.1 and 2C1.2 and their accompanying commentary and inserting the following:

''§ 2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

(a) Base Offense Level:

(1) 14, if the defendant was a public official; or

(2) 12, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe or extortion, increase by 2 levels.

(2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by 2 levels.

(c) Cross References

(1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense, if the resulting offense level is greater than that determined above.

(2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply § 2X3.1 (Accessory After the Fact) or § 2J1.2 (Obstruction of Justice), as appropriate,

in respect to that other offense, if the resulting offense level is greater than that determined above.

(3) If the offense involved a threat of physical injury or property destruction, apply § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), if the resulting offense level is greater than that determined above.

(d) Special Instruction for Fines—Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of § 8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment.

Commentary

Statutory Provisions: 15 U.S.C. §§ 78dd–1, 78dd–2, 78dd–3; 18 U.S.C. §§ 201(b)(1), (2), 371 (if conspiracy to defraud by interference with governmental functions), 872, 1341 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1342 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1343 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1951. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

''Government identification document'' means a document made or issued by or under the authority of the United States Government, a State, or a political subdivision of a State, which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

''Payment'' means anything of value. A payment need not be monetary.

''Public official'' shall be construed broadly and includes the following:

(A) ''Public official'' as defined in 18 U.S.C. § 201(a)(1).

(B) A member of a state or local legislature. ''State'' means a State of the United States, and any commonwealth, territory, or possession of the United States.

(C) An officer or employee or person acting for or on behalf of a state or local government, or any department, agency, or branch of government thereof, in any official function, under or by authority of such department, agency, or branch of government, or a juror in a state or local trial.

(D) Any person who has been selected to be a person described in subdivisions (A), (B), or (C), either before or after such person has qualified.

(E) An individual who, although not otherwise covered by subdivisions (A) through (D): (i) Is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto authority to make governmental decisions (*e.g.*, which may include a leader of a state or local political party who acts in the manner described in this subdivision).

2. More than One Bribe or Extortion.—Subsection (b)(1) provides an adjustment for offenses involving more than one incident of either bribery or extortion. Related payments that, in essence, constitute a single incident of bribery or extortion (*e.g.*, a number of installment payments for a single action) are to be treated as a single bribe or extortion, even if charged in separate counts.

In a case involving more than one incident of bribery or extortion, the applicable amounts under subsection (b)(2) (*i.e.*, the greatest of the value of the payment, the benefit received or to be received, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government) are determined separately for each incident and then added together.

3. Application of Subsection (b)(2).—''Loss'', for purposes of subsection (b)(2)(A), shall be determined in accordance with Application Note 3 of the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud). The value of 'the benefit received or to be received' means the net value of such benefit. Examples: (1) A government employee, in return for a $500 bribe, reduces the price of a piece of surplus property offered for sale by the government from $10,000 to $2,000; the value of the benefit received is $8,000. (2) A $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the preceding examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.

4. Application of Subsection (b)(3).—

(A) Definition.—''High-level decision-making or sensitive position'' means a position characterized by a direct authority to make decisions for, or on behalf of, a government department, agency, or other government entity, or by a substantial influence over the decision-making process.

(B) Examples.—Examples of a public official in a high-level decision-making position include a prosecuting attorney, a judge, an agency administrator, and any other public official with a similar level of authority. Examples of a public official who holds a sensitive position include a juror, a law enforcement officer, an election official, and any other similarly situated individual.

5. Application of Subsection (c).—For the purposes of determining whether to apply the cross references in this section, the ''resulting offense level'' means the final offense level (*i.e.*, the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A–D). *See* § 1B1.5(d); Application Note 2 of the Commentary to § 1B1.5 (Interpretation of References to Other Offense Guidelines).

6. Inapplicability of § 3B1.3.—Do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

7. Upward Departure Provisions.—In some cases the monetary value of the unlawful payment may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the enhancements in § 2C1.1(b)(2) and (c)(1), (2), and (3). However, in cases in which the seriousness of the offense is still not adequately reflected, an upward departure is warranted. *See* Chapter Five, Part K (Departures).

In a case in which the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. *See* § 5K2.7 (Disruption of Governmental Function).

Background: This section applies to a person who offers or gives a bribe for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence such individual's official actions, or to a public official who solicits or accepts such a bribe.

The object and nature of a bribe may vary widely from case to case. In some cases, the object may be commercial advantage (*e.g.*, preferential treatment in the award of a government contract). In

others, the object may be issuance of a license to which the recipient is not entitled. In still others, the object may be the obstruction of justice. Consequently, a guideline for the offense must be designed to cover diverse situations.

In determining the net value of the benefit received or to be received, the value of the bribe is not deducted from the gross value of such benefit; the harm is the same regardless of value of the bribe paid to receive the benefit. In a case in which the value of the bribe exceeds the value of the benefit, or in which the value of the benefit cannot be determined, the value of the bribe is used because it is likely that the payer of such a bribe expected something in return that would be worth more than the value of the bribe. Moreover, for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is greater.

Under § 2C1.1(b)(3), if the payment was for the purpose of influencing an official act by certain officials, the offense level is increased by 4 levels.

Under § 2C1.1(c)(1), if the payment was to facilitate the commission of another criminal offense, the guideline applicable to a conspiracy to commit that other offense will apply if the result is greater than that determined above. For example, if a bribe was given to a law enforcement officer to allow the smuggling of a quantity of cocaine, the guideline for conspiracy to import cocaine would be applied if it resulted in a greater offense level.

Under § 2C1.1(c)(2), if the payment was to conceal another criminal offense or obstruct justice in respect to another criminal offense, the guideline from § 2X3.1 (Accessory After the Fact) or § 2J1.2 (Obstruction of Justice), as appropriate, will apply if the result is greater than that determined above. For example, if a bribe was given for the purpose of concealing the offense of espionage, the guideline for accessory after the fact to espionage would be applied.

Under § 2C1.1(c)(3), if the offense involved forcible extortion, the guideline from § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) will apply if the result is greater than that determined above.

Section 2C1.1 also applies to offenses under 15 U.S.C. §§ 78dd–1, 78dd–2, and 78dd–3. Such offenses generally involve a payment to a foreign public official, candidate for public office, or agent or intermediary, with the intent to influence an official act or decision of a foreign government or political party. Typically, a case prosecuted under these provisions will involve an intent to influence governmental action.

Section 2C1.1 also applies to fraud involving the deprivation of the intangible right to honest services of government officials under 18 U.S.C. §§ 1341–1343 and conspiracy to defraud by interference with governmental functions under 18 U.S.C. § 371. Such fraud offenses typically involve an improper use of government influence that harms the operation of government in a manner similar to bribery offenses.

Offenses involving attempted bribery are frequently not completed because the offense is reported to authorities or an individual involved in the offense is acting in an undercover capacity. Failure to complete the offense does not lessen the defendant's culpability in attempting to use public position for personal gain. Therefore, solicitations and attempts are treated as equivalent to the underlying offense.

§ 2C1.2. Offering, Giving, Soliciting, or Receiving a Gratuity

(a) Base Offense Level:

(1) 11, if the defendant was a public official; or

(2) 9, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved more than one gratuity, increase by 2 levels.

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

(3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the resulting offense level is less than level 15, increase to level 15.

(4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by 2 levels.

(c) Special Instruction for Fines—Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of § 8C2.4 (Base Fine), use the value of the unlawful payment.

Commentary

Statutory Provisions: 18 U.S.C. §§ 201(c)(1), 212–214, 217. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

''Government identification document'' means a document made or issued by or under the authority of the United States Government, a State, or a political subdivision of a State, which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

''Public official'' shall be construed broadly and includes the following:

(A) ''Public official'' as defined in 18 U.S.C. § 201(a)(1).

(B) A member of a state or local legislature.

(C) An officer or employee or person acting for or on behalf of a state or local government, or any department, agency, or branch of government thereof, in any official function, under or by authority of such department, agency, or branch of government, or a juror.

(D) Any person who has been selected to be a person described in subdivisions (A), (B), or (C), either before or after such person has qualified.

(E) An individual who, although not otherwise covered by subdivisions (A) through (D): (i) is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto authority to make governmental decisions (*e.g.*, which may include a leader of a state or local political party who acts in the manner described in this subdivision).

2. Application of Subsection (b)(1).—Related payments that, in essence, constitute a single gratuity (*e.g.*, separate payments for airfare and hotel for a single vacation trip) are to be treated as a single gratuity, even if charged in separate counts.

3. Application of Subsection (b)(3).—

(A) Definition.—''High-level decision-making or sensitive position'' means a position characterized by a direct authority to make decisions for, or on behalf of, a government department, agency, or other government entity, or by a substantial influence over the decisionmaking process.

(B) Examples.—Examples of a public official in a high-level decisionmaking position include a prosecuting attorney, a judge, an agency administrator, a law enforcement officer, and any other public official with a similar level of authority. Examples of a public official who holds a sensitive position include a juror, a law enforcement officer, an election official, and any other similarly situated individual.

4. Inapplicability of § 3B1.3.—Do not apply the adjustment in § 3B1.3 (Abuse of Position or Trust or Use of Special Skill).

Background: This section applies to the offering, giving, soliciting, or receiving of a gratuity to a public official in respect to an official act. It also applies in cases involving (1) the offer to, or acceptance by, a bank examiner of a loan or gratuity; (2) the offer or receipt of anything of value for procuring a loan or discount of commercial bank paper from a Federal Reserve Bank; and (3) the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt.''.

Chapter Two, Part C, Subpart 1, is amended by striking §§ 2C1.6 and 2C1.7 and their accompanying commentary.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 209 by striking ''2C1.4'' and inserting ''2C1.3'';

In the line referenced to 18 U.S.C. § 212 by striking ''2C1.6'' and inserting ''2C1.2'';

In the line referenced to 18 U.S.C. § 213 by striking ''2C1.6'' and inserting ''2C1.2'';

In the line referenced to 18 U.S.C. § 214 by striking ''2C1.6'' and inserting ''2C1.2'';

In the line referenced to 18 U.S.C. § 217 by striking ''2C1.6'' and inserting ''2C1.2'';

In the line referenced to 18 U.S.C. § 371 by striking ''2C1.7'' and inserting ''2C1.1 (if conspiracy to defraud by interference with governmental functions)''; and by striking ''924(c)'' and inserting ''924(c))'';

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

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

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

In the line referenced to 18 U.S.C. § 1909 by striking '', 2C1.4''; and

In the line referenced to 41 U.S.C. § 423(e) by striking '', 2C1.7''.

Reason for Amendment: This amendment increases punishment for bribery, gratuity, and ''honest services'' cases while providing additional enhancements to address previously unrecognized aggravating factors inherent in some of these offenses. This amendment reflects the Commission's conclusion that, in general, public corruption offenses previously did not receive punishment commensurate with the gravity of such offenses. The amendment also ensures that punishment levels for public corruption offenses remain proportionate to those for closely analogous offenses sentenced under § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) and § 2J1.2 (Obstruction of Justice). To simplify guideline application, this amendment also consolidates § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) with § 2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions) and consolidates § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) with § 2C1.6 (Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper).

Sections 2C1.1 and 2C1.2 each are amended to include alternative base offense levels, with an increase of two levels for public official defendants who violate their offices or responsibilities by accepting bribes, gratuities, or anything else of value. The higher alternative base offense levels for public officials reflect the Commission's view that offenders who abuse their positions of public trust are inherently more culpable than those who seek to corrupt them, and their offenses present a somewhat greater threat to the integrity of governmental processes.

A specific offense characteristic in the former §§ 2C1.1, 2C1.2, and 2C1.7 that raised offense levels incrementally with the financial magnitude of the offense or, if greater, by eight levels for the defendant's status as a ''high-level decision-maker'' is replaced by two separate specific offense characteristics in the amended guidelines. These new specific offense characteristics for ''loss'' and ''status'' are to be applied cumulatively when they both co-exist in the case. Their operation in tandem ensures that the offense level will always rise commensurate with the financial magnitude of the offense, and that all offenses involving ''an elected public official or any public official in a high-level decision-making or sensitive position'' will receive four additional offense levels and, when applicable, a minimum offense level of level 18 (in § 2C1.1) or level 15 (in § 2C1.2). The minimum offense level ensures that an offender sentenced under the amended guidelines will not receive a less severe sentence than a similarly situated offender under the former guidelines. Application notes and illustrative examples have been added to the amended guidelines to clarify the meaning of ''high-level decision-making or sensitive position.''

A new specific offense characteristic has been added to §§ 2C1.1 and 2C1.2 that provides two additional offense levels when the offender is a public official whose position involves the security of the borders of the United States or the integrity of the process for generating documents related to naturalization, legal entry, legal residence, or other government identification documents. This specific offense characteristic recognizes the extreme sensitivity of these positions in light of heightened threats from international terrorism.

5. *Amendment:* Section 2D1.1(b) is amended by redesignating subdivisions (5) and (6) as subdivisions (6) and (7), respectively; and by inserting after subdivision (4) the following:

''(5) If the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by 2 levels.''.

Section 2D1.1 is amended by adding after subsection (d) the following:

''(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under § 3A1.1(b)(1) shall apply.''.

Section 2D1.1(c) is amended in subdivision (10) by striking ''or Schedule III substances'' in the thirteenth entry; and by inserting after the thirteenth entry the following: ''40,000 or more units of Schedule III substances;'';

In subdivision (11) by striking ''or Schedule III substances'' in the thirteenth entry; and by inserting after the thirteenth entry the following: ''At least 20,000 but less than 40,000 units of Schedule III substances;'';

In subdivision (12) by striking ''or Schedule III substances'' in the thirteenth entry; and by inserting after the thirteenth entry the following: ''At least 10,000 but less than 20,000 units of Schedule III substances;'';

In subdivision (13) by striking ''or Schedule III substances'' in the thirteenth entry; and by inserting after the thirteenth entry the following: ''At least 5,000 but less than 10,000 units of Schedule III substances;'';

In subdivision (14) by striking ''or Schedule III substances'' in the thirteenth entry; and by inserting after

the thirteenth entry the following: ''At least 2,500 but less than 5,000 units of Schedule III substances;'';

In subdivision (15) by striking ''or Schedule III substances'' in the fourth entry; and by inserting after the fourth entry the following: ''At least 1,000 but less than 2,500 units of Schedule III substances;'';

In subdivision (16) by striking ''or Schedule III substances'' in the fourth entry; and by inserting after the fourth entry the following: ''At least 250 but less than 1,000 units of Schedule III substances;''; and

In subdivision (17) by striking ''or Schedule III substances'' in the fourth entry; and by inserting after the fourth entry the following: ''Less than 250 units of Schedule III substances;''.

Section 2D1.1 is amended in the subdivision captioned ''*Notes to Drug Quantity Table'' in Note (F) in the first sentence by inserting ''(except gamma-hydroxybutyric acid)'' after ''Depressants''; and in the second sentence by inserting ''(except gamma-hydroxybutyric acid)'' after ''substance'', and by striking ''gm'' and inserting ''ml''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by striking Note 5 and inserting the following:

''5. Analogues and Controlled Substances Not Referenced in this Guideline.—Any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. For purposes of this guideline 'analogue' has the meaning given the term 'controlled substance analogue' in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether a greater quantity of the analogue is needed to produce a substantially similar effect on the central nervous system as the controlled substance for which it is an analogue.

In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the marihuana equivalency of the most closely related controlled substance referenced in this guideline. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:

(A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.

(B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.

(C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables by striking the subdivision captioned ''Schedule I or II Depressants'' and inserting the following new subdivisions:

''Schedule I or II Depressants (except gamma-hydroxybutyric acid): 1 unit of a Schedule I or II Depressant (except gamma-hydroxybutyric acid) = 1 gm of marihuana.

Gamma-hydroxybutyric Acid: 1 ml of gamma-hydroxybutyric acid = 8.8 gm of marihuana''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 12 by striking the last sentence of the third paragraph and inserting the following:

''If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by adding at the end the following:

''22. Application of Subsection (b)(5).—For purposes of subsection (b)(5), 'mass-marketing by means of an interactive computer service' means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(5) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. 'Interactive computer service', for purposes of subsection (b)(5) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

''23. Application of Subsection (e)(1).—

''(A) Definition.—For purposes of this guideline, 'sexual offense' means a 'sexual act' or 'sexual contact' as those terms are defined in 18 U.S.C. § 2246(2) and (3), respectively.

(B) Upward Departure Provision.—If the defendant committed a sexual offense against more than one individual, an upward departure would be warranted.''.

Section 2D1.11(b)(2) is amended by striking ''21 U.S.C. §§ 841(d)(2), (g)(1), or 960(d)(2),'' and inserting ''21 U.S.C. § 841(c)(2) or (f)(1), or § 960(d)(2), (d)(3), or (d)(4),''.

Section 2D1.11(b) is amended by adding at the end the following:

''(4) If the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed a listed chemical through mass-marketing by means of an interactive computer service, increase by 2 levels.''.

Section 2D1.11(e) is amended in subdivision (1) by striking ''10,000 KG or more of Gamma-butyrolactone;'' and inserting ''2271 L or more of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

In subdivision (2) by striking ''At least 3,000 KG but less than 10,000 KG of Gamma-butyrolactone;'' and inserting ''At least 681.3 L but less than 2271 L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

In subdivision (3) by striking ''At least 1,000 KG but less than 3,000 KG of Gamma-butyrolactone;'' and inserting ''At least 227.1 L but less than 681.3 L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

In subdivision (4) by striking ''At least 700 KG but less than 1,000 KG of Gamma-butyrolactone;'' and inserting ''At least 159 L but less than 227.1 L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

In subdivision (5) by striking ''At least 400 KG but less than 700 KG of Gamma-butyrolactone;'' and inserting ''At least 90.8 L but less than 159 L of Gamma-

butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

In subdivision (6) by striking ''At least 100 KG but less than 400 KG of Gamma-butyrolactone;'' and inserting ''At least 22.7 L but less than 90.8 L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

In subdivision (7) by striking ''At least 80 KG but less than 100 KG of Gamma-butyrolactone;'' and inserting ''At least 18.2 L but less than 22.7 L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

In subdivision (8) by striking ''At least 60 KG but less than 80 KG of Gamma-butyrolactone;'' and inserting ''At least 13.6 L but less than 18.2 L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus'';

In subdivision (9) by striking ''At least 40 KG but less than 60 KG of Gamma-butyrolactone;'' and inserting ''At least 9.1 L but less than 13.6 L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus''; and

In subdivision (10) by striking ''Less than 40 KG of Gamma-butyrolactone;'' and inserting ''Less than 9.1 L of Gamma-butyrolactone;''; and by inserting '', White Phosphorus, or Hypophosphorous Acid'' after ''Red Phosphorus''.

The Commentary to § 2D1.11 captioned ''Statutory Provisions'' is amended by inserting '', (3), (4)'' after ''(d)(1), (2)''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended in Note 5 by striking ''21 U.S.C. §§ 841(d)(2), (g)(1), and 960(d)(2)'' and inserting ''21 U.S.C. §§ 841(c)(2) and (f)(1), and 960(d)(2), (d)(3), and (d)(4)''; and by striking ''Where'' and inserting ''In a case in which''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended by adding at the end the following:

''7. Application of Subsection (b)(4).—For purposes of subsection (b)(4), 'mass-marketing by means of an interactive computer service' means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(4) would apply to a defendant who operated a web site to promote the sale of Gamma-butyrolactone (GBL) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. 'Interactive computer service', for purposes of subsection (b)(4) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).''.

Section 2D1.12(b) is amended by adding at the end the following:

''(3) If the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed any prohibited flask, equipment, chemical, product, or material through mass-marketing by means of an interactive computer service, increase by 2 levels.

(4) If the offense involved stealing anhydrous ammonia or transporting stolen anhydrous ammonia, increase by 6 levels.''.

The Commentary to § 2D1.12 captioned ''Application Notes'' is amended by adding at the end the following:

''4. Application of Subsection (b)(3).—For purposes of subsection (b)(3), 'mass-marketing by means of an interactive computer service' means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(3) would apply to a defendant who operated a web site to promote the sale of prohibited flasks but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. 'Interactive computer service', for purposes of subsection (b)(3) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).''.

Appendix A (Statutory Index) is amended by striking the following: ''21 U.S.C. § 957 2D1.1''.

Reason for Amendment: This amendment makes several modifications to the guidelines in Chapter Two, Part D (Offenses Involving Drugs). First, this amendment implements section 608 of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, (the ''PROTECT Act''), Pub. L. 108–21, which directs the Commission to review and consider amending the guidelines with respect to gamma-hydroxybutyric acid (GHB) to provide increased penalties that reflect the seriousness of offenses involving GHB and the need to deter them. The Commission identified several harms associated with GHB offenses and separately increased penalties for Internet trafficking and drug facilitated sexual assault, two harms associated with trafficking and use of this and other controlled substances. Specifically, the amendment modifies § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide an approximate five-year term of imprisonment (equivalent to base offense level 26, Criminal History Category I) for distribution of three gallons of GHB. The Commission determined, based on information provided by the Drug Enforcement Administration, that this quantity typically reflects a mid-level distributor. The trigger for the ten-year penalty (base offense level 32) is set at 30 gallons, reflecting quantities associated with a high-level distributor. This amendment also increases the penalties under § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) for offenses involving gamma-butyrolactone (GBL), a precursor for GHB. The quantities in § 2D1.11 track the quantities used in § 2D1.1.

Second, this amendment adds a two-level enhancement in §§ 2D1.1, 2D1.11, and 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy) for mass marketing of a controlled substance, listed chemical, or prohibited equipment, respectively, through the use of an interactive computer service. The Commission identified use of an interactive computer service as a tool providing easier access to illegal products. Use of an interactive computer service enables drug traffickers to market their illegal products more efficiently and anonymously to a wider audience than through traditional drug trafficking means, while making it more difficult for law enforcement authorities to discover the offense and apprehend the offenders.

Third, this amendment provides a special instruction in § 2D1.1(e) that requires application of the vulnerable victim adjustment in § 3A1.1(b)(1) (Hate Crime Motivation or Vulnerable Victim) if the defendant commits a sexual offense by distributing a controlled substance to another individual, with or without that individual's knowledge. The amendment addresses cases in which the cross reference in

§ 2D1.1(d)(2) does not apply. The cross reference in § 2D1.1(d)(2) is limited to cases involving a conviction under 21 U.S.C. § 841(b)(7), which prescribes a 20-year statutory maximum penalty for the distribution of a controlled substance to another individual, without that individual's knowledge, with the intent to commit a crime of violence (including rape). Because the statute requires that the distribution occur without knowledge, the cross reference does not apply to drug facilitated sexual assaults when the victim of the sexual assault knowingly ingests the controlled substance. This amendment reflects the Commission's view that a defendant who commits a drug-facilitated sexual assault should receive increased punishment whether or not the victim knowingly ingested the controlled substance distributed by the defendant.

Fourth, this amendment modifies the existing rule at Application Note 5 of § 2D1.1 to provide a uniform mechanism for determining sentences in cases involving analogues of controlled substances or controlled substances not specifically referenced in this guideline. The genesis of this amendment was the Commission's investigation of GHB, during which the Commission learned that analogues of GHB, specifically GBL and 1,4 Butanediol (BD), among others, often are used in its stead and cause the same effects as GHB. The Commission was concerned that analogues of other drugs might be similarly used. Additionally, the Commission became aware that courts employ a variety of means to determine the applicable guideline range for defendants charged with offenses involving controlled substances not specifically referenced in § 2D1.1, resulting in disparate sentences. The purpose of the amendment is to provide a more uniform mechanism for determining sentences in cases involving analogues or controlled substances not specifically referenced in this guideline.

Fifth, this amendment corrects a technical error in the Drug Quantity Table at § 2D1.1(c) with respect to Schedule III substances. Specifically, the maximum base offense level for Schedule III substances is level 20, but prior to the amendment there was no corresponding language in the Drug Quantity Table to so indicate.

Sixth, this amendment addresses a circuit conflict regarding the interpretation of the last sentence in Application Note 12 of § 2D1.1. *See United States* v. *Smack,* 347 F.3d 533 (3rd Cir. 2003) (criticizing language of note); *compare United States* v. *Gomez,* 103 F.3d 249, 252–53 (2d Cir. 1997) (holding that the last sentence of the note is intended to apply only to sellers); *United States* v. *Perez de Dios,* 237 F.3d 1192 (10th Cir. 2001) (same); *United States* v. *Brassard,* 212 F.3d 54, 58 (1st Cir. 2000) (same), *with United States* v. *Minore,* 40 Fed. Appx. 536, 537 (9th Cir. 2002) (mem.op.) (applying the final sentence of the new Note 12 to a buyer in reverse sting operation); *United States* v. *Estrada,* 256 F.3d 466, 476 (7th Cir. 2001) (same). Application Note 12 covers offenses involving an agreement to sell a specific quantity of a controlled substance. This amendment makes clear that the court shall exclude from the offense level determination the amount of the controlled substance, if any, that the defendant establishes that he or she did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, regardless of whether the defendant agreed to be the seller or the buyer of the controlled substance.

Seventh, this amendment updates the statutory references in § 2D1.11(b)(2) and accompanying commentary to conform to statutory redesignations of certain offenses, and also expands application of § 2D1.11(b)(2) to include 21 U.S.C. § 960(d)(3) and (d)(4) among the statutes of conviction for which the three-level reduction at subsection (b)(2) is available. The reduction formerly applied in cases in which the defendant, convicted under 21 U.S.C. § 841(c)(2), (f)(1), or § 960(d)(2), as properly redesignated, did not have knowledge or actual belief that the listed chemical would be used to manufacture a controlled substance. Section 841(c)(2) of title 21, United States Code, requires a finding of either knowledge or a reasonable cause to believe that the listed chemical would be used to manufacture a controlled substance. Sections 960(d)(3) and (d)(4) of title 21, United States Code, similarly require a finding that a person who imports, exports, or serves as a broker for, a listed chemical knows or has a reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance. Given that the reduction applies in 21 U.S.C. § 841(c)(2) cases in which the defendant had a reasonable cause to believe, but not knowledge or actual belief, that the listed chemical would be used to manufacture a controlled substance, and the mens rea in 21 U.S.C. § 841(c)(2) is the same as in 21 U.S.C. § 960(d)(3) and (d)(4), the amendment adds 21 U.S.C. § 960(d)(3) and (d)(4) to § 2D1.11(b)(2).

Eighth, this amendment adds white phosphorus and hypophosphorous acid to the Chemical Quantity Table in § 2D1.11(e). Both substances are List I chemicals that can be substituted for red phosphorus in the manufacture of methamphetamine. Red phosphorus was added to the Chemical Quantity Table effective November 1, 2003 (*see* Amendment 661), but notice and comment requirements prevented white phosphorus and hypophosphorous acid from being added contemporaneously.

Ninth, this amendment provides an enhancement of six levels at § 2D1.12 if the offense involved stealing anhydrous ammonia or transporting stolen anhydrous ammonia. A widely used source of nitrogen fertilizer for crops, anhydrous ammonia also is used in the manufacture of methamphetamine. Anhydrous ammonia must be stored and handled under high pressure, which requires specially designed and well-maintained equipment. The improper handling and storage of anhydrous ammonia can result in permanent injury (such as cell destruction and severe chemical burns) and explosions. Methamphetamine manufacturers often obtain anhydrous ammonia by siphoning large-volume tanks at fertilizer plants and farms, and rarely have the knowledge or equipment required to properly handle it. This enhancement accounts for the inherent dangers created by such conduct, as well as the likely intended unlawful use.

Finally, this amendment modifies Appendix A (Statutory Index) by deleting the reference to 21 U.S.C. § 957, which is not a substantive criminal offense, but rather a registration provision for which violations are prosecuted under 21 U.S.C. § 960(a) or (b) (for controlled substances) or § 960(d)(6) (for listed chemicals).

6. *Amendment:* Section 2D1.1(a) is amended by striking subdivision (3) and inserting the following:

''(3) The offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under § 3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels.''.

Section 2D1.11 is amended by striking subsection (a) and inserting the following:

''(a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e), as appropriate, except that if (A) the defendant receives an adjustment under § 3B1.2 (Mitigating Role); and (B) the base offense level under subsection (e) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels.''.

Reason for Amendment: The amendment modifies the maximum base offense level for certain offenders provided at § 2D1.1(a)(3) (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Prior to the amendment, subsection (a)(3) limited the maximum base offense level to level 30 for all offenders sentenced under § 2D1.1 who also received an adjustment under § 3B1.2 (Mitigating Role). In order to address proportionality concerns arising from the ''mitigating role cap,'' the amendment modifies § 2D1.1(a)(3) to provide a graduated reduction for offenders whose quantity level under § 2D1.1(c) results in a base offense level greater than level 30 and who qualify for a mitigating role adjustment under § 3B1.2. Specifically, the amendment provides a two-level reduction if the defendant receives an adjustment under § 3B1.2 and the base offense level determined at the Drug Quantity Table in § 2D1.1 is level 32. If the base offense level determined at § 2D1.1(c) is level 34 or 36, and the defendant receives an adjustment under § 3B1.2, a three-level reduction is provided. A four-level reduction is provided if the defendant receives an adjustment under § 3B1.2 and the base offense level under § 2D1.1(c) is level 38. This amendment also provides an identical reduction in § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy).

7. *Amendment:* Section 2K2.1(b) is amended by striking subdivision (3) and inserting the following:

''(3) If the offense involved—

(A) A destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by 15 levels; or

(B) A destructive device other than a destructive device referred to in subdivision (A), increase by 2 levels.''.

Section 2K2.1(b) is amended by striking the paragraph that begins ''Provided, that the'' and inserting the following:

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

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended by striking Notes 1 through 4; and by redesignating Note 5 as Note 1.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 1, as redesignated by this amendment, by inserting Definitions.—''before ''For purposes of this guideline:''; by inserting before '' 'Controlled substance offense' '' the following paragraph: '' 'Ammunition' has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).'';

By inserting after the paragraph that begins '' 'Crime of violence' '' the following paragraph: '' 'Destructive device' has the meaning given that term in 26 U.S.C. § 5845(f).'';

And by adding at the end, the following paragraph: '' 'Firearm' has the meaning given that term in 18 U.S.C. § 921(a)(3).''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended by inserting after Note 1, as redesignated by this amendment, the following:

''2. Firearm Described in 18 U.S.C. § 921(a)(30).—For purposes of subsection (a), a 'firearm described in 18 U.S.C. § 921(a)(30)' (pertaining to semiautomatic assault weapons) does not include a weapon exempted under the provisions of 18 U.S.C. § 922(v)(3).''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended by redesignating Notes 6 through 19 as Notes 3 through 16, respectively.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 8, as redesignated by this amendment, by striking ''a two-level'' and inserting ''the applicable''; and by adding at the end the following paragraph:

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

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 13, as redesignated by this amendment, by inserting ''(*see* Application Note 8)'' after ''multiple individuals''.

Section 2X1.1 is amended by striking subsection (d) and inserting the following:

''(d) Special Instruction

(1) Subsection (b) shall not apply to:

(A) Any of the following offenses, if such offense involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5): 18 U.S.C. § 81; 18 U.S.C. § 930(c); 18 U.S.C. § 1362; 18 U.S.C. § 1363; 18 U.S.C. § 1992; 18 U.S.C. § 2339A; 18 U.S.C. § 2340A; 49 U.S.C. § 46504; 49 U.S.C. § 46505; and 49 U.S.C. § 60123(b).

(B) Any of the following offenses: 18 U.S.C. § 32; 18 U.S.C. § 1993; and 18 U.S.C. § 2332a.''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 1993(a)(8) by inserting ''2A5.2 (if attempt or conspiracy to commit 18 U.S.C. § 1993(a)(4), (a)(5), or (a)(6)),'' before ''2A6.1''.

Reason for Amendment: Before promulgation of this amendment, subsection (b)(3) of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) generally provided a two-level enhancement if the offense involved a destructive device, without regard to the type of destructive device involved. This amendment increases that enhancement to 15 levels if the destructive device was a man-portable air defense system (MANPADS), portable rocket, missile, or device used for launching a portable rocket or missile. It maintains the two-level enhancement for all other destructive devices. MANPADS and similar weapons are highly regulated under chapter 53 of title 26, United States Code, and chapter 44 of title 18, United States Code, and are classified as ''destructive devices'' under 26 U.S.C. § 5845(f).

This amendment responds to concerns that these types of weapons, which have been used overseas, have the ability to inflict death or injury on large numbers of persons if fired at an aircraft, train, building, or similar target. Because of the inherent risks of such weapons and the fact that there is no legitimate reason to possess them, the Commission determined that the statutory maximum penalty for possession of such devices should apply in all such offenses, even after possible application of acceptance of responsibility. The amendment also re-designates Application Note 11 as Application Note 8, and adds an invited upward departure for non-MANPADS destructive devices in a case in which the two-level enhancement for such devices does not adequately capture the

seriousness of the offense because of the type of destructive device involved, the risk to public welfare, and the risk of death or serious bodily injury that the destructive device created. Furthermore, in response to concerns that it is unclear whether certain types of firearms qualify as ''destructive devices'' using the guideline definition of ''destructive device,'' the amendment adopts the statutory definition provided in 26 U.S.C. § 5845(f). For consistency, similar statutory definitions are substituted for the definitions of ''ammunition'' and ''firearm.''

The amendment also increases guideline penalties for attempts and conspiracies to commit certain offenses if those offenses involved the use of a MANPADS or similar destructive device. Affected offenses include 18 U.S.C. § 32 (Destruction of aircraft or aircraft facilities), 18 U.S.C. § 1993 (Terrorist attacks and other acts of violence against mass transportation systems), and 18 U.S.C. § 2332a (Use of certain weapons of mass destruction). The Commission amended the special instruction in subsection (d) of § 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)) to prohibit application of the three-level reduction for attempts and conspiracies for these offenses generally, and not just in the context of the use of a MANPADS or similar destructive device.

Finally, the amendment modifies the Statutory Index (Appendix A) reference for convictions under 18 U.S.C. § 1993(a)(8), relating to attempts, threats, or conspiracies to commit any of the substantive terrorist offenses in 18 U.S.C. § 1993(a). Under this amendment, these offenses will be referred to § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry) rather than § 2A6.1 (Threatening or Harassing Communications).

8. *Amendment:* Chapter Two, Part K, Subpart 2, is amended by adding at the end the following new guideline and accompanying commentary:

''§ 2K2.6. Possessing, Purchasing, or Owning Body Armor by Violent Felons

(a) Base Offense Level: 10

(b) Specific Offense Characteristic

(1) If the defendant used the body armor in connection with another felony offense, increase by 4 levels.

Commentary

Statutory Provision: 18 U.S.C. § 931.

Application Notes:

1. Application of Subsection (b)(1).—

(A) Meaning of ''Defendant''.—Consistent with § 1B1.3 (Relevant Conduct), the term 'defendant', for purposes of subsection (b)(1), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(B) Meaning of ''Felony Offense''.—For purposes of subsection (b)(1), 'felony offense' means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

(C) Meaning of ''Used''.—For purposes of subsection (b)(1), 'used' means the body armor was (i) actively employed in a manner to protect the person from gunfire; or (ii) used as a means of bartering. Subsection (b)(1) does not apply if the body armor was merely possessed. For example, subsection (b)(1) would not apply if the body armor was found in the trunk of a car but was not being actively used as protection.

2. Inapplicability of § 3B1.5.—If subsection (b)(1) applies, do not apply the adjustment in § 3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence).

3. Grouping of Multiple Counts.—If subsection (b)(1) applies (because the defendant used the body armor in connection with another felony offense) and the instant offense of conviction includes a count of conviction for that other felony offense, the counts of conviction for the 18 U.S.C. § 931 offense and that other felony offense shall be grouped pursuant to subsection (c) of § 3D1.2 (Groups of Closely Related Counts).''.

The Commentary to § 3B1.5 captioned ''Application Notes'' is amended by adding at the end the following:

''3. Interaction with § 2K2.6 and Other Counts of Conviction.—If the defendant is convicted only of 18 U.S.C. § 931 and receives an enhancement under subsection (b)(1) of § 2K2.6 (Possessing, Purchasing, or Owning Body Armor by Violent Felons), do not apply an adjustment under this guideline. However, if, in addition to the count of conviction under 18 U.S.C. § 931, the defendant (A) is convicted of an offense that is a drug trafficking crime or a crime of violence; and (B) used the body armor with respect to that offense, an adjustment under this guideline shall apply with respect to that offense.''.

Reason for Amendment: This amendment addresses the new offense at 18 U.S.C. § 931, which was created by section 11009 of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273. Section 931 of title 18, United States Code, prohibits the purchase, ownership, or possession of body armor by individuals who have been convicted of either a federal or state felony that is a crime of violence. The statutory maximum term of imprisonment for 18 U.S.C. § 931 is three years.

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

The new guideline provides a base offense level of 10 because 18 U.S.C. § 931 offenses have lesser statutory maximum punishments than offenses involving weapon possession and trafficking. Those offenses, which are sentenced at § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), have a base offense level of 12 if there is no aggravating circumstance present in the case.

The new guideline provides a four-level increase at § 2K2.6(b)(1) ''[i]f the defendant used the body armor in connection with another felony offense'' because violations in which the body armor was used in connection with another felony offense are more serious than those involving only possession, purchase, or ownership of body armor. ''Felony offense'' is defined as ''any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year'' and does not require that a charge be brought or a conviction sustained.

The commentary also provides guidance for the scope of the terms ''defendant'' and ''used'' for purposes of § 2K2.6(b)(1). Use of the term ''defendant'' limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused. The term ''used'' requires that the body armor be actively used in order to protect from gunfire or be used as a means of bartering. Finally, the commentary provides that when subsection (b)(1) applies and the defendant also is convicted of the underlying offense (the offense with respect to which the body armor was used), the counts shall be grouped pursuant to subsection (c) of § 3D1.2 (Groups of Closely Related Counts).

Section 3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of

Violence) has been amended so that the adjustment in that guideline does not apply with respect to the 18 U.S.C. § 931 offense. However, if the defendant is convicted of the offense with respect to which the body armor was used, § 3B1.5 will apply to that offense.

9. *Amendment:* Section 2L2.2(b) is amended by adding at the end the following:

''(3) If the defendant fraudulently obtained or used a United States passport, increase by 4 levels.''.

The Commentary to § 2L2.2 captioned ''Application Notes'' is amended by striking Note 1 and inserting the following:

''1. Definition.—For purposes of this guideline, 'immigration and naturalization offense' means any offense covered by Chapter Two, Part L.''; by striking Note 2, and redesignating Note 3 as Note 2; and in Note 2, as redesignated by this amendment, by inserting ''Application of Subsection (b)(2).—'' before ''Prior''.

The Commentary to § 2L2.2 captioned ''Application Notes'' is amended by adding at the end the following:

''3. Application of Subsection (b)(3).—The term 'used' is to be construed broadly and includes the attempted renewal of previously-issued passports.

4. Multiple Counts.—For the purposes of Chapter Three, Part D (Multiple Counts), a count of conviction for unlawfully entering or remaining in the United States covered by § 2L1.2 (Unlawfully Entering or Remaining in the United States) arising from the same course of conduct as the count of conviction covered by this guideline shall be considered a closely related count to the count of conviction covered by this guideline, and therefore is to be grouped with the count of conviction covered by this guideline.

5. Upward Departure Provision.—If the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to engage in terrorist activity, an upward departure may be warranted. *See* Application Note 4 of the Commentary to § 3A1.4 (Terrorism).''.

Reason for Amendment: The purpose of this amendment is to provide increased punishment for defendants who fraudulently use or obtain United States passports. The amendment adds a new specific offense characteristic at subsection (b)(3) of § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) that provides an increase of four levels if the defendant fraudulently obtained or used a United States passport. Application Note 3 clarifies that ''use'' is to be construed broadly and includes the attempted renewal of a previously issued United States passport. Application Note 5 invites an upward departure if the defendant fraudulently obtained or used a United States passport with the intent to engage in terrorist activity.

This amendment responds to comments received from the Departments of State and Justice to the effect that maintaining the integrity of United States passports is at the core of United States border and security efforts. Accordingly, this amendment ensures increased punishment for those defendants who threaten the security of the United States by their fraudulent abuse of United States passports.

10. *Amendment:* Section 2Q1.2(b) is amended by adding at the end the following:

''(7) If the defendant was convicted under 49 U.S.C. § 5124 or § 46312, increase by 2 levels.''.

The Commentary to § 2Q1.2 captioned ''Statutory Provisions'' is amended by striking ''; 49 U.S.C. § 60123(d)'' and inserting ''; 49 U.S.C. §§ 5124, 46312''.

The Commentary to § 2Q1.2 captioned ''Application Notes'' is amended by striking Note 9 and inserting the following:

''9. Other Upward Departure Provisions.—

(A) Civil Adjudications and Failure to Comply with Administrative Order.—In a case in which the defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. *See* § 4A1.3 (Departures Based on Inadequacy of Criminal History Category).

(B) Extreme Psychological Injury.—If the offense caused extreme psychological injury, an upward departure may be warranted. *See* § 5K2.3 (Extreme Psychological Injury).

(C) Terrorism.—If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure would be warranted. *See* Application Note 4 of the Commentary to § 3A1.4 (Terrorism).''.

Reason for Amendment: This amendment adds a two-level enhancement in § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) for offenders convicted under 49 U.S.C. § 5124 or § 46312. These offenses pose an inherent risk to large populations in a manner not typically associated with other pollution offenses sentenced under the same guideline.

In addition, this amendment adds an application note inviting an upward departure if the offense was calculated to influence or affect the conduct of the government by intimidation or coercion, or to retaliate against government conduct. The Commission added this departure provision to address concerns that terrorists may commit hazardous material transportation offenses because of their potential to cause a one-time, catastrophic event. The upward departure provision would apply in cases in which a defendant who has a terrorist motive is not also convicted of a ''federal crime of terrorism'' that would trigger application of § 3A1.4 (Terrorism).

This amendment also adds an upward departure provision that could apply if the offense resulted in extreme psychological injury. This provision conforms to the upward departure provision found at § 2Q1.4 (Tampering or Attempted Tampering with a Public Water System; Threatening to Tamper with a Public Water System).

11. *Amendment:* Chapter Eight is amended by striking the ''Introductory Commentary'' and inserting the following:

Introductory Commentary

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

This chapter reflects the following general principles:

First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.

Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.

Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) The involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) The existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.

Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.

These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws.''.

Section 8A1.2(a) is amended by inserting '', Subpart 1'' after ''Part B''.

Section 8A1.2(b)(2)(D) is amended by adding at the end the following:

''To determine whether the organization had an effective compliance and ethics program for purposes of § 8C2.5(f), apply § 8B2.1 (Effective Compliance and Ethics Program).''.

The Commentary to § 8A1.2 captioned ''Application Notes'' is amended in Note 3(c) in the second sentence by inserting ''of the organization'' after ''high-level personnel''.

The Commentary to § 8A1.2 captioned ''Application Notes'' is amended by striking Note 3(k).

Chapter Eight, Part B is amended by striking the heading and inserting the following:

PART B—REMEDYING HARM FROM CRIMINAL CONDUCT, AND EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

1. REMEDYING HARM FROM CRIMINAL CONDUCT'';

and by adding at the end the following new subpart:

''2. EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

§ 8B2.1. Effective Compliance and Ethics Program

(a) To have an effective compliance and ethics program, for purposes of subsection (f) of § 8C2.5 (Culpability Score) and subsection (c)(1) of § 8D1.4 (Recommended Conditions of Probation—Organizations), an organization shall—

(1) Exercise due diligence to prevent and detect criminal conduct; and

(2) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

(b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

(1) The organization shall establish standards and procedures to prevent and detect criminal conduct.

(2)(A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

(4)(A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(B) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) To ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;

(B) To evaluate periodically the effectiveness of the organization's compliance and ethics program; and

(C) To have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond

appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.

(c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

'Compliance and ethics program' means a program designed to prevent and detect criminal conduct.

'Governing authority' means the (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.

'High-level personnel of the organization' and 'substantial authority personnel' have the meaning given those terms in the Commentary to § 8A1.2 (Application Instructions—Organizations).

'Standards and procedures' means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct.

2. Factors to Consider in Meeting Requirements of this Guideline.—

(A) In General.—Each of the requirements set forth in this guideline shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that shall be considered include: (i) Applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) similar misconduct.

(B) Applicable Governmental Regulation and Industry Practice.—An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program.

(C) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization.

(ii) Large Organizations.—A large organization generally shall devote more formal operations and greater resources in meeting the requirements of this guideline than shall a small organization. As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs.

(iii) Small Organizations.—In meeting the requirements of this guideline, small organizations shall demonstrate the same degree of commitment to ethical conduct and compliance with the law as large organizations. However, a small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrated through more formally planned and implemented systems.

Examples of the informality and use of fewer resources with which a small organization may meet the requirements of this guideline include the following: (I) The governing authority's discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organization's compliance and ethics efforts; (II) training employees through informal staff meetings, and monitoring through regular 'walk-arounds' or continuous observation while managing the organization; (III) using available personnel, rather than employing separate staff, to carry out the compliance and ethics program; and (IV) modeling its own compliance and ethics program on existing, well-regarded compliance and ethics programs and best practices of other similar organizations.

(D) Recurrence of Similar Misconduct.—Recurrence of similar misconduct creates doubt regarding whether the organization took reasonable steps to meet the requirements of this guideline. For purposes of this subdivision, 'similar misconduct' has the meaning given that term in the Commentary to § 8A1.2 (Application Instructions—Organizations).

3. Application of Subsection (b)(2).—High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program, shall perform their assigned duties consistent with the exercise of due diligence, and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

If the specific individual(s) assigned overall responsibility for the compliance and ethics program does not have day-to-day operational responsibility for the program, then the individual(s) with day-to-day operational responsibility for the program typically should, no less than annually, give the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance and ethics program.

4. Application of Subsection (b)(3).—

(A) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(B) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals so as to ensure that all individuals within the high-level personnel and substantial authority personnel of the organization will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law under subsection (a). With respect to the hiring or promotion of such individuals, an organization shall consider the relatedness of the individual's illegal activities and other misconduct (*i.e.*, other conduct inconsistent with an effective compliance and ethics program) to the specific responsibilities the individual is anticipated to be assigned and other factors such as: (i) The recency of the individual's illegal activities and other misconduct; and (ii) whether the individual has engaged in other such illegal activities and other such misconduct.

5. Application of Subsection (b)(6).—Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.

6. Application of Subsection (c).—To meet the requirements of subsection (c), an organization shall:

(A) Assess periodically the risk that criminal conduct will occur, including assessing the following:

(i) The nature and seriousness of such criminal conduct.

(ii) The likelihood that certain criminal conduct may occur because of the nature of the organization's

business. If, because of the nature of an organization's business, there is a substantial risk that certain types of criminal conduct may occur, the organization shall take reasonable steps to prevent and detect that type of criminal conduct. For example, an organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish standards and procedures designed to prevent and detect fraud.

(iii) The prior history of an organization may indicate types of criminal conduct that it shall take actions to prevent and detect.

(B) Prioritize periodically, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b), in order to focus on preventing and detecting the criminal conduct identified under subdivision (A) of this note as most likely to occur.

(C) Modify, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b) to reduce the risk of criminal conduct identified under subdivision (A) of this note as most likely to occur.

Background: This section sets forth the requirements for an effective compliance and ethics program. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107–204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this chapter 'are sufficient to deter and punish organizational criminal misconduct.'

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable. The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.''.

The Commentary to § 8C2.4 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 8C2.5 is amended by striking subsection (f) and inserting the following:

''(f) Effective Compliance and Ethics Program

(1) If the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program, as provided in § 8B2.1 (Effective Compliance and Ethics Program), subtract 3 points.

(2) Subsection (f)(1) shall not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.

(3)(A) Except as provided in subdivision (B), subsection (f)(1) shall not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual described in § 8B2.1(b)(2)(B) or (C), participated in, condoned, or was willfully ignorant of the offense.

(B) There is a rebuttable presumption, for purposes of subsection (f)(1), that the organization did not have an effective compliance and ethics program if an individual—

(i) Within high-level personnel of a small organization; or

(ii) Within substantial authority personnel, but not within high-level personnel, of any organization,

participated in, condoned, or was willfully ignorant of, the offense.''.

The Commentary to § 8C2.5 captioned ''Application Notes'' is amended by striking Note 1 and inserting the following:

''1. Definitions.—For purposes of this guideline, 'condoned', 'prior criminal adjudication', 'similar misconduct', 'substantial authority personnel', and 'willfully ignorant of the offense' have the meaning given those terms in Application Note 3 of the Commentary to § 8A1.2 (Application Instructions—Organizations).

'Small Organization', for purposes of subsection (f)(3), means an organization that, at the time of the instant offense, had fewer than 200 employees.''.

The Commentary to § 8C2.5 captioned ''Application Notes'' is amended in Note 3 in the last sentence by striking ''entire organization'' and inserting ''organization in its entirety''.

The Commentary to § 8C2.5 captioned ''Application Notes'' is amended in Note 10 by striking ''The second proviso in subsection (f)'' and inserting ''Subsection (f)(2)''; and by striking ''this proviso'' and inserting ''subsection (f)(2)''.

The Commentary to § 8C2.5 captioned ''Application Notes'' is amended in Note 12 by adding at the end the following:

''Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.''.

Section 8C2.8(a) is amended in subdivision (9) by striking ''and''; in subdivision (10) by striking the period at the end of the subdivision and inserting ''; and''; and by adding at the end the following:

''(11) whether the organization failed to have, at the time of the instant offense, an effective compliance and ethics program within the meaning of § 8B2.1 (Effective Compliance and Ethics Program).''.

The Commentary to § 8C2.8 captioned ''Application Notes'' is amended in Note 4 in the first sentence by inserting ''within high-level personnel of'' after ''organization or''.

Section 8C4.10 is amended by striking ''(Effective Program to Prevent and Detect Violations of Law)'' and inserting ''(Effective Compliance and Ethics Program)''; and by adding at the end the following paragraph:

''Similarly, if, at the time of the instant offense, the organization was required by law to have an effective compliance and ethics program, but the organization did not have such a program, an upward departure may be warranted.''.

Chapter Eight, Part D, is amended in the ''Introductory Commentary'' by striking ''8D1.5'' and inserting ''8D1.4, and § 8F1.1,''.

Section 8D1.1(a) is amended by striking subdivision (3) and inserting the following:

''(3) If, at the time of sentencing, (A) the organization (i) has 50 or more employees, or (ii) was otherwise required under law to have an effective compliance and ethics program; and (B) the organization does not have such a program;''.

Section 8D1.4(b)(4) is amended by striking ''(1)'' and inserting ''(A)''; by striking ''(2)'' and inserting ''(B)''; and by striking ''(3)'' and inserting ''(C)''.

Section 8D1.4(c) is amended by striking subdivision (1) and inserting the following:

''(1) The organization shall develop and submit to the court an effective compliance and ethics program

consistent with § 8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.'';

and in subdivisions (2), (3), and (4) by striking ''to prevent and detect violations of law'' each place it appears and inserting ''referred to in subdivision (1)''.

The Commentary to § 8D1.4 captioned ''Application Notes'' is amended by striking ''Notes'' in the heading and inserting ''Note''; and in Note 1 by striking ''a program to prevent and detect violations of law'' and inserting ''a compliance and ethics program''; and by striking the last sentence of the first paragraph and inserting ''The court should approve any program that appears reasonably calculated to prevent and detect criminal conduct, as long as it is consistent with § 8B2.1 (Effective Compliance and Ethics Program), and any applicable statutory and regulatory requirements.''.

Chapter Eight, Part D is amended by striking § 8D1.5 and its accompanying commentary.

Chapter Eight is amended by adding at the end the following Part:

''PART F—VIOLATIONS OF PROBATION—ORGANIZATIONS

§ 8F1.1. Violations of Conditions of Probation—Organizations (Policy Statement)

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.

Commentary

Application Notes:

1. Appointment of Master or Trustee.—In the event of repeated violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.

2. Conditions of Probation.—Mandatory and recommended conditions of probation are specified in §§ 8D1.3 (Conditions of Probation—Organizations) and 8D1.4 (Recommended Conditions of Probation—Organizations).''.

Reason for Amendment: This amendment modifies existing provisions of Chapter Eight and provides a new guideline at § 8B2.1 (Effective Compliance and Ethics Program). Most notably, § 8B2.1 strengthens the existing criteria an organization must follow in order to establish and maintain an effective program to prevent and detect criminal conduct for purposes of mitigating its sentencing culpability for an offense. This amendment is the culmination of a multi-year review of the organizational guidelines, implements several recommendations issued on October 7, 2003, by the Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Advisory Group), and responds to the Sarbanes-Oxley Act (''the Act''), Pub. L. 107–204, which in section 805 directed the Commission to review and amend the organizational guidelines and related policy statements to ensure that they are sufficient to deter and punish organizational misconduct.

Consistent with the Act's focus on deterring criminal misconduct, this amendment revises the introductory commentary to Chapter Eight to highlight the importance of structural safeguards designed to prevent and detect criminal conduct. First and foremost among these safeguards is a regime of internal crime prevention and self-policing (''an effective compliance and ethics program''). While Chapter Eight derives its authority and content from the federal criminal law, an effective compliance and ethics program not only will prevent and detect criminal conduct, but also should facilitate compliance with all applicable laws.

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

In order to emphasize the importance of compliance and ethics programs and to provide more prominent guidance on the requirements for an effective program, the amendment elevates the criteria for an effective compliance program previously set forth in the Commentary to § 8A1.2 (Application Instructions—Organizations) into a separate guideline. Furthermore, the amendment elaborates upon these criteria, introducing additional rigor generally and imposing significantly greater responsibilities on the organization's governing authority and executive leadership.

Section 8B2.1(a)(1) sets forth the existing requirement that an organization exercise due diligence to prevent and detect criminal conduct, but adds the requirement that an organization ''otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.'' This addition is intended to reflect the emphasis on ethical conduct and values incorporated into recent legislative and regulatory reforms, such as those provided by the Act.

Section 8B2.1(b) provides that due diligence and the promotion of desired organizational culture are indicated by the fulfilment of seven minimum requirements, which are the hallmarks of an effective program that encourages compliance with the law and ethical conduct. While the framework of requirements is derived from the existing criteria for an effective compliance program at Application Note 3(k) to § 8A1.2, significant additional guidance is provided.

First, § 8B2.1(b)(1) provides that organizations must establish ''standards and procedures to prevent and detect criminal conduct.'' Application Note 1 establishes that ''standards and procedures'' encompass ''standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct.''

Second, the new guideline replaces the requirement in Application Note 3(k)(2) to § 8A1.2 that ''specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance'' with more specific and exacting requirements. Section 8B2.1(b)(2) defines the specific roles and reporting relationships of particular categories of personnel with respect to compliance and ethics program responsibilities. Specifically, the Commission has determined that the organization's governing authority must ''be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.'' Application Note 1 defines ''governing authority'' as the ''(A) Board of Directors, or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.''

Section 8B2.1(b)(2) provides that it is the organizational leadership, defined in the guidelines as ''high-level personnel,'' who must ensure that the organization's program is effective. The accompanying commentary at Application Note 1 retains existing definitions for the terms ''high-level personnel'' and ''substantial authority personnel'' of the organization. Section

8B2.1(b)(2)(B) provides that the organization must assign someone in high-level personnel ''overall responsibility'' for the program. This prescription makes explicit that, while another individual or individuals may be assigned operational responsibility for the program, someone within high-level personnel must be assigned the ultimate responsibility for the program's effectiveness.

Section 8B2.1(b)(2)(C) requires that certain individual(s) have day-to-day responsibility for the compliance and ethics program and adequate resources to carry out the associated tasks. Specifically, § 8B2.1 requires that the individual assigned day-to-day operational responsibility for the program, whether it be a high-level person or an employee to whom this task is assigned, report to organizational leadership and the governing authority on the program. If authority is delegated, the governing authority must receive reports from such individuals at least annually, according to the commentary in Application Note 3. In order to carry out such responsibility, the new guideline mandates that such individual or individuals, no matter the level, must ''be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.''

Third, § 8B2.1(b)(3) replaces the previous requirement that substantial authority personnel be screened for their ''propensity to engage in violations of law'' with the requirement that the organization ''use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.'' Application Note 4(A) makes explicit that this provision does not require any ''conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.'' Application Note 4(B) provides that the organization shall hire and promote individuals so as to ensure that all individuals within the organizational leadership will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages a commitment to compliance with ethics and the law. If an individual has engaged in illegal activities, the organization has an obligation to consider the relatedness of the individual's illegal activities and other misconduct to the specific responsibilities such individual is expected to be assigned. The recency of the individual's illegal activities and other misconduct also should be considered.

Fourth, § 8B2.1(b)(4) makes compliance and ethics training a requirement, and specifically extends the training requirement to the upper levels of an organization, including the governing authority and high-level personnel, in addition to all of the organization's employees and agents, as appropriate. Furthermore, subsection (b)(4) establishes that this communication and training obligation is ongoing, requiring ''periodic'' updates.

Fifth, § 8B2.1(b)(5) expands the existing requirement regarding reasonable steps to achieve compliance. Specifically, the amendment mandates that organizations use auditing and monitoring systems designed to detect criminal conduct. It also adds the specific requirement that the organization periodically evaluate the effectiveness of its compliance and ethics program. Significantly, the new guideline expands the focus of internal reporting from simply reporting ''the criminal conduct * * * of others'' to using internal systems to either ''report or seek guidance regarding potential or actual criminal conduct.'' The addition of ''seeking guidance'' is consistent with the increased focus of this guideline on the prevention and deterrence of wrongdoing within organizations. This section also replaces the existing reference to ''reporting systems without fear of retribution'' with the more specific requirement that the organization must have ''a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.''

The Commission is aware that both anonymous and confidential mechanisms have inherent value and limitations. For example, anonymous mechanisms may hinder an organization from engaging in an effective dialogue with the potential whistleblower to discover additional information that might lead to a more efficient detection of the wrongdoing. Confidential mechanisms may permit the dialogue and development of maximum information, but the ability of organizations to ensure total confidentiality may be limited by legal obligations relating to self-disclosure, law enforcement subpoenas, and civil discovery requests. The Commission intends for an organization to have maximum flexibility in implementing a system that is best suited to its culture and conforms to applicable law. A responsible organization is expected, as appropriate, to communicate to its employees any applicable limitations of its internal reporting mechanisms.

Sixth, § 8B2.1(b)(6) broadens the existing criterion that the compliance standards be enforced through disciplinary measures by adding that such standards also be encouraged through ''appropriate incentives to perform in accordance with the compliance and ethics program.'' This addition articulates both a duty to promote proper conduct in whatever manner an organization deems appropriate, as well as a duty to sanction improper conduct.

Finally, § 8B2.1(b)(7) retains the requirement that an organization take reasonable steps to respond to and prevent further similar criminal conduct. This dual duty underscores the organization's obligation to address both specific instances of misconduct and systemic shortcomings that compromise the deterrent effect of its compliance and ethics program.

In addition to the seven requirements for a compliance and ethics program, § 8B2.1(c) expressly provides, as an essential component of the design, implementation, and modification of an effective program, that an organization must periodically assess the risk of the occurrence of criminal conduct. The new guideline includes at Application Note 6 various factors that should be addressed when assessing relevant risks. Specifically, organizations should evaluate the nature and seriousness of potential criminal conduct, the likelihood that certain criminal conduct may occur because of the nature of the organization's business, and the prior history of the organization. To be effective, this process must be ongoing. Organizations must periodically prioritize their compliance and ethics resources to target those potential criminal activities that pose the greatest threat in light of the risks identified.

The amendment also provides additional guidance with respect to the implementation of compliance and ethics programs by small organizations by including frequent references to small organizations throughout the commentary of § 8B2.1 and providing illustrations (*see e.g.*, Application Note 2(C)(ii)). It also encourages larger organizations to promote the adoption of compliance and ethics programs by smaller organizations, including those

with which they conduct or seek to conduct business.

This amendment also changes the automatic preclusion for compliance program credit provided in § 8C2.5(f) (Culpability Score) for ''small organizations.'' A ''small organization'' is defined, for this subsection only, as an organization having fewer than 200 employees. This modification is intended to assist smaller organizations that previously may have been automatically precluded, because of their size, from arguing for a culpability score reduction based upon an effective compliance and ethics program that fulfills all of the guideline requirements. Rather than precluding absolutely these small organizations from obtaining the reduction if certain categories of high-level personnel are involved in the offense of conviction, § 8C2.5(f)(3) establishes that an offense by an individual within high-level personnel of the organization results in a rebuttable presumption for a small organization that it did not have an effective program. The small organization, however, can rebut that presumption by demonstrating that it had an effective program, despite the involvement in the offense of a person high in the organization's structure.

This amendment also addresses concerns about the relationship between obtaining credit under § 8C2.5(g) and waiver of the attorney-client privilege and the work product protection doctrine. Pursuant to § 8C2.5(g)(1) and (2), an organization's culpability score will be reduced if it ''fully cooperated in the investigation'' of its wrongdoing, among other factors. The Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines studied the relationship between waivers and § 8C2.5(g) by obtaining testimony and conducting its own research, including a survey of United States Attorneys' Offices (all of which are described at Part V of the Advisory Group Report of October 7, 2003). The Commission addresses some of these concerns by providing at Application Note 12 that waiver of the attorney-client privilege and of work product protections ''is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.'' The Commission expects that such waivers will be required on a limited basis. See ''United States Attorneys'' Bulletin,'' November 2003, Volume 51, Number 6, pp. 1, 8.

12. *Amendment:* The Commentary to § 1B1.3 captioned ''Application Notes'' is amended in Note 5 by striking the fifth sentence and inserting ''In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward departure may be warranted.''.

The Commentary to § 1B1.4 captioned ''Background'' is amended in the fifth sentence by striking ''sentencing above the guideline range'' and inserting ''an upward departure''.

The Commentary to § 1B1.8 captioned ''Application Notes'' is amended in Note 1 in the third sentence by striking ''increase the defendant's sentence above the applicable guideline range by upward departure'' and inserting ''depart upward''; and in the last sentence by striking ''below the applicable guideline range'' and inserting ''downward''.

Section 2B1.1(b)(10), as redesignated by Amendment 3 of this document, is amended in subdivision (A) by striking ''device-making equipment'' and inserting ''(i) device-making equipment, or (ii) authentication feature''; in subdivision (B) by inserting ''(i)'' before ''unauthorized access''; and by inserting '', or (ii) authentication feature'' after ''counterfeit access device''; and in subdivision (C)(i) by striking the semi-colon and inserting a comma.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 4 by striking subdivision (C)(ii), as redesignated by Amendment 3 of this document, and inserting the following:

''(ii) Special Rule.—A case described in subdivision (C)(i) of this note that involved—

(I) A United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims.

(II) A housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 7, as redesignated by Amendment 3 of this document, by striking ''(b)(7)'' each place it appears and inserting ''(b)(8)''; and in Note 8, as redesignated by Amendment 3 of this document, by striking ''(b)(8)'' each place it appears and inserting ''(b)(9)''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 9, as redesignated by Amendment 3 of this document, by striking ''(b)(9)'' each place it appears and inserting ''(b)(10)''; in subdivision (A) by inserting before the paragraph that begins '' 'Counterfeit access device' '' the following paragraph:

'' 'Authentication feature' has the meaning given that term in 18 U.S.C. § 1028(d)(1).''; in the paragraph that begins '' 'Means of identification' '' by striking ''(d)(4)'' and inserting ''(d)(7)''; and in subdivision (B) by inserting ''Authentication Features and'' before ''Identification Documents.''; and by inserting ''authentication features,'' after ''involving''.

The Commentary § 2B1.1 captioned ''Application Notes'' is amended in Note 10, as redesignated by Amendment 3 of this document, by striking ''(b)(10)'' each place it appears and inserting ''(b)(11)''; in Note 11, as redesignated by Amendment 3 of this document, by striking ''(b)(12)'' each place it appears and inserting ''(b)(13)''; in Note 12, as redesignated by Amendment 3 of this document, by striking ''(b)(12)'' each place it appears and inserting ''(b)(13)''; in Note 13, as redesignated by Amendment 3 of this document, by striking ''(b)(13)'' each place it appears and inserting ''(b)(14)''; and by striking ''(b)(12)(B)'' each place it appears and inserting ''(b)(13)(B)''; in Note 14, as redesignated by Amendment 3 of this document, by striking ''(b)(14)'' and inserting ''(b)(15)''; and in Note 19(B), as redesignated by Amendment 3 of this document, by striking ''(b)(13)(iii)'' and inserting ''(b)(14)(iii)''.

The Commentary to § 2B1.1 captioned ''Background'' is amended in the ninth paragraph by striking ''Subsection (b)(7)(D)'' and inserting ''Subsection (b)(8)(D)''; in the tenth paragraph by striking ''Subsection (b)(8)'' and inserting ''Subsection (b)(9)''; in the eleventh paragraph by striking ''Subsections (b)(9)(A) and (B)'' and inserting ''Subsections (b)(10)(A)(i) and (B)(i)''; in the twelfth paragraph by striking ''Subsection (b)(9)(C)'' and inserting ''Subsection (b)(10)(C)''; in the thirteenth paragraph by striking ''Subsection (b)(11)(B)'' and inserting ''Subsection (b)(12)(B)''; in the fourteenth paragraph by striking ''Subsection (b)(12)(A)'' and inserting ''Subsection (b)(13)(A)''; in the fifteenth paragraph by striking ''Subsection (b)(12)(B)'' and inserting ''Subsection (b)(13)(B)''; in the sixteenth paragraph by striking ''Subsection (b)(13) implements'' and inserting ''Subsection (b)(14) implements''; and by striking ''subsection (b)(13)(B)'' and inserting ''subsection (b)(14)(B)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 7 by striking ''sentence below the applicable guideline range'' and inserting ''downward departure''.

The Commentary to § 2R1.1 captioned ''Application Notes'' is amended in Note 7 by striking '', or even above,''; and by inserting '', or an upward departure,'' after ''guideline range''.

The Commentary to § 2T1.8 captioned ''Application Note'' is amended in Note 1 by striking ''a sentence above the guidelines'' and inserting ''an upward departure''.

Chapter Two, Part T, Subpart 3, is amended in the ''Introductory Commentary'' by striking ''imposing a sentence above that specified in the guideline in this Subpart'' and inserting ''departing upward''.

Chapter Two, Part X is amended by adding at the end the following new Subpart:

''6. OFFENSES INVOLVING USE OF A MINOR IN A CRIME OF VIOLENCE

§ 2X6.1. Use of a Minor in a Crime of Violence.

(a) Base Offense Level: 4 plus the offense level from the guideline applicable to the underlying crime of violence.

Commentary

Statutory Provision: 18 U.S.C. § 25.

Application Notes:

1. Definition.—For purposes of this guideline, 'underlying crime of violence' means the crime of violence as to which the defendant is convicted of using a minor.

2. Inapplicability of § 3B1.4.—Do not apply the adjustment under § 3B1.4 (Using a Minor to Commit a Crime).

3. Multiple Counts.—

(A) In a case in which the defendant is convicted under both 18 U.S.C. § 25 and the underlying crime of violence, the counts shall be grouped pursuant to subsection (a) of § 3D1.2 (Groups of Closely Related Counts).

(B) Multiple counts involving the use of a minor in a crime of violence shall not be grouped under § 3D1.2.''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 5(b) by striking ''3(g)'' and inserting ''4(g)''.

Section 3D1.2(d) is amended by striking the period after ''2P1.3'' and inserting a semi-colon; and by inserting after the line that begins ''§§ 2P1.1,'' the following new line: ''§ 2X6.1.''.

The Commentary to § 3D1.3 captioned ''Application Notes'' is amended in Note 4 by striking ''a sentence above the guideline range'' and inserting ''an upward departure''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 in the first sentence of the paragraph that begins '' 'Crime of violence' '' does not include'' by inserting '', unless the possession was of a firearm described in 26 U.S.C. § 5845(a)'' before the period.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 by inserting before the paragraph that begins ''Unlawfully possessing a prohibited flask'' the following paragraph:

''Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence'.''.

The Commentary to § 4B1.4 captioned ''Application Note'' is amended by striking ''Note'' in the heading and inserting ''Notes''; and by adding at the end the following:

''2. Application of § 4B1.4 in Cases Involving Convictions Under 18 U.S.C. § 844(h), § 924(c), or § 929(a).—If a sentence under this guideline is imposed in conjunction with a sentence for a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a), do not apply either subsection (b)(3)(A) or (c)(2). A sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a) accounts for the conduct covered by subsections (b)(3)(A) and (c)(2) because of the relatedness of the conduct covered by these subsections to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).

In a few cases, the rule provided in the preceding paragraph may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (*i.e.*, the guideline range that would have resulted if subsections (b)(3)(A) and (c)(2) had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).''.

Section 5C1.2(a) is amended by striking ''verbatim''.

The Commentary to § 5G1.2 captioned ''Application Notes'' is amended in Note 3(B)(iii) in the first sentence by striking ''2113(a) (20 year'' and inserting ''113(a)(3) (10 year''; in the second sentence by striking ''400'' and inserting ''460'', and by striking ''360-life'' and inserting ''460–485 months''; and in the third sentence by striking ''40'' and inserting ''100'', and by striking ''2113(a)'' and inserting ''113(a)(3)''.

Section 5H1.1 is amended by striking ''sentence should be outside the applicable guideline range'' and inserting ''departure is warranted''; by striking ''impose a sentence below the applicable guideline range when'' and inserting ''depart downward in a case in which''; and by inserting ''; Gambling Addiction'' after ''Abuse''.

Section 5H1.2 is amended by striking ''sentence should be outside the applicable guideline range'' and inserting ''departure is warranted''.

Section 5H1.3 is amended by striking ''sentence should be outside the applicable guideline range'' and inserting ''departure is warranted''.

Section 5H1.5 is amended by striking ''sentence should be outside the applicable guideline range'' and inserting ''departure is warranted''.

Chapter Five, Part H is amended by striking § 5H1.6 and inserting the following:

5H1.6. Family Ties and Responsibilities (Policy Statement).

In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.''.

The Commentary to § 5H1.6 is amended by adding at the end the following:

''*Background:* Section 401(b)(4) of Public Law 108–21 directly amended this policy statement to add the second paragraph, effective April 30, 2003.''.

Section 5H1.11 is amended by striking ''sentence should be outside the applicable guideline range'' and inserting ''departure is warranted''.

Section 5H1.12 is amended by striking ''grounds for imposing a sentence outside the applicable guideline range'' and inserting ''in

determining whether a departure is warranted''.

Section 5K2.14 is amended by striking ''increase the sentence above the guideline range'' and inserting ''depart upward''.

Section 5K2.16 is amended by striking ''departure below the applicable guideline range for that offense'' and inserting ''downward departure''.

Section 5K2.21 is amended by striking ''increase the sentence above the guideline range'' and inserting ''depart upward''.

Section 5K2.22 is amended by striking ''impose a sentence below the applicable guideline range'' each place it appears and inserting ''depart downward''; and by striking ''for imposing a sentence below the guidelines'' and inserting ''to depart downward''.

Section 5K2.23 is amended by striking ''sentence below the applicable guideline range'' and inserting ''downward departure''.

Section 6A1.1 is amended by striking ''A probation officer'' and all that follows through ''presentence report.'' and inserting the following:

''(a) The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless—

(1) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(2) The court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

Rule 32(c)(1)(A), Fed. R. Crim. P.

(b) The defendant may not waive preparation of the presentence report.''.

The Commentary to § 6A1.1 is amended to read as follows:

''Commentary

A thorough presentence investigation ordinarily is essential in determining the facts relevant to sentencing. Rule 32(c)(1)(A) permits the judge to dispense with a presentence report in certain limited circumstances, as when a specific statute requires or when the court finds sufficient information in the record to enable it to exercise its statutory sentencing authority meaningfully and explains its finding on the record.''.

Chapter Six, Part A is amended by striking § 6A1.2 and its accompanying commentary and inserting the following:

''§ 6A1.2. Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

(a) The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. Rule 32(e)(2), Fed. R. Crim. P.

(b) Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. An objecting party must provide a copy of its objections to the opposing party and to the probation officer. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report accordingly. Rule 32(f), Fed. R. Crim. P.

(c) At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them. Rule 32(g), Fed. R. Crim. P.

Background: In order to focus the issues prior to sentencing, the parties are required to respond in writing to the presentence report and to identify any issues in dispute. *See* Rule 32(f), Fed. R. Crim. P.''.

Section 6A1.3(b) is amended by striking ''Rule 32(c)(1)'' and inserting ''Rule 32(i)''.

The Commentary to § 6A1.3 is amended by striking the first paragraph; by striking ''117 S. Ct. 633, 635'' and inserting ''519 U.S. 148, 154''; and by striking ''117 S. Ct. at 637'' and inserting ''519 U.S. at 157''.

Chapter Six, Part A is amended by adding at the end the following:

''§ 6A1.4. Notice of Possible Departure (Policy Statement)

Before the court may depart from the applicable sentencing guideline range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. Rule 32(h), Fed. R. Crim. P.

Commentary

Background: The Federal Rules of Criminal Procedure were amended, effective December 1, 2002, to incorporate into Rule 32(h) the holding in *Burns* v. *United States,* 501 U.S. 129, 138–39 (1991). This policy statement parallels Rule 32(h), Fed. R. Crim. P.''.

Chapter Six, Part B is amended by striking the Introductory Commentary and inserting the following:

''Introductory Commentary

Policy statements governing the acceptance of plea agreements under Rule 11(c), Fed. R. Crim. P., are intended to ensure that plea negotiation practices: (1) Promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and (2) do not perpetuate unwarranted sentencing disparity.

These policy statements make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge. The policy statements also ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record.''.

Section 6B1.1 is amended by striking subsections (a), (b), and (c) and inserting the following:

''(a) The parties must disclose the plea agreement on open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement on camera. Rule 11(c)(2), Fed. R. Crim. P.

(b) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. Rule 11(c)(3)(B), Fed. R. Crim. P.

(c) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. Rule 11(c)(3)(A), Fed. R. Crim. P.''.

The Commentary to § 6B1.1 is amended in the first paragraph by striking ''Rule 11(e)'' and inserting ''Rule 11(c)'';

and by striking the second paragraph and inserting the following:

''Section 6B1.1(c) deals with the timing of the court's decision regarding whether to accept or reject the plea agreement. Rule 11(c)(3)(A) gives the court discretion to accept or reject the plea agreement immediately or defer a decision pending consideration of the presentence report. Given that a presentence report normally will be prepared, the Commission recommends that the court defer acceptance of the plea agreement until the court has reviewed the presentence report.''.

Section 6B1.3 is amended by striking ''If a plea'' and all that follows through ''Fed. R. Crim. P.'' and inserting the following:

''If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera)—

(a) Inform the parties that the court rejects the plea agreement;

(b) Advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(c) Advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

Rule 11(c)(5), Fed. R. Crim. P.''.

The Commentary to § 6B1.3 is amended by striking ''Rule 11(e)(4)''and inserting ''Rule 11(c)(5)''; and by striking ''that would require dismissal of charges or imposition of a specific sentence.'' and inserting a period.

Appendix A is amended by inserting after the line referenced to 18 U.S.C. § 4 the following new line: ''18 U.S.C. § 25 2X6.1''.

Reason for Amendment: This nine-part amendment consists of four technical and conforming amendments and five amendments of a more substantive nature, some of which are in response to new legislation.

First, this amendment corrects a typographical error in Application Note 4 to § 3C1.1 (Obstructing or Impeding the Administration of Justice) by changing a reference to Application Note 3(g) to 4(g).

Second, this amendment makes a number of conforming changes to various guideline provisions and commentary as a result of departure amendments previously made in furtherance of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21 (the ''PROTECT Act'').

Third, this amendment corrects an error in an example provided in Application Note 3(B)(iii) of § 5G1.2 (Sentencing on Multiple Counts of Conviction).

Fourth, this amendment generally updates Chapter Six (Sentencing Procedures and Plea Agreements) in response to a number of amendments that were made to the Federal Rules of Criminal Procedure effective December 1, 2002. While some of these changes to the Rules were substantive, the bulk of the changes to Rules 11 and 32 of the Federal Rules of Criminal Procedure were organizational and stylistic. These guideline amendments conform to those changes made to the Federal Rules of Criminal Procedure with respect to such issues as deadlines for disputed issues and requirements for disclosure of presentence reports, as well as procedures the court must follow in rejecting certain plea agreements. Certain outdated commentary also has been deleted.

Fifth, this amendment broadens the special multiple victim rule in Application Note 4(C)(ii) of § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), as redesignated by Amendment 3 of this document, for offenses involving stolen United States mail. The rule is expanded to include theft of mail from housing unit cluster boxes, whether owned by the United States Postal Service or otherwise. The amendment provides a presumption that a theft from such a cluster box involves the number of victims corresponding to the number of mailboxes contained in the cluster box. The same rationale for the original special rule applies to this expansion: (i) Unique proof problems in that once entry is gained to such a cluster box and mail is removed, it is difficult to determine the number of persons from whom mail was stolen; (ii) the frequently significant, but difficult to quantify, non-monetary losses; and (iii) the importance of maintaining the integrity of the United States mail service. *See* USSG App. C (Vol. II) (Amendment 617). These reasons are equally valid whether the mail receptacle is owned by the United States Postal Service or is privately owned.

Sixth, this amendment modifies § 2B1.1(b)(10), as redesignated by Amendment 3 of this document, which provides a two-level enhancement and a minimum offense level of 12, in response to the Secure Authentication Feature and Enhanced Identification Defense Act of 2003 (the ''SAFE ID Act'') (section 607 of the PROTECT Act, Pub. L. 108–21). That Act created a new offense at 18 U.S.C. § 1028(a)(8), prohibiting the trafficking of authentication features (*e.g.*, a hologram or symbol used by a government agency to determine whether a document is counterfeit, altered, or otherwise falsified), and amended 18 U.S.C. § 1028 to prohibit the transfer or possession of authentication features. This amendment makes § 2B1.1(b)(10) applicable to offenses involving authentication features.

Seventh, this amendment creates a new guideline at § 2X6.1 (Use of a Minor to Commit a Crime of Violence). This new guideline is in response to a new offense provided at 18 U.S.C. § 25 (Use of Minors in Crimes of Violence), which was created by section 601 of the PROTECT Act. The new offense prohibits any person 18 years of age or older from intentionally using a minor to commit a crime of violence or to assist in avoiding detection or apprehension for such offense. For a first conviction, the penalty is twice the maximum term of imprisonment that would otherwise be authorized for the offense, and for each subsequent conviction, three times the maximum term of imprisonment that would otherwise be authorized for the offense.

While consideration was given to expanding the existing two-level adjustment at § 3B1.4 (Using a Minor to Commit a Crime), the Commission determined it was more appropriate and consistent with guideline construction to create a new guideline for the new substantive offense created by Congress in the PROTECT Act. This new guideline at § 2X6.1 directs the court to increase by 4 levels the offense level from the guideline applicable to the underlying crime of violence. Application notes are included to provide that the adjustment under § 3B1.4 is inapplicable if § 2X6.1 is used and to provide rules for the grouping of multiple counts.

Eighth, this amendment expands the definition of ''crime of violence'' in Application Note 1 to § 4B1.2 (Definitions of Terms Used in Section 4B1.1) to include unlawful possession of any firearm described in 26 U.S.C. § 5845(a). The amendment also excepts possession of those firearms described in 26 U.S.C. § 5845(a) from the rule that excludes felon in possession offenses from the definition of ''crime of violence.'' Congress has determined that those firearms described in 26 U.S.C. § 5845(a) are inherently dangerous and when possessed unlawfully, serve only violent purposes. In the National Firearms Act, Pub. L. 90–618, Congress required that these firearms be registered with the National Firearms Registration and Transfer Record. A number of courts have held that possession of certain of these firearms, such as a sawed-off shotgun, is a ''crime of violence'' due to the serious potential risk of physical injury to another person.

The amendment's categorical rule incorporating 26 U.S.C. § 5845(a) firearms includes short-barreled rifles and shotguns, machine guns, silencers, and destructive devices. It will affect

determinations both of career offender status under Chapter Four, Part B and also of appropriate base offense levels in § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).

Ninth, this amendment provides an application note in § 4B1.4 (Armed Career Criminal) to address an apparent ''double counting'' issue that appears to be present when a defendant is convicted both of 18 U.S.C. § 922(g) (Felon in Possession) and also of an offense such as 18 U.S.C. § 924(c) (Use of a Firearm in Relation to Any Crime of Violence or Drug Trafficking Crime) or a similar offense carrying a mandatory minimum consecutive penalty, such as 18 U.S.C. § 844(h) relating to use of explosives, or 18 U.S.C. § 929(a) relating to use of restricted ammunition.

The basis for the mandatory minimum, consecutive penalties in these offenses is the same as the basis for the enhanced guideline offense level 34 at § 4B1.4(b)(3)(A) and the enhanced Criminal History Category VI at § 4B1.4(c)(2); *i.e.*, the use or possession of the firearm in connection with a crime of violence or controlled substance offense. The Commission determined that the mandatory minimum, consecutive sentences in these statutes are sufficient to take into account the aggravated conduct referenced in § 4B1.4.

An upward departure is provided for those cases that result in a total maximum penalty that is less than the maximum of the guideline range that would have resulted if the enhanced offense level under § 4B1.4(b)(3)(A) and the criminal history enhancement under § 4B1.4(c)(2) had been applied. However, the extent of the upward departure shall not exceed the maximum of the guideline range that would have resulted had there not been a conviction under 18 U.S.C. § 924(c), § 844(h), or § 929(a).

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